

THE FRAGMENTATION OF THE GLOBAL MARKET: THE CASE OF DIGITAL VERSATILE DISCS (DVDS) ♦

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INTRODUCTION.....	410
I. THE CONSUMER AND THE GLOBAL MARKET: FRUSTRATION BY FRAGMENTATION?	414
II. THE DVD REGIONAL CODING SYSTEM (DVD-RCS)	415
A. <i>The Facts</i>	415
B. <i>The Reasons: Minimising the Risk While Maximising the Revenues</i>	418
C. <i>A Critical Evaluation and Some Policy Considerations Related to the DVD Regional Coding System</i>	427
D. <i>Who Are the Principal Victims?</i>	430
III. REGIONAL CODING AND THE WTO: SOME LEGAL CONSIDERATIONS.....	431
A. <i>General Remarks</i>	431
B. <i>The DVD Regional Coding System and International Trade Law Under the WTO</i>	434
C. <i>The Global Market or the WTO Between Trade Liberalisation and Market Integration</i>	437
D. <i>Private Action Under the International Trade Regime: The WTO – Bargain or Constitution?</i>	440
E. <i>The DVD Regional Coding System and the Special Agreements Administered Under the WTO</i>	441
1. <i>The General Agreement on Tariffs and Trade (GATT)</i>	441
2. <i>The Agreement on Technical Barriers to Trade (TBT Agreement)</i>	445

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3. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)	449
IV. THE DVD REGIONAL CODING SYSTEM AND CULTURAL DIVERSITY	452
CONCLUSION	454

INTRODUCTION

The civilisation of ancient Greece was nurtured within city walls. In fact, all the modern civilisations have their cradles of brick and mortar. These walls leave their mark deep in the minds of men. They set up a principle of “divide and rule” in our mental outlook, which begets in us a habit of securing all our conquests by fortifying them and separating them from one another. We divide nation and nation, knowledge and knowledge, man and nature. It breeds in us a strong suspicion of whatever is beyond the barriers we have built, and everything has to fight hard for its entrance into our recognition.

- Rabindranath Tagore, *Sādhanā*¹

Over the past centuries, the principle *divide et impera* (divide and rule) appears to have sustained its wide appeal. This is because it is believed that by fragmenting the complete picture of reality and breaking it into smaller units, it allows for their respective better control and domination. What is often forgotten in this context, however, is to ask for the impact that the fragmentation caused by this division has on the system in its entirety? The gain in control over a small constituent might well be offset by a loss in control over the system as a whole. This is, for instance, the case with the representatives of legal science and legal practice who continue to insist on the old division of public international law and private international law based on an underlying domestic and international law dichotomy.² This division prevails despite repeated calls and major efforts to end this flawed division, such as those found in the context of the debate about the emergence of a

¹ RABINDRANATH TAGORE, *SADHANA: THE REALISATION OF LIFE* 3 (The MacMillan Co. 1913).

² See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L. L. 280, 280 (1982); Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL.[REC.] DES COURS 315, 321-22 (1979).

system of “transnational law”³ or of a new law merchant (*lex mercatoria*).⁴

Since the early days of trade and commerce, the regulation of business has been characterised by a struggle between public and private law-related aspects that is based on apparently divergent interests between individual private actors, and the collective society, usually represented by the state. The interests are only “apparently divergent” because in international business, as in other areas, it is in truth mostly the sum of private activities and related interests that constitute the public interest. In spite of the mutual dependence and even a mutual entanglement in the law-making process of private interests, on the one hand, and the public interest on the other, their respective representation is still widely divided between organisations of private persons (legal and moral) and those of public authorities, or in other words between “state” and “non-state actors” (or else “governmental” and “non-governmental organisations”). One of the major reasons for this flawed division is a prevailing conceptual separation of private international law from public international law that is too rigid.⁵

In addition to this divide, there exists a similar struggle between political and economic forces in international cooperation that is, by and large, reflected in the institutional separation between the United Nations Organization system and the system established by the General Agreement on Tariffs and Trade (“GATT”)/World Trade Organization (“WTO”) system following the failure of the International Trade Organization (“ITO”) to materialise. This conflict, which prevails in particular in the lack of coherence between the United Nations (“U.N.”) specialised agencies and the WTO, is manifest in their ability to tackle numerous trade and trade-related problems, otherwise known as the so-called “trade linkage debate” and its various “trade and . . . problems.”⁶ The problems related to this division have become aggravated by trends that emerged more recently, especially following the end of the Cold War, and which are summarised in the debate about the fragmentation of international law in general and the proliferation of international organisations and regula-

³ See Felix Hanschmann, *Theorie transnationaler Rechtsprozesse*, in NEUE THEORIEN DES RECHTS 347, 347-69 (Sonja Buckel et al. eds., 2006). See generally PHILIP C. JESSUP, TRANSNATIONAL LAW (1956).

⁴ See Berthold Goldman, *Frontières du roit et « lex mercatoria »*, 9 ARCHIVES DE PHILOSOPHIE DU DROIT 177, 177 (1964).

⁵ See also Rostam J. Neuwirth, *International Law and the Public/Private Law Distinction*, 55 AUSTRIAN J. PUB. & INT’L L. REV. 393 (2000).

⁶ See, e.g., Joel P. Trachtman, *Institutional Linkage: Transcending “Trade and . . .”* 96 AM. J. INT’L L. 77, 80 (2002).

tions in particular.⁷ Especially, the proliferation of international organisations and regulations creates not only the risk of the unnecessary duplication of the activities pursued by them but also of creating divergent solutions and serious conflicts that become manifest in the form of a lack of systemic consistency and absence of policy coherence and are capable of further eroding the already fragile integrity and unity of the global legal order.⁸

In the context of the unity of the global legal order, it is necessary to address an interesting parallel to the issue of cultural diversity. Just as unity of the global legal order does not imply a radical uniformisation of international laws, cultural diversity does not mean the fragmentation of different cultures. Instead, cultural diversity can be understood as an oxymoron, where different cultural actors find a common framework for the creation and cultivation of a common culture. Given that the cultural industries (in the form of various cultural goods and services) provide important vectors of creative content and cultural identity, one such important framework is found in the global marketplace where these products are traded and consumed. This is precisely the place where economic considerations of international trade meet cultural considerations of the diversity of cultural expressions. This place is where international trade and cultural diversity no longer appear to stand in contradiction but, instead, call for a coherent response in the spirit of their mutual complementarity.

This article argues that the persistent division between public and private international law and the purported negative effects of the fragmentation of international law form the root causes for many problems that the present international legal order and, more specifically, the international trading system confront today. One such problem dealt with by this case study is exemplified in the current practice of trade in films stored on Digital Versatile Discs (“DVDs”). This argument is not, however, a critique of the somewhat fragmentary and decentralised nature of international law, which is partly explained by the historical development of in-

⁷ On the debate on the fragmentation of international law, see generally Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007); Pierre-M. Dupuy, *A Doctrinal Debate in the Globalisation Era: on the “Fragmentation” of International Law*, 1 EUR. J. LEGAL STUD. 1 (2007), available at <http://www.ejls.eu/1/4UK.pdf>; Int'l Law Comm'n, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, ¶ 251 (2006), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf.

⁸ See Gerhard Hafner, *Pros and Cons Ensuing From Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 849-53, 858 (2004).

ternational law. Neither does this argument comprehend cultural diversity as the parallel coexistence of different cultures flourishing along a fragmented web of societies or nation states. Instead, it advocates cultural diversity as the *conditio sine qua non* for the provision of the greatest variety of cultural expressions within a common framework available to all citizens of this world. Thus, this contributes to a better understanding of, and dialogue between, the different cultures providing the true wealth of life on this planet.

Based on the discussion of the Digital Versatile Disc Regional Coding System ("DVD-RCS"), this article evaluates how the persistent division between public and private international law and the fragmentation of international law based on the proliferation of international organisations and regulations in combination with the insufficient scientific consideration of the international trading system governed by the WTO as a whole, is detrimental to the issue of cultural diversity. The DVD-RCS is a system that, for the purpose of a better control of the distribution of films on DVDs, divides the world in different geographical regions to the effect that a movie on a DVD from one region can only be watched on the respective hardware (i.e., a computer or a DVD player) manufactured or distributed and sold in the same region. As such, it appears to have a clearly trade restrictive and market distorting effect that will be subjected to a brief legal analysis of the relevant rules under the WTO administered agreements.

As a starting point, Part I will take the case of a cineaste and a global consumer to cast some light on the present possibilities as well as hindrances for a consumer trying to enjoy the benefits of electronic commerce in the global market. Part II provides general information about the DVD-RCS, such as its division of countries into six different geographical regions or zones that presently fragment the global market. Based on a short sketch of the movie industry's particular economic dynamics, it also tries to discover the reasons behind the introduction of DVD-RCS and discusses the various arguments put forward in support of it. In Part III, the DVD-RCS is subjected to a legal analysis to establish either its compatibility or incompatibility with the trading rules enshrined in the various special agreements adopted under the aegis of the WTO, such as GATT, the Agreement on Technical Barriers to Trade ("TBT Agreement"), and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). In line with the dual economic and cultural natures of movies, Part IV briefly touches upon important aspects of the DVD-RCS for the protection and promotion of cultural diversity. In the Conclusion, the

basic findings, as well as remarks, are offered as to possible future amendments to the WTO system that would allow it to better meet the present and future challenges deriving from new technological innovations affecting the worlds of business and leisure alike.

I. THE CONSUMER AND THE GLOBAL MARKET: FRUSTRATION BY FRAGMENTATION?

Speaking of future challenges in international business, the starting point for a critical evaluation of the DVD-RCS is a short episode that illustrates what consumers may experience when trying to take advantage of the latest possibilities that electronic commerce and the global market promise to offer.

Once upon a time there was a cineaste who was a great admirer of the movies of the Argentinean director Eliseo Subiela or to be more precise, of those that he had been able to see. His admiration started in the late 1990s when he happened to dwell for some days in Vienna, the capital of Austria, and was invited by a friend to see the movie *No te mueras sin decirme adónde vas* (*Don't Die Without Telling Me Where You Are Going*) in a small, local cinema. For his taste, it was one of the best movies he had ever seen, and it therefore was no surprise that he was henceforth curious to see more of Mr. Subiela's work. Due to the lack of supply, it was not until a few years later that he was able to see the next of Subiela's movies during a short stay in Paris, France. The second movie he saw was *El lado oscuro del corazón* (*The Dark Side of the Heart*), which was made in 1992.

Over the next decade, important changes occurred to not only the trading system but also to the trade in films and the carriers for the content of visual materials. In other words, digitisation progressed, and the DVDs began to rapidly replace the Video Cassette Recording ("VCR") and the Compact Disc ("CD") as the dominant medium. During the summer of 2009, our cineaste wanted to see the first Subiela movie he had seen again and checked on the Austrian mirror site of www.amazon.com. The Austrian site (www.amazon.at) immediately redirected the cineaste to Amazon's German site (www.amazon.de). When he entered the name "Eliseo Subiela" into the small search box, only the movie *The Dark Side of the Heart* appeared to be available in the DVD format. Therefore, he immediately changed to the global domain of www.amazon.com hoping that there the variety would be greater. His assumption proved correct, and he found several

of Subiela's movies on sale. He happily ordered all six movies available in the DVD format.⁹

On a later evening, the movies arrived by mail. He collected them from his mailbox, switched on his laptop, which he had bought in Europe, and put in the first DVD. He then started the preinstalled software to watch the movie. Suddenly, the computer stalled and it read: "*STOPP! Die Wiedergabe von Inhalten dieser Region ist nicht gestattet.*" (In English, this means: "Stop! Playback of content of this region is not permitted.") As a matter of fact, out of the six movies that he had ordered, he was able to watch only one, *Heartlift* (2005). The other five movies would not play and displayed the same aforementioned error report because the computer was set for a region different from the one in which the majority of the purchased DVDs were coded. Why, he wondered, did this happen? The answer will be given in the following sections.

II. THE DVD REGIONAL CODING SYSTEM (DVD-RCS)

A. *The Facts*

In general, DVD-RCS, which is also known as "Regional Playback Control," forms part of the concept of "Digital Rights Management" (DRM). DRM stands for new control technologies, which are used by copyright holders to limit the usage of creative digital content stored on various media.¹⁰ These technologies also allow for the design of new business models based on new modes of distribution of music, movies, and other content available in digital form. One such DRM scheme to protect intellectual property rights ("IPRs") is the Content Scramble System ("CSS"), which is used on almost all commercially-produced DVD-Video Discs. In particular, CSS prevents movies from being illegally duplicated. However, it also allows for other restrictive measures, one of which is the DVD-RCS. Both the CSS and the DVD-RCS have their origin in a licensing agreement administered by the DVD Copy Con-

⁹ The movies ordered were NO TE MUERAS SIN DECIRME ADÓNDE VAS [DON'T DIE WITHOUT TELLING ME WHERE YOU ARE GOING] (Artear Argentina, Instituto Nacional de Cine y Artes Audiovisuales (INCAA) 1995); EL LADO OSCURO DEL CORAZON [THE DARK SIDE OF THE HEART] (CQ3 Films, Max Films Productions 1992); EL LADO OSCURO DEL CORAZON 2 (Tornasol Films, Enrique Cerezo Producciones Cinematográficas S.A. 2001); LIFTING DE CORAZÓN [HEARTLIFT] (Aleph Media, Aquelarre Servicios Cinematograficos, Cinema Digital, INCAA, Jaleo Films, Terraplen Producciones 2005); ÚLTIMAS IMÁGENES DEL NAUFRAGIO [LAST IMAGES OF THE SHIPWRECK] (Cine Qua Non, Televisión Española 1989); and DESPÁBILATE AMOR [WAKE UP LOVE] (Artear Argentina, INCAA, Kinucha Mitre, Raúl J. Naya Producciones S.A. 1996).

¹⁰ See generally Darren A. Handler, *The Copyright & Digital Mismanagement Chasm: Fair Use Implications of Digital Rights Management Technologies Upon the Digital Versatile Disk Medium*, 7 WAKE FOREST INTELL. PROP. L.J. 173, 179-84 (2007).

rol Association (“DVD CCA”), a “not-for-profit corporation with responsibility for licensing CSS to manufacturers of DVD hardware, discs and related products,” which is said to be necessary in order to release copyrighted content into the market.¹¹ The license agreement includes several industries, such as the owners and manufacturers of the content of DVDs, creators of encryption engines, hardware and software decrypters, and manufacturers of DVD Players and DVD-ROM (ready only memory) drives.¹²

Hence, it is for the distribution of films on DVDs that the DVD-RCS divides the world into different geographical regions to the effect that a movie on a DVD from one region can only be watched on a computer or a DVD player set to the same region unless one uses a multi-region DVD player. Thus, in this system, hardware and the content on the carrier are tied to one region. Some computers allow for a change of the regional coding setup up to five times before finally setting the coding to the region chosen last.

As far as the regions are concerned, it is interesting to note that the regions do not correspond to geographically homogenous areas or, in other words, to regional or continental considerations but appear to follow, at least from a geographical point of view, “artificial” considerations. The principal regions are the following:¹³

REGION 0	DVD is “region free” or “playable in all regions.”
REGION 1	Bermuda, Canada, the Cayman Islands, United States and U.S. territories
REGION 2	Albania, Andorra, Bahrain, Belarus, Bosnia and Herzegovina, Croatia, Egypt, European Union, Faroe Islands, French Guiana, Georgia, Greenland, Guernsey, Iceland, India, Iran, Iraq, Isle of Man, Israel, Japan, Jersey, Jordan, Kuwait, Lebanon, Lesotho, Liechtenstein, Macedonia, Moldova, Monaco, Montenegro, Norway, Oman, Qatar, Russian Federation, San Marino, Saudi Arabia, Serbia, South Africa, Swaziland, Switzerland, Syrian Arab Republic, Turkey, Ukraine, United Arab Emirates, Vatican City State, Yemen

¹¹ See DVD Copy Control Association, Frequently Asked Questions (FAQ), <http://www.dvdcca.org/faq.html> (last visited Sept. 21, 2009).

¹² *Id.*

¹³ See DVD Regions, <http://hometheaterinfo.com/dvd3.htm> (last visited Sept. 21, 2009).

REGION 3	Southeast Asia, Hong Kong, the Philippines, Macau, South Korea, and Taiwan
REGION 4	Australia, New Zealand, Papua New Guinea, Central America, the Caribbean, Mexico, Oceania, and South America (except French Guiana)
REGION 5	African countries not explicitly included in other regions, countries included in the former Soviet Union, the Indian subcontinent, Mongolia, North Korea, and Seychelles
REGION 6	Mainland China
REGION 7	Reserved
REGION 8	International Territories

This classification may, for instance, create awkward situations where a citizen of French Guiana cannot buy a DVD in a neighbouring country and play it on a DVD player sold in his territory. The same is true between mainland China and Hong Kong, Macau and Taiwan, or between various North African countries. It is, however, possible that a DVD can be coded with multiple regions, such as Regions Two and Four, which would make it playable, for instance, in Europe and in Australia and in Central America as well as South America. Occasionally, DVDs from the same regions may also differ in terms of the content stored on them, diverging particularly in terms of extras and further splitting the relevant market into even smaller units.¹⁴ Most of all, the system punishes every traveler or tourist who purchases a legal copy of a DVD abroad and who will find out that it will not play on his or her home DVD player.

Another factor, different from the reasons behind DRM that further reduces the accessibility of content on DVDs is found in the different standards of video formatting. Different standards of video formatting, such as PAL (Phase Alternating Line), SECAM (*Séquentiel Couleur avec Mémoire*), and NTSC (National Television System Committee) have emerged because of differences in the quality of the images and other facets.¹⁵ The three systems, which are used in different parts of the world and do not correspond to the fragmentation by regional coding systems, are mutually incompatible. Hence, recordings from one system cannot be played on DVD (as well as VCR) players using another system. This means that unless a DVD purchaser is using a multi-system device,

¹⁴ *Id.*

¹⁵ For a good overview of different formats, see Television Standards – Formats and Techniques, http://www.paradiso-design.net/videostandards_en.html (last visited Sept. 21, 2009).

or he converts the original video format to the one of his device, he will not be able to see, for instance, a Japanese DVD on a U.K. device, despite the fact that both countries are in the same regional coding area (Region Two).¹⁶

As a final important element, the practice of regional coding of films appears to evolve with technology, as the latest example of the use of Regional Code Enhanced (“RCE”) DVD software shows.¹⁷ Similarly, the same practice continues with the invention of new optical disc formats designed for the storage of data and high-definition video. In this sector the struggle for dominance in the post-DVD era has only recently been decided in favour of the Sony-backed Blu-ray Disc technology over the High Definition-Digital Versatile Disc (“HD-DVD”) technology backed by Toshiba and Microsoft.¹⁸ For the present purpose, an interesting difference between the two technologies is precisely that only Blu-ray Disc technology foresaw the possibility of regionally encoding the content stored on them, whereas HD-DVD technology was planned to be region-free instead. The only difference between the Blu-ray technology and the present DVD-RCS is that Blu-ray Discs only foresee the division of the world in three regions as opposed to the six DVD regions.¹⁹ Like the present system, the usage of region coding on a Blu-ray Disc movie title remains a publisher’s option, and a Blu-ray Disc player will play any movie title that does not have region coding applied, in addition to all titles of its corresponding region.²⁰

B. *The Reasons: Minimising the Risk While Maximising the Revenues*

Next to the fact that DVD-RCS is already being used and apparently continues to be used in the context of new technologies, it is important to ponder the possible reasons underlying the prac-

¹⁶ See, e.g., Michael Demtschyna, PAL vs NTSC or, Which DVD Do I Buy?, <http://www.michaeldvd.com.au/Articles/PALvsNTSC/PALvsNTSC.asp> (last visited Oct. 6, 2009).

¹⁷ It seems that RCE only prevents viewing a region-coded disc on a region-free DVD player but not on a multi-region player. See RCE Information, <http://hometheaterinfo.com/dvd3.htm> (last visited Sept. 21, 2009).

¹⁸ See, e.g., Claudine Beaumont, *Blu-ray Wins*, THE DAILY TELEGRAPH, Feb. 23, 2008, at 19.

¹⁹ Region A/1: North America, Central America, South America, Japan, North Korea, South Korea, Taiwan, Hong Kong and Southeast Asia; Region B/2: Europe, Greenland, French territories, Middle East, Africa, Australia and New Zealand; and Region C/3: India, Nepal, Mainland China, Russia, Central and South Asia. See DVD Region Encoding, <http://www.amazon.com/gp/help/customer/display.html?nodeId=3193231> (last visited Aug. 27, 2009).

²⁰ See Blu-ray Disc for Video, <http://www.blu-raydisc.com/en/Technical/FAQs/Blu-rayDiscforVideo.html> (last visited Sept. 21, 2009).

tice of film production and film distribution companies of regionally segmenting the market. This practice clearly has implications for trade in movies and affects foremost consumers and travellers who are prepared and willing to purchase a legal copy of a movie as opposed to pirated copies.

The main reason that comes to mind is clearly an economic one that is closely related to the peculiar economic dynamics of the motion picture industry in particular, and to so-called “cultural industries,” “copyright-based,” or “creative industries,” in general. Shortly after the invention of cinema and hence still in the very early stage of the development of these industries, critical studies into the special characteristics of these cultural goods and services were undertaken.²¹ These studies discussed the motion picture’s impact on a great variety of issues, such as the motion picture industry’s business and finance structure, its effect as a trade getter, its relation to the arts, its educational and social value, its impact on moral standards, its relation to propaganda, and related problems of censorship.²² These special characteristics made the motion picture different from other ordinary goods and also resulted in a growing interest of economists in culture or cultural products.²³

Today, these cultural or copyright-based industries can be seen as pioneering industries paving new ways and creating trends for other industrial sectors.²⁴ This can, for instance, be observed in the car industry’s current struggle to adapt to globalization in a “post-Fordist era.”²⁵ Generally, the significance of creativity and thus of IPRs is increasing in a knowledge-based economy of the information society.²⁶ These peculiarities account for a different fi-

²¹ See Walter Benjamin, *Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit*, in 1 WALTER BENJAMIN – GESAMMELTE SCHRIFTEN, vol I, 436 (Rolf Tiedemann & Hermann Schweppenhäuser eds., 2d ed. 1978).

²² See e.g., *The Motion Picture Industry*, 254 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 1-236 (1947); *The Motion Picture Industry and Its Economic and Social Aspects*, 128 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 1-195 (1926).

²³ See generally FRANÇOISE BENHAMOU, *L’ÉCONOMIE DE LA CULTURE* (2001); DAVID THROSBY, *ECONOMICS AND CULTURE* (2001); BRUNO S. FREY, *ARTS & ECONOMICS: ANALYSIS & CULTURAL POLICY* (2000).

²⁴ See, e.g., Joseph Lampel, et al., *Balancing Act: Learning from Organizing Practices in Cultural Industries*, 11 ORG. SCE. 263, 263 (2000) (“The dilemmas experienced by managers in cultural industries are also to be found in a growing number of other industries where knowledge and creativity are key to sustaining competitive advantage.”).

²⁵ See Benjamin Coriat, *Globalization, Variety, And Mass Production: The Metamorphosis of Mass Production in the New Competitive Age*, in CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS 240, 240-41 (J. Rogers Hollingsworth & Robert Boyer eds., 1997).

²⁶ See United Nations Conference on Trade and Development, June 13-18, 2004, *Creative Industries and Development*, 3, U.N. Doc. TD(XI)/BP/13 (June 4, 2004) (“While creativity is becoming an increasingly important input into the production process of all goods and services, there is a group of activities in which it is used intensively and with a particularly high degree of professional specificity. These activities are the so-called creative indus-

nancing and pricing structure. For example, one may ask in which other industry does one pay for all products exactly the same price seven days a week, throughout the entire year.²⁷

A first such peculiarity is the dual economic and cultural character of films and other similar products. Furthermore, the products of these industries are referred to as possessing “public goods” features, which means that they are non-rival and non-excludable in consumption, or, in other words, that the consumption of the good by one person does not diminish the possibility of another person to consume it.²⁸ Additionally, they also generate important externalities, such as cross-product externalities, which means that their consumption promotes the consumption of another good. This certainly applies not only to popcorn and soft drinks but to all sorts of goods displayed in the film and has been recognised by the denomination of film as the “silent salesman” or “trade getter.”²⁹

Perhaps the principal, and in the context of DVD-RCS, crucial element common to these industries is the high risk in the initial production of these goods and the close to zero costs of reproduction and distribution. The high risk also stems from the fact that films can be qualified as “experience goods” in the sense that the products’ features and characteristics cannot be easily evaluated before purchase. This increases the risk of a “box office bomb” (i.e., a film for which the production and marketing costs greatly exceed the revenue retained by the movie studio), which has induced the studios to develop special risk-minimising but revenue-maximising business practices. There is a plethora of such practices, including horizontal and vertical integration and concentration,³⁰ the star system, the development of prototypes, and peculiar contractual arrangements like block booking or zoning.³¹ These practices repeatedly caused and continue to cause

tries.”).

²⁷ See Barak Y. Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 YALE J. ON REG. 317 (2004).

²⁸ See Peter Drahos, *The Regulation of Public Goods*, 7 J. INT’L. ECON. L. 321, 321 (2004).

²⁹ See Julius Klein, *What are Motion Pictures Doing for Industry*, 128 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 79 (1926); see also Frank A. Tichenor, *Motion Pictures as Trade Getters*, 128 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 84 (1926).

³⁰ “Horizontal integration” describes the attempts of a firm to control the relevant market of its products by “integrating” one or more competitors through various measures such as mergers, acquisitions or other forms of takeovers. By contrast, “vertical integration” usually describes attempts of a firm to control the entire production chain including in particular upstream suppliers and downstream buyers. Both practices eventually reduce the number of competitors, hence “concentrate” the ownership and with it the control of the market to the detriment of the variety and quality as well as competitive pricing of the products, ultimately harming the consumer.

³¹ See, e.g., Albert Breton, *Introduction to an Economics of Culture: a Liberal Approach*, in

concern and conflict with competition rules and antitrust authorities.³²

Two risk-minimising practices that are of major interest here are the order of the economic exploitation among the cultural industries and “zoning” (i.e., the release of a movie at different times in different parts of the world). With regard to the order of exploitation, it usually starts with a book that is then made into a film. The film is first released in the cinema and followed by the exploitation on the video rental market (primarily DVDs and high definition DVDs) before it will be screened on television (first pay-television and later free-to-air television). Additionally the exploitation is often complemented by a soundtrack, and sometimes, other accessory gadgets or “fan articles.” To minimise the risk of a box office bomb this line of exploitation is sometimes limited to different zones to test the potential appeal of the movie before it is marketed on a wider or even a global scale. If, for example, an audience in California likes a movie, it is likely worth marketing the movie to the rest of North America. If the same movie also appeals to a European audience, it is perhaps also worth trying it in the Middle East and so on and so forth around the globe.

This marketing-driven approach is however not the sole explanation for zoning in the form of the DVD-RCS. More closely linked to revenues is the following explanation for the encoding of DVDs presented by the DVD CCA as follows:

Movies are often released at different times in different parts of the world. For example, a film that opens in December in the U.S. might not premier in Tokyo until several months later. By the time that Tokyo premier occurs, the film may be ready for DVD distribution in the U.S.

Regional DVD coding allows viewers to enjoy films on DVD at home shortly after their region's theatrical run is complete by enabling regions to operate on their own schedules. A film can be released on DVD in one region even though it is still being played in theaters in another region because regional coding ensures it will not interfere with the theatrical run in another region. Without regional coding, all home viewers would have to wait until a film completes its entire global theatrical run before a DVD could be released anywhere.³³

CULTURAL INDUSTRIES: A CHALLENGE FOR THE FUTURE OF CULTURE, 40 (UNESCO 1982).

³² One of the oldest and still one of the most interesting cases is *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). For a more recent account, see Craig G. Fox, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 HOFSTRA L. REV. 505 (1992).

³³ The DVD CCA's sole reason for regional encoding is the differences in the dates of release of movies. DVD Copy Control Association Frequently Asked Questions, *supra* note

Hence, better control of the successive marketing of motion pictures on various carriers and through different services appears to be the central purpose of the regional coding system. This was also summarised as follows:

The regional coding system was put into place so that movie studios can control when and where DVDs are distributed so as not to interfere with schedules for sequential release of movies, which includes theatrical runs, Pay TV broadcast, video rental release, retail video release, and free-to-air television broadcast.³⁴

It is, however, submitted here that with the recent intensification in the field of information and communications technologies (“ICT”) the available time gaps between the regions are becoming considerably smaller and smaller given that the accessibility of information has improved globally particularly due to the Internet. This means that the delay in the global release dates of a movie should become shorter because awareness of audiences in other countries is greater since they may read about the release of a film on the Internet. This trend is, for instance, exemplified in the case of the marketing of the major box office hits *Casino Royale*, which was released globally over a period of slightly more than two months, and *The Lord of the Rings: The Fellowship of the Ring* which was released in all regions within four months (and a majority of the countries in less than one month).³⁵

Nonetheless, if marketing and release were the only reasons, one might wonder why, for instance, old movies such as the *James Bond 007 – From Russia With Love*, which was released long before the DVD era in 1964, are still sold in a regionally encoded format. Equally, it remains to be asked why artistic movies like the mentioned *No te mueras sin decirme adónde vas*, which are never released on a global scale, are then sold on regionally encoded DVDs. The obvious answer to this question is that the order of exploitation cannot be the sole reason for this practice.

In addition to the temporal “zoning” for marketing purposes, this practice also allows – in line with the governing laws and regu-

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³⁴ See, e.g., Organisation for Economic Co-operation and Development, Directorate for Science, Technology and Industry, Committee on Consumer Policy, *Report on Disclosure Issues Related to the Use of Copy Control and Digital Rights Management Technologies*, at 4, OECD Doc. DSTI/CP(2005)15/FINAL (April 18, 2006) [hereinafter *OECD Report on Disclosure*], available at <http://www.oecd.org/dataoecd/47/31/36546422.pdf>.

³⁵ For the precise release dates of *Casino Royale*, see the Internet Movie Database, <http://www.imdb.com/title/tt0381061/releaseinfo> (last visited Sept. 21, 2009). For the release dates of *The Lord of the Rings: The Fellowship of the Ring*, see Internet Movie Database, <http://www.imdb.com/title/tt0120737/releaseinfo> (last visited Sept. 21, 2009).

lations of the place – charging different prices in different markets for the same product. This practice is called “price discrimination” and has two related features. First, price discrimination may serve as a profit-maximising measure because once the production and marketing costs of the movie have been recouped, for instance on the domestic or the North American market, every additional sale of the movie in another country, even if it were only for ten cents, maximises the revenues of the movie and improves the overall box office results. This particular practice of price discrimination has been often criticised as dumping, i.e., the sale of a good in an export market below the actual production costs (plus a reasonable addition for selling cost and profit) or the sales price in the domestic market. Price discrimination was named as the main reason for the success of American film and media productions in the global context because the size of their (linguistically comparatively homogenous) home market allows them to recoup costs before exporting it to another country,³⁶ which for instance, is certainly more difficult for a Slovenian language production, since its market is limited to 2,000,000 people.

In a second feature, in which it was mentioned as yet another reason for the maintenance of the DVD-RCS, price discrimination makes it possible to restrict “the resale across markets thereby allowing sellers to exploit regional difference in demand patterns.”³⁷ In this case, it is not necessarily the dumping of the products in other markets at prices below production costs (plus a reasonable addition for selling cost and profit) but rather the “blocking” of prices at artificially higher levels in either the domestic or selected export markets. In fact, the available information suggests that the geographically random drawing of the different regions follows economic considerations linked to the per capita gross domestic product (“GDP”) of countries or the respective purchasing power of consumers.³⁸ Following a look at global statistics this appears by and large true but one still wonders how, for example, Liechtenstein, with a per capita GDP of U.S. \$102,605, and Yemen with a per capita GDP of U.S. \$853 can be grouped together in Region 2; similarly, one is left to wonder how Australia with a per capita GDP of U.S. \$37,924 and Papua New Guinea with a per capita GDP of U.S. \$989 can be grouped together in Region 4.³⁹

³⁶ See W. Ming Shao, *Is There No Business Like Show Business? Free Trade and Cultural Protectionism*, 20 YALE J. INT'L L. 105, 121-22 (1995).

³⁷ See Emily Dunt, et al., *The Economic Consequences of DVD Regional Restrictions*, Sept. 19, 2001, at 7, available at <http://www.mbs.edu/home/jgans/papers/dvd.pdf>.

³⁸ *Id.* at 8-9.

³⁹ For a comparison of the cited countries' GDPs, see U.N. Stat. Div., *Indicators on Income*

These examples may be extreme but they nevertheless indicate that the DVD-RCS disregards some large disparities in terms of per capita GDP among different countries belonging to the same region. This is certainly linked to considerations of a different kind, such as their market size or significance as a sales market for DVDs, but nevertheless, it highlights some major irregularities in the arguments bolstering the DVD-RCS.

Notwithstanding such irregularities, the principal rationale underlying such exploitation of regional differences is still said to be price discrimination which, on the one hand, allows the producers/distributors to maximise their revenues by charging higher prices to economically stronger consumers. On the other hand, it may also allow economically weaker countries and their populations to enjoy these products which they would otherwise not be able, or perhaps not be willing, to purchase. Put briefly, price discrimination allows for the boosting of revenues by maximising the sales of the same product at different prices in different markets. It must be added here that, in the case of the DVD-RCS, different markets mainly exist because of the regional coding technology, which segments and further fragments an emerging global market in trade in DVDs and their audiovisual content.

An economic perspective, however, suggests that “market segmentation and price discrimination need not always lead to a loss in social welfare and may in some circumstances raise social welfare.”⁴⁰ As a possible result of the removal of such regional price discrimination, prices could be expected to move to an average level that is likely to benefit those consumers located in the regions where the per capita income is higher, and to harm their counterparts in regions where it is lower.⁴¹ This, however, may not be the case if the final retail prices in the stronger economies were beforehand artificially “blocked” at a much higher price than its actual production costs plus the profit margin. If this was the case, the removal of the system might introduce a more competitive price below the average level and possibly below the lower price in the weaker economies. Altogether, the authors of an economic analysis of the regional coding system come to the following result: “We conclude that the conditions that may theoretically allow such restrictions to be efficient are unlikely to hold in the case of DVDs and that social welfare is likely to be significantly enhanced by

and Economic Activity, available at
<http://unstats.un.org/unsd/demographic/products/socind/inc-eco.htm>.

⁴⁰ See Dunt, *supra* note 37, at 9.

⁴¹ *Id.* at 10.

eliminating such technical restrictions.”⁴²

A further reason for the regional coding system, and the segmentation of the market it entails, is probably found in a complex combination of factors relevant for the industry. Such factors include copyright protection or the prevention of free-riding, the prevention of parallel imports, and the generation of market power, as well as the possible protection of different distribution systems in an industry that is generally characterised by a high degree of vertical integration. Equally, the DVD CCA contends that the regional coding system based on the CSS helps to prevent the infringement of copyrights or, in other words, to more efficiently enforce the protection of copyrighted goods, such as movies.⁴³ However, a counterargument is that, first of all, there are other copyrighted content on DVDs (e.g., Microsoft Encarta) not vested with a regional coding system. An even more powerful argument against this assumption is that pirated copies are generally region-free and can be played on every device whereas the legally purchased ones are usually region encoded and can hence only be played on hardware corresponding to that region. This fact ultimately means that the DVD-RCS directly “encourages” consumers, who wish to see a particular movie that may not be available in their regional coding system, to obtain an illegal copy rather than to purchase a legal one.

Thus, it is probably more appropriate to state that regional coding is for the motion picture industry what gerrymandering is for the electoral system, namely the redesign of electoral constituents to the advantage of one candidate or political party. Similarly, by – at least in geographic terms – randomly subdividing the global market into different regions, it is possible for the motion picture industry, or at least its major global players, to secure a competitive advantage by way of an increase of their market power vis-à-vis their main local or regional competitors. The present international copyright regime is fragmented with regard to the regulation of parallel imports. Article 6 of the TRIPS Agreement leaves it to the discretion of the WTO Members of how to address the issue of the exhaustion of intellectual property rights.⁴⁴ This practice also makes parallel imports technically (and not legally) impossible, at least with regard to imports originating not in other countries but at least in other regions. The reasoning behind this is clearly the prevention of free-riding on various costs in market-

⁴² *Id.* at 1, 17.

⁴³ See DVD Copy Control Association, <http://www.dvdcca.org> (last visited Sept. 21, 2009).

⁴⁴ See discussion *infra* Part III.E.3.

ing and customer service.⁴⁵

A last element mentioned is the prevention of confusion of consumers.⁴⁶ The argument goes that since films are released in different versions in different countries, restrictions on the parallel importation of DVDs are a means for protecting the DVD version which was authorised by the national broadcasting authority of the respective country. For instance, the French movie *37°2 le matin* (1986) (which, literally translated means, “37.2°C in the Morning”) was titled *Betty Blue* in the English version. Hence, given that the translation is not even vaguely literal, it is possible (though not likely) that a consumer who, for instance, likes the main actress in the movie, buys both movies thinking that they are two different movies. Here, like in the case of exclusive distribution systems, however, the coverage is incomplete, since the coding system does not follow national (regulatory) or linguistic boundaries, but instead in these terms randomly drawn regional boundaries. Against this kind of argument for the use of a regional coding system is that the regional coding system itself is subject to criticism by consumer protection motivated policy considerations.⁴⁷ As exemplified in the episode above, it is more likely that the current labelling practice for the regional coding system will cause confusion to a consumer not familiar with the system. A relevant Organisation for Economic Co-operation and Development (“OECD”) Report questions the labelling practice as follows:

To those who are familiar with the region system, this labelling appears to be clear. For those who are not aware of the region system, however, a number on a globe is perhaps not enough information to indicate what playback restrictions are included. Explanatory text about the region code system is not usually included on or inside the DVD.⁴⁸

One, probably initially unwanted side-effect of the regional coding system is the technical possibility to target special consumer preferences or other cultural idiosyncracies, or, else, to exercise censorship. Accordingly, the same product can be sold in different versions on each regional code. To give but one example, this can be the case for the rating of films against different cultural backgrounds, such as it was the case with the film *Eyes Wide Shut* (1999) which was released in different versions in Re-

⁴⁵ See Dunt, *supra* note 37, at 11-12.

⁴⁶ *Id.* at 12-13.

⁴⁷ See *infra* note 55.

⁴⁸ See, e.g., OECD *Report on Disclosure*, *supra* note 34, at 11.

gion One, Two, and Three, with the main differences relating to sexually explicit content out of respect for religious texts.⁴⁹

Moreover, the practice of regional coding not only effectively “misleads” consumers in the purchase of DVDs but also in the purchase of hardware, such as DVD players or computers. This is because a consumer might not be aware that the DVD player or computer purchased will not display all (legally) purchased DVDs. This may negatively affect the consumer in several ways. First, he already paid a higher price for the hardware device in the first place because of the license requirement and the regional coding technology built into it. Second, the consumer has to bear additional costs for deactivating the regional coding in the hardware or is forced into illegality by acquiring the relevant circumvention techniques or “hacks.”⁵⁰ Alternatively, the consumer has to bear higher costs if he buys a multi-zone DVD player, which is also more expensive than the ordinary device. In these cases and in some jurisdictions, doubts also arise with regard to the legality of the use of circumvention techniques or even the use of such multi-zone DVD players.⁵¹

Finally, from the perspective of the hardware, it is interesting to ask why the hardware manufacturers actually agreed to a system that is inevitably linked with higher production costs in their industry as well as a limitation on the free circulation of their goods across regional (not national) borders. The answers are likely to be found in the power of the content industries and possibly also in the concentration of ownership between the content and hardware manufacturing industries.

C. *A Critical Evaluation and Some Policy Considerations Related to the DVD Regional Coding System*

Defenders of the DVD-RCS have put forward a few unconvincing arguments. Nevertheless, information, including the wider context, suggests that the main reasons for this practice are to be found in the economic peculiarities of the motion picture

⁴⁹ In this regard the European version is completely uncensored whereas the orgy scene was partially censored in the American release to avoid an “NC-17” rating (i.e., “No Children 17 and Under Admitted”) under the Motion Picture Association of America Rating System by placing computer generated people in front of the sexually explicit action. The Internet Movie Database, Alternate Versions for *Eyes Wide Shut*, <http://www.imdb.com/title/tt0120663/alternateversions> (last visited Sept. 21, 2009).

⁵⁰ The cost of modifying DVD players has been reported to range between \$100 to \$150. Dunt, *supra* note 37, at 14.

⁵¹ For a discussion of the problem of circumvention in the US context, see, for example, Qixiang Sun, *The DMCA Anti-Circumvention Provisions and the Region Coding System: Are Multi-Zone DVD Players Illegal After the Chamberlain and Lexmark Cases?*, 2005 U. ILL. J.L. TECH. & POL’Y 317 (2005).

and further related “cultural industries” (e.g., the music and video industry, television, and the print media industry) that surface in various risk-minimising and revenue-maximising practices. Hence, very much like in the uniform pricing practice of movies at the ticket office, it is the industry’s history and structure, in combination with the governing domestic and international legal rules, that have led to implementation of the DVD-RCS.

Among several reasons, it is possible to identify as the main reasons behind the regional coding system, first, control over the chain of the successive marketing of movie products across various categories of goods and services; and, second, the possibility to price discriminate between different territorial units in accordance with the per capita income and purchasing power of its consumers.

The DVD-RCS appears to have provided sufficient reasons for the industry which introduced it in the first place, to maintain this practice and even reinforce (e.g., RCE) and continue (e.g., Blu-ray technology) it in the future.

What is interesting to note in this context is that, given that the supporters of this system are predominantly representatives of the American film industry (Region One), the underlying rationale is quite similar to the arguments put forward by supporters of a so-called “*exception culturelle*,” i.e., an exemption for cultural goods and services developed toward the end of the Uruguay Round negotiations.⁵² Similar arguments emerged again in the context of the adoption of the United Nations Educational Scientific and Cultural Organization (“UNESCO”) Convention on the Promotion and Protection of the Diversity of Cultural Contents.⁵³ In that context, the American trade representatives accused their mainly European and Canadian counterparts of “economic protectionism” for wanting to restrict the trade in these cultural goods and services. Obviously, in the case of the European and Canadian representatives, the accusation was “defensive economic protectionism” while, in the case of the American representative, the arguments could be dismissed as “offensive economic protectionism.” If based on solely economic elements, both lines of arguments miss the point, and are actually identical in the way that they restrict the flow of DVDs around the world. Similarly, one

⁵² See, e.g., Karl F. Falkenberg, *The Audiovisual Sector*, in THE URUGUAY ROUND RESULTS 429 (Jacques H.J. Bourgeois et al. eds., 1995).

⁵³ On the evolution of the debate from the “cultural exception” to “cultural diversity,” see, for example, Christoph Beat Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?*, 9 J. INT’L ECON. L. 553, 554-55 (2006).

might ask whether the release of different versions in different regional codes, such as the censoring of certain content, amounts to the kind of cultural paternalism that defenders of the *exception culturelle* or of a cultural specificity clause were accused of when they wanted to exempt certain cultural goods and services from free trade rules and by adopting local content requirements. Ultimately, it is clear that this restriction on the flow of DVDs is detrimental to the diversity of supply of movie titles.

Returning to the issue of regional coding, although it may yield sufficient positive reasons for the industry, it is a source of negative feelings and frustration among consumers because it limits the available offerings and causes additional costs.⁵⁴ Probably, the main reason why the issue has not received the kind of attention one would expect it to receive, lies, first and foremost, in the absence of adequate legal remedies at the international level and, second, in the fact that the coding system can be rather easily circumvented by either buying a multi-system DVD player, modifying the ordinary DVD player, or unlocking the regional coding on the computer.⁵⁵ One reason that the encoding is said to be quite easily circumvented, is that (except for where there has been a concentration in the ownership, such as in the case of Sony) the manufacturers of hardware devices are usually interested more in the selling of their own products rather than protecting the revenues of the movie industry.⁵⁶ Therefore, in order to save production costs, the hardware is generally designed in a universal way and manipulated or encoded to play only discs from one region at the end. However, it must be added that from a legal point of view, the possibility to circumvent the region coding system is not satisfactory because of the uncertainty about the actual legality of such circumvention technologies. Principally, for a legal debate, a certain result cannot be deemed satisfactory or legally consistent if it is obtained via illegal means or simply because nobody complies

⁵⁴ On the negative effects on the consumer and the frustration of access to and use of content in the context of DVD region coding, see, for example, Transatlantic Consumer Dialogue (TACD), a forum of U.S. and E.U. consumer organisations that develops and agrees on joint consumer policy recommendations to the U.S. government and European Union to promote the consumer interest in E.U. and U.S. policy making. Resolution on Digital Rights Management – The Sequel, at 6, available at http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=55&Itemid=. See also Alex Ortolani, *Buy and Yell: Steps by Movie and Music Firms to Combat Illegal Downloads and Piracy Have Left Some Consumers Seeing Red*, S. CHINA MORNING POST, Apr. 24, 2006, at 5.

⁵⁵ See, e.g., Sam Andrews, *DVD Regional Coding Not Working*, BILLBOARD, Nov. 18, 2000, at 99; Andy Reinhardt, *The French Have a Word for It: Hacking*, BUSINESSWEEK, Jan. 16, 2002, available at http://www.businessweek.com/bwdaily/dnflash/jan2002/nf20020116_7617.htm.

⁵⁶ Reinhardt, *supra* note 55.

with the law in question.

This is the reason why the possible circumvention is not the prime focus of this article, since the DVD-RCS *prima facie* affects the consumer who is willing to pay for an authorised copy. Additionally, it is not the prime focus of this article to discuss whether the system should be abolished or prohibited, a debate that is apparently going on in some national jurisdictions. Instead, what is of prime interest here is to show the deficiencies in the current international trading system in coping with some of the most imminent legal problems that are either caused or aggravated by the persistent fragmentation of international law. To this end, and before concluding, it still needs to be established whether the system is actually in conformity with, or in violation of, international trade rules as established under the WTO and other instruments.

D. *Who Are the Principal Victims?*

Having considered the possible effects of DVD-RCS and prior to starting the legal analysis, it is important to establish who may be the principal victim of this practice or, in other words, who is forced to bear the principal costs and consequences. Under normal circumstances, a violation of a trade rule is attested by the World Trade Organization Dispute Settlement Body ("DSB") following a request for consultations by a complaining party that, if the parties fail to settle the dispute, can then be transformed into a request for the establishment of a panel.⁵⁷ The state, as a WTO Member, usually acts in the interest of a domestic industry, or on the basis of some complaint by one or more companies that might suffer an injury due to a violation of trade rules by another state. Thus, before engaging in a legal analysis of the DVD-RCS under the WTO rules, it is necessary to look at the potential victims of this practice. Therefore, while the motion picture industry itself or at least some of its most powerful representatives (e.g., the major global players), was responsible for the creation of it, the hardware industry by and large consented to and decided to comply with it, despite the fact that the modification of the hardware may incur additional costs to the manufacturer of DVD players and computers. Most likely, however, these additional costs are

⁵⁷ See Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 4, 6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

directly transferred to the final consumer. First, the consumer pays a higher price for the hardware due to the encoding technology (or for buying a more expensive multi-region device). Second, the consumer is punished again when he buys a regionally encoded DVD (most likely but not always for a higher price based on regional price discrimination), and a third time when he or she has to manipulate the regionally encoded hardware again (unless it is a multi-region device) to be able to play the regionally encoded DVD.

The extent to which filmmakers and directors are affected and agree or disagree with this practice cannot be established here due to a lack of relevant information. Moreover, in this question, directors of different genres of films (e.g., blockbusters or artistic movies) are likely to support different solutions. However, from an international trading perspective, it is clear that for production and distribution companies that disagree with the system, there is no direct harm, since these companies can always market and sell their products as region-free products that can then be played even on regionally encoded hardware devices. To resume, it can be established that the principal victim of the practice of the DVD-RCS is thus the consumer and especially the one with a more culturally diverse demand in terms of content.

III. REGIONAL CODING AND THE WTO: SOME LEGAL CONSIDERATIONS

A. *General Remarks*

Undoubtedly, from a legal perspective, it is surprising that there is no legal paper available on the issue of the DVD-RCS that casts some light on the issue from an international trade law perspective. This is even more surprising given its clear impact on trade flows which raises several questions regarding its compatibility with WTO rules. Only during the years 2000 and 2001 was the issue given some minor attention in the context of competition rules, such as in Australia and in the European Union ("E.U."). For example, the former European Commissioner for Competition Policy, Mr. Mario Monti, mentioned the DVD-RCS in a speech, announcing that the European Commission would carry out an investigation. He is reported to have said:

The thrust of the complaints that we have been receiving is that such a system allows the film production companies to charge higher DVD prices in the [E.U.] because [E.U.] consumers are artificially prevented from purchasing DVDs from overseas.

As a direct result of these complaints, we have initiated contacts

with the major film production companies. We will examine closely what they have to say. Whilst I naturally recognise the legitimate protection which is conferred by intellectual property rights, it is important that, if the complaints are confirmed on the facts, we do not permit a system which provides greater protection than the intellectual property rights themselves, where such a system could be used as a smoke-screen to allow firms to maintain artificially high prices or to deny choice to consumers.

My services have had contacts on this issue with the Australian Competition and Consumer Commission, which has also sought clarifications from the major film production companies. I have noted with great interest the Australian Competition and Consumer Commission's conclusion that the regional coding system imposes a '*severe restriction of choice*' on consumers. The Commission will need to determine whether there are similarly negative effects in the EU which could fall within the scope of the competition rules.⁵⁸

Although a Member of the European Parliament submitted written questions to the European Commission at roughly the same time period,⁵⁹ there is no indication of a positive or negative outcome of the European Commission's investigation into the matter. More recently, the coding system was mentioned in the context of the European Commission consulting on the functioning of the internal market. There, a reply by the *Global Entertainment Retailers Association – Europe* described the regional coding of and territorial restrictions on the distribution of DVDs as contributing "directly to distortions in the market" and artificially restricting "the free flow of goods from outside the E.U., making sourcing

⁵⁸ Mario Monti, European Commissioner for Competition Policy, *Content, Competition and Consumers: Innovation and Choice*, Speech/01/275 at the European Competition Day (June 11, 2001), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/275&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁵⁹ Written Question E-1890/02 from Glyn Ford (PSE) to the Commission, Regional Coding of DVD Players, 2003 O.J. (C 137 E) 34; Written Question E-2371/00 from Glyn Ford (PSE) to the Commission, DVD discs and competition, 2001 O.J. (C 103 E) 138; Written Question E-1510/00 by Glyn Ford (PSE) to the Commission, DVD Players, 2001 O.J. (C 53 E) 158; Written Question E-1509/00 by Glyn Ford (PSE) to the Commission, DVD Players and Free Competition, 2001 O.J. (C 53 E) 157. The author made numerous attempts to directly contact Mr. G. Ford (MEP) but until today he has still not received a reply answering the questions in substance. The only information received was a copy of the 2005 OECD *Report on Disclosure*, which had no contextual and obviously also no institutional relation to the questions asked to Mr. Glyn Ford.

from non-E.U. countries illegal and thus unavailable.”⁶⁰ Unfortunately, no further mention is made of it in the final document that summarises the consultation process.⁶¹ In the absence of any written record or public documents on the outcome of the Commission’s investigation, an e-mail from the European Commission Directorate General for Competition revealed that the Commission services did not pursue the case of DVD region coding further. This was because “the significant price differences between region 1 and 2 DVDs that existed resulting from the regional coding system” had disappeared in recent years due to a convergence in prices between these two regions, and hence the issue had been pursued no further.⁶² To verify whether the price differences really disappeared would require more detailed information about the parameters and criteria applied by the Commission. As will be shown below, in individual cases, however, still huge differences in the pricing can be found.⁶³ Moreover, price differences are certainly not the only distortions to trade and negative effects that are related to the practice of the DVD-RCS.

From the perspective of European law, taking the hypothetical example of the DVD-RCS being established within the internal market, it appears that the underlying measure is likely to be qualified as a violation of the rules of the *acquis communautaire*. If brought before the European Court of Justice (“ECJ”), the measure could be expected to be outlawed either on the basis of the resulting fragmentation or partitioning of the internal (or common) market based on the rules on free movement of goods (Art. 28 TEC) or based on the prohibitions of concerted practices (Art. 81 TEC) or the abuse of a dominant position (Art. 82 TEC).⁶⁴ Since, however, the present regional coding system does not partition the EU internal market “internally,” things are by and large different.⁶⁵

⁶⁰ Reply to the European Commission’s Consultation on the Internal Market, Global Entertainment Retail Association – Europe (June 15, 2006) (on file with author).

⁶¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Single Market for 21st Century Europe, at 1, COM (2007) 724 final (Nov. 20, 2007).

⁶² E-mail from Per Hellström, Head of Unit of DG Competition, to Rostam J. Neuwirth, Assistant Professor at the Faculty of Law, Univ. of Macau (Jan. 22, 2008) (on file with author).

⁶³ See discussion of the movie *Heartlift*, *infra* Section III.E.1.

⁶⁴ See, e.g., Joined Cases 55/80 & 57/80, Musik-Vertrieb Membran GmbH et K-tel Int’l v. GEMA, 1981 E.C.R. 147; Cas 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG, 1971 E.C.R. 487; Consolidated Version of the Treaty Establishing the European Community, arts. 81, 82, Nov. 10, 1997, 2006 O.J. (C 321 E) 37.

⁶⁵ Cf. Joined Cases 60/84 & 61/84, Cinéthèque SA v. Fédération Nationale des Cinémas Français, 1985 E.C.R. 2605 (concerning a French law which provided that “no cinematographic work shown in cinemas may simultaneously be exploited in the form of re-

In Australia, a case was decided by the Australian Federal Court concerning the regional coding system on CD-ROMs sold to the owners of Sony Playstation gaming consoles.⁶⁶ In the judgment, the Federal Court ruled that “mod chips” (i.e., devices that circumvent a regional coding system) breached the anti-circumvention provisions of the Australian Copyright Act.⁶⁷ The Australian Competition and Consumer Commission (“ACCC”), which had expressed the belief that “region coding is detrimental to consumers as it severely limits their choice and, in some cases, access to competitively priced goods,” decried the decision.⁶⁸ Thus except for some reports on the national debates on the issue of DRM or the DVD-RCS, there exists no comparable debate at the global level (yet).⁶⁹

B. *The DVD Regional Coding System and International Trade Law Under the WTO*

In order to find out whether the DVD-RCS is compatible with the rules contained in the various agreements both establishing the WTO as well as those administered by it, we must first have a look at the origin of the DVD-RCS and try to determine the nature of the measure at issue. As mentioned before, the DVD-RCS has been developed as a by-product of the CSS, a protection system against the illegal duplication of movies stored on DVDs. This system is administered by the DVD CCA, which calls itself a “not-for-profit corporation” and gives licenses for the use of the CSS to

cordings intended for sale or hire for the private use of the public, in particular in the form of video-cassettes or video-discs, before the expiration of a period of between six and 18 months to be determined by decree.”)

On this law, the court noted:

Nevertheless, the application of such a system may create barriers to intra-Community trade in video-cassettes because of the disparities between the systems operated in the different Member States and between the conditions for the release of cinematographic works in the cinemas of those states. In those circumstances a prohibition of exploitation laid down by such a system is not compatible with the principle of the free movement of goods provided for in the Treaty unless any obstacle to intra-Community trade thereby created does not exceed that which is necessary in order to ensure the attainment of the objective in view and unless that objective is justified with regard to Community law.

Id.

⁶⁶ *Kabushiki Kaisha Sony Computer Entertainment v. Stevens* (2003) F.C.A.F.C. 157.

⁶⁷ See Kimberlee Weatherall, *Before the High Court: On Technology Locks and the Proper Scope of Digital Copyright Laws - Sony in the High Court*, 26 SYDNEY L. REV. 613 (2004).

⁶⁸ See James Pearce, *Aussie Mod-Chip Veto Criticised*, ZDNET AUSTRALIA, Aug. 1, 2003, available at <http://news.zdnet.co.uk/hardware/0,1000000091,39115420,00.htm>.

⁶⁹ See, e.g., Parallel Importing in New Zealand, The Ministry of Economic Development, http://www.med.govt.nz/templates/Page_____1230.aspx (describing the related debate on parallel imports and the creative industries in New Zealand); See also Ministry of Economic Development, *Parallel Importing and the Creative Industries: A Discussion Paper* (December 2000), <http://www.med.govt.nz/upload/2266/creatdisc.pdf> (last visited Sept. 21, 2009).

various industries, such as the “owners and manufacturers of the content of DVDs; creators of encryption engines, hardware and software decrypters; and manufacturers of DVD Players and DVD-ROM drives.”⁷⁰ Unfortunately, further information on the ownership, membership or composition of the board of directors of the DVD CCA is not available, and the home page does not display a contact address for clarification on some of these issues.⁷¹

From the highly cryptic statement on the home page of the DVD CCA, it appears that the DVD-RCS would thus be a measure derived from private actions. Therefore, what would be of special interest and great significance for the subsequent legal analysis of the DVD-RCS under the rules of the WTO, would be the question about a possible governmental endorsement of the DVD-RCS by one or more WTO Members. The reason being that, in line with the predominant understanding of the WTO as an organisation of public international law, private parties’ actions are held to be only to a very limited extent capable of establishing responsibility of a WTO Member for an alleged violation of WTO rules. This is, in particular, reflected in the clarification of the WTO Panel in the Report on the *Kodak-Fuji Case*, where it states as follows:

As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term measure in Article XXIII:1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties.⁷²

However, this relatively narrow interpretation of the term “measure” and its restriction to governmental policies or actions, excluding those of private parties, is immediately put into perspective in the following sentence, which reads:

But while this “truth” may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions.⁷³

⁷⁰ DVD Copy Control Association Frequently Asked Questions, *supra* note 11.

⁷¹ *Id.*

⁷² See Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, at 10.52, WT/DS44/R (Mar. 31, 1998) [hereinafter *Kodak/Fuji Report*].

⁷³ *Id.*

Without this partial attenuation, it might be easy for a government to evade its trade obligations by simply delegating governmental authority to the private sector or informally encouraging the private sector to adopt certain practices or measures. As mentioned by the panel, there have been cases where the line of distinction between governmental action and private party action appeared as thin and sharp as a razor blade.⁷⁴ Already, the General Agreement on Tariffs and Trade of 1947 (“GATT 1947”) system was confronted with this issue several times.⁷⁵ Equally, in the short time period since the establishment of the WTO system, three cases arose which dealt with the question about alleged violations of WTO rules based on private actions or at least a governmental endorsement of private actions.⁷⁶

One important aspect deriving from these cases is that the differences in the underlying measures make it difficult for the dispute settlement body to establish clear guidelines. Instead, the Panel has stated the following:

These past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.⁷⁷

Based on the increasing interdependence and complexity of business relations in a global market, it is argued here that the number of disputes concerning the potential public endorsement of private actions in view of a possible violation of international trade rules will only increase in the future. This question is also inextricably tied to the increasing removal of tariff barriers and to the introduction of new forms of non-tariff barriers in combination with changes to the industries organisational structure, such as their frequent privatisation and their growing concentration

⁷⁴ See Rex J. Zedalis, *When Do the Activities of Private Parties Trigger WTO Rules?*, 10 J. INT'L ECON. L. 335 (2007).

⁷⁵ See Panel Report, *Japan – Restrictions on Imports of Certain Agricultural Products*, L/6253 (Nov. 18, 1987); GATT B.I.S.D. (35th Supp.), Report of the Panel, *Japan – Trade in Semiconductors*, L/6309 (May 4, 1988), GATT B.I.S.D. (35th Supp.) [hereinafter *Japan – Semiconductors*]; Report of the Panel, *European Economic Communities – Restrictions on Imports of Dessert Apples*, L/6491 (Apr. 18, 1989), GATT B.I.S.D. (36th Supp.).

⁷⁶ See Kodak/Fuji Report, *supra* note 72; Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (Dec. 19, 2000); Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161 & 169/AB/R (Dec. 11, 2000).

⁷⁷ See Kodak/Fuji Report, *supra* note 72, at 10.56.

based on mergers and acquisitions.

Generally, in such a changing business and trading environment, the initial argument about the persistent gap between issues of private international and public international law is thus gaining prominence. This will ultimately require some further thoughts on the nature of the WTO and its covered agreements as well as the extent to which private actions may cause a violation of WTO rules.

For the DVD-RCS system, this means that the question of whether a private party's action, which in this case would be the system administered by the DVD CCA, is capable of violating trade rules, depends on the degree of governmental endorsement of the said action. Such endorsement would have to be established on a case-by-case basis. Given that no detailed background information is available on the activity and especially on the membership of the DVD CCA, this question cannot be answered at this point. Moreover, it is not the focus of this article to adjudicate a potential dispute, but instead to try to detect deficiencies in the present trading system and to find ways for its improvement. For this reason, we will now turn to the question of the overall context and the conceptual framework of the WTO system.

C. The Global Market or the WTO Between Trade Liberalisation and Market Integration

Lately, as was mentioned before, the debate on the fragmentation of international law has gained momentum and aroused greater interest. While the parallel process of the juridification of international law and the proliferation of international organisations has advanced, the process of the continuous liberalisation of trade also has changed the picture of global trade relations. What began as a process of trade liberalisation on the basis of the reduction of tariffs and the removal of obstacles to cross-border trade gradually appears to have turned into a process of harmonisation of trade laws eventually leading to the integration of the global market.⁷⁸

This distinction is one of degree but is deemed to be of great importance and of special relevance to the question of measures involving private parties as well as considerations about possible harmful effects for the private consumer, such as those caused by the DVD-RCS. This is because it can be argued that the significance of private parties' involvement in the international trading

⁷⁸ On the various stages of economic integration, see, for example, BELA BALASSA, *THE THEORY OF ECONOMIC INTEGRATION* 6-7 (1962).

regime increases in proportion with the degree of market integration. This is so because trade liberalisation consists mainly of the mentioned reduction of tariffs and removal of obstacles to cross-border trade on the basis of negative integration measures. Market integration, on the other hand, aims at creating a single market and thus involves more non-tariff barriers, as well as a certain degree of harmonisation based on positive integration measures.⁷⁹ In other words, and from the perspective of the private individual, the role and rights of private persons in a legal system must develop in proportion with the obligations the system imposes on them. In turn, the degree of market integration obtained by the WTO will also influence the expectations the public will have vis-à-vis the WTO.

Having briefly recalled the principal implications of the difference between trade liberalisation and market integration, it is now possible to try to evaluate the compatibility of the DVD-RCS with existing trade rules. To this end, it is useful first to take a look at the underlying rationale for the establishment of the international trading system under both the GATT 1947 as well as the Agreement Establishing the World Trade Organization (“WTO Agreement”). This rationale is laid down in the Preamble of the WTO Agreement, which, elaborating further on the Preamble of the GATT 1947,⁸⁰ reads as follows:

The Parties to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development

Being desirous of contributing to these objectives by entering

⁷⁹ See generally Fritz W. Scharpf, *Balancing Positive and Negative Integration: The Regulatory Options for Europe*, Eur. Univ. Inst. Policy Paper No. 97/4, 1997, available at <http://www.mpifg.de/pu/workpap/wp97-8/wp97-8.html>; Kanishka Jayasuriya, *Globalization and the Changing Architecture of the State: The Regulatory State and the Politics of Negative Coordination*, 8 J. EUR. PUB. POL’Y 101 (2001).

⁸⁰ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations⁸¹

The application of the key phrases in this text, i.e., “raising standards of living” and the “substantial reduction of tariffs and other barriers to trade,” to the region coding system suggests that, *prima facie*, the region coding system is not in line with the spirit of the international trading system. Notwithstanding the restrictive effect, it must be accepted that not all restrictions of trade, as undesirable as they may be from a trade perspective, are automatically illegal or in violation of obligations entered by the Members of the WTO. For instance, even different languages, different currencies, and different laws may all constitute “restrictions” to trade, but they are certainly not illegal under the WTO. As a matter of fact, some restrictions may even be outlawed but still accepted under the various special and general exceptions enshrined in the various WTO agreements. As reflected but not duly emphasised in the trade linkage debate is that some restrictions on trade may even contribute to the sustainability of the trading system in the long run. Restrictions may also contribute to a rise in the standard of living, which as even economists point out, cannot be measured in economic terms only.⁸²

Last but not least, there may also be measures for which there exist no legal remedies to challenge them or, else, they may violate the spirit but not the letter of the law applicable to them. This appears to be the case with the DVD-RCS, especially against growing evidence for the gradual transformation of the international trading system from a tool for international trade liberalisation to one of global market integration.⁸³ This evidence consists in the qualitative leap made from the GATT 1947 system to the establishment of the WTO and is characterised in particular by the inclusion of trade in services (General Agreement on Trade in Services (“GATS”)) and in the TRIPS Agreement, as well as the

⁸¹ Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

⁸² See AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); see also Alain Kirman & Miriam Teschl, *On the Emergence of Economic Identity*, 9 REVUE DE PHILOSOPHIE ECONOMIQUE 59 (2004); Amartya Sen, *Social Identity*, 9 REVUE DE PHILOSOPHIE ECONOMIQUE 81 (2004); Bruno Frey & Alois Stutzer, *What Can Economists Learn From Happiness Research?*, 40 J. ECON. LIT. 402 (2002).

⁸³ On the subject, the former U.N. Secretary-General, Kofi Annan, stated, “[o]ur post-war institutions were built for an inter-national world, but we now live in a global world.” JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 18 (2006).

inauguration of a more rigid and legalistic dispute settlement system, the Dispute Settlement Understanding (“DSU”).

D. *Private Action Under the International Trade Regime: The WTO – Bargain or Constitution?*

Obviously, the crucial question in the legal analysis of the legality of the DVD-RCS is the exact origin of the system, whether public or private, or in other words, governmental or non-governmental origins. As was mentioned, this aspect is highly important, depending not only on the degree of economic integration obtained by the WTO system, but also to some extent on the way it is perceived in legal terms. Thus closely related to the previous controversy, there is also lack of consensus on the nature of the WTO as a legal regime, whether its Members have concluded “a bargain” or perhaps even drafted a “constitution of international trade.”⁸⁴ This initial distinction has wider implications for the question of what the applicable law is, otherwise framed by the distinction of the body of WTO rules in a self-sufficient (self-contained regime) or one requiring the interpretation of its rules “in accordance with customary rules of interpretation of public international law”⁸⁵ as it is laid down in Article 3, Section (2) of the DSU. This initial distinction may also have an impact on the question concerning the role of private parties in the WTO dispute settlement system, whether they can have access or not.⁸⁶ Generally, under the traditional perception of public international law, private persons (both natural and legal) cannot (at least directly) be subjects of rules of international law because it is said to be the law governing the relations between states and between states and international organisations only. However, under a more “realistic” approach, in a sense that it takes the present reality of global business into account, the necessity to weave the regulatory web smaller in order to encompass more complex forms of restrictions to inter-

⁸⁴ See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, 16, WT/DS1/AB/R, WT/DS10/AB/R, WT/DS22/AB/R (Oct. 4, 1996) (stating that “the WTO is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain.”). *But see* JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION – CONSTITUTION AND JURISPRUDENCE* (1998).

⁸⁵ DSU, *supra* note 57, art. 3, section 2.

⁸⁶ So far, the maximum involvement of private parties in the WTO system is the acceptance of amicus curiae briefs by non-governmental organisations. *See* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 79-91, WT/DS58/AB/R (Oct. 12, 1998); *see also* Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT’L L.J. 221 (2003).

national trade will definitely gain in importance. Especially *pro futuro* and in a *de lege ferenda* approach, this issue is absolutely crucial for not only the legitimacy⁸⁷ but certainly also the efficiency of the WTO, as private actions will assume greater legal relevance under the international trading regime.⁸⁸

E. *The DVD Regional Coding System and the Special Agreements Administered Under the WTO*

1. The General Agreement on Tariffs and Trade (GATT)

Verily, it is the GATT, the world's first multilateral trading agreement that deserves initial attention given that DVDs, unlike other related cultural products (e.g., television) can relatively easily be qualified as a good rather than a service. Following, the Most-Favoured Nations Principle ("MFN") and National Treatment ("NT") in Articles I and III, which, as long as no government endorsement of private action can be established, bear no direct relevance for the regional coding system, the first article that attracts attention is Article IV of the GATT, which relates to cinematograph films.⁸⁹ It is precisely a cinematograph film that is usually stored on a DVD. Nonetheless, the reading of the text of Article IV, especially the wording "*internal quantitative regulations relating to exposed cinematograph films*"⁹⁰ widely excludes the article from its possible scope of application to the regional coding system. Following the debate on television services during the 1960s, the present problem related to the DVD-RCS, however, proves once more the validity of the theory, which sees the principal function of Article IV in the role of a "sleeping beauty" or a powerful reminder of the complex entwinement of cultural, technological, and economic aspects in the category of cultural goods and services and in a political mandate "to ponder on the relation between trade and non-trade issues as they find their reflection in the institutional organisation of the international order as a whole, but specifically in light of the need for greater coherence."⁹¹ Ultimately, it points to the fact that some-

⁸⁷ See Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 GOVERNANCE: AN INT'L J. OF POL'Y, ADMIN. & INSTITUTIONS. 73 (2003).

⁸⁸ Joseph H.H. Weiler restates a strengthening of the role of private parties in several trading regimes. Joseph H.H. Weiler, *Cain and Abel – Convergence and Divergence in International Trade Law*, in THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE, 1, 4 (Joseph H.H. Weiler, ed., 2000).

⁸⁹ GATT, *supra* note 80.

⁹⁰ *Id.* (emphasis added).

⁹¹ See Rostam J. Neuwirth, *The Cultural Industries and the Role of Article IV GATT: Reflections on Policy Options for Canada and the EU in the new WTO Round*, Conference Paper from the Europe - Russian Conference Series at Carlton Univ., Nov. 22-23, 2002, available at

thing was missing in the GATT 1947 system, which continues to be missing under the present WTO system.

The next relevant article in line is Article VI of the GATT, which in connection with the Antidumping Agreement (“AD Agreement”), addresses the issue of dumping, a special form of price discrimination. Article 2 of the AD Agreement defines dumping as follows:

For the purpose of this Agreement, a product is to be considered as being dumped, *i.e.* introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.⁹²

Given that the DVD-RCS allows for price discrimination in different segments of the global market and the sale of the same DVD at different prices in different regions as well as countries, this practice could (where the sale in the other country occurs at a price lower than the one of the country of origin and injury occurs to domestic like DVD producers) be met with the levy of antidumping duties. However, this remains highly hypothetical given the industry’s unique pricing methods and in particular, the problem of determining with accuracy relevant concepts such as the “normal value,” the “comparable price, in the ordinary course of trade, for the like product,” “injury,” and “domestic industry.”⁹³ For example, it remains difficult to establish the “likeness” of an imported movie with a domestic one. It is also difficult to establish “likeness” between two movies belonging to the same genre, let alone to different genres. Equally, it would be interesting to know whether two DVDs of the same movie but with different region coding were considered “like products” or not. What if one of the versions contains extra content, such as interviews with the actors and actresses? As a matter of fact, DVDs are produced in one region and sold in the same region coding format in another region. For instance, the latest movie by Subiela, *Heartlift*, is encoded in Region Two and costs about £19.99 (approx. U.S. \$39.70) on www.amazon.co.uk, and only U.S. \$29.90 on www.amazon.com. In this example the price difference of the same film in the domestic

<http://www.carleton.ca/ces/events/novemberconference2002/Neuwirth.pdf>.

⁹² GATT, *supra* note 80.

⁹³ On the problem of the special characteristics of cultural products relating to dumping and subsidies, see ROSTAM J. NEUWIRTH, *THE CULTURAL INDUSTRIES IN INTERNATIONAL TRADE LAW: INSIGHTS FROM THE NAFTA, THE WTO, AND THE EU* 138-45 (2006).

and in the foreign market is almost U.S. \$10.00. Does that mean that the film is being dumped on the US market? Although a single film is not highly representative, it certainly calls into question the “convergence of prices” between Region One and Two, as stated by the European Commission services. The most problematic issue in the context of dumping as applied to the DVD-RCS is that it generally requires a “material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.”⁹⁴ The injuries deriving from region coding, however, primarily hurt the private consumer who is not mentioned in the AD Agreement and who has no access to the WTO dispute settlement system.

Hence, although the complexity of the DVD-RCS does not allow for a direct application of Article VI of the GATT or the AD Agreement, it nonetheless points to the direct relevance of competition law-related issues in the realm of international trade, which is why the founding fathers drafted Article IV in the first place and why their successors negotiated the AD Agreement and created a “Working Group on the Interaction between Trade and Competition Policy.”⁹⁵

A more promising provision for that matter appears to be in Article XI of the GATT, which – as an expression of the spirit enshrined in the Preamble – calls for a general elimination of quantitative restrictions both in the case of the importation in, or exportation from, the territory of a WTO Member destined for the territory of any other Member of the WTO. It practically authorises as the sole form of prohibitions or restrictions to trade, the use of “duties, taxes or other charges” and further prohibits quotas, import, and export licenses as well as “other measures.” The wider scope of the prohibition on quantitative restrictions was highlighted by the Panel in the *Japan – Semi-Conductors* case where it noted that “Article XI:1 GATT, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures;” meaning that this “wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exporta-

⁹⁴ See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 3, n.9.

⁹⁵ See generally Clarisse Morgan, *Competition Policy and Anti-dumping – Is it Time for a Reality Check?*, 30 J. WORLD T. 61 (1996) (discussing links between trade and competition policy); Working Group on the Interaction Between Trade and Competition, *Report (1997) to the General Council*, WT/WGTCP/1 (Nov. 28, 1997) (providing background information on the Working Group on the Interaction Between Trade and Competition). Please note that in July 2004, the General Council of the WTO decided that the interaction between trade and competition policy no longer formed part of the Work Program set out in the Doha Ministerial Declaration.

tion or sale for export of products was covered by this provision, irrespective of the legal status of the measure.”⁹⁶ This was also qualified as meaning that “any measure maintained by a WTO Member that effectively restricts exports is prohibited under Article XI:1, regardless of the legally binding status of the measure.”⁹⁷

As was shown, the DVD-RCS clearly has a trade restrictive effect on the circulation of movies by restricting both the importation and exportation to various contracting parties and is based on a technical measure and not on a duty, tax, or other charge. Hence, if only a link between the private origins of the regional coding system with one or more Member States from which the DVDs are exported could be established, it could amount to a clear violation of the general prohibition of quantitative restrictions.

Having established a principal incompatibility of the DVD-RCS with the spirit and purpose of the GATT rules, we must also see whether this practice might not be covered by one or more exceptions. Having excluded Article IV of the GATT, the only potentially relevant clause left is Article XX, which – provided that certain requirements listed in the *chapeau* are met – authorises Members to deviate from some of the obligations enshrined in the agreement. The two scenarios which appear relevant are the adoption or enforcement of measures “necessary to protect public morals” or “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the] Agreement, including those relating to . . . the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.”⁹⁸ The relevance of these measures stems from the alleged possibilities of the regional coding system to censor sensitive content in accordance with dominant regional cultural differences, to prevent the sale of pirated copies, and to protect consumers against confusion caused by parallel imports. In practical terms, however, since in most cases the origin of the measures lies not only within the realm of a private entity and does not originate in the country of importation but in the country of exportation, Article XX will prove of little direct relevance.⁹⁹ In merely substantive terms, the clause on the protec-

⁹⁶ *Japan – Semi-Conductors*, *supra* note 75, at ¶ 106.

⁹⁷ See RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW* 106 (1998).

⁹⁸ GATT, *supra* note 80.

⁹⁹ It would hardly make sense, for instance, if India filed a complaint against the U.S. (provided that a liability of the government for the company could be established) for the sale of a different version of the movie *Eyes Wide Shut* respecting Indian religious feelings. In addition, on what basis could the U.S. invoke the general exception for public morals?

tion of public morals is of greater relevance for the DVD-RCS than the one related to the protection of intellectual property rights or the prevention of deceptive practices.

From merely a terminological perspective, an interesting exception in the GATT is found in Article XXIV:5, which allows for a deviation from the MFN principle for the sake of regional integration. This clause reflects a possible utility of an organisational entity at the regional level and to this end explicitly authorises the creation of free trade areas (“FTAs”) or customs unions (“CUs”), which – it is assumed – shall in the long run benefit the multilateral trading system by way of their trade creative effect. Since the DVD-RCS does not follow boundaries along regional trading blocs because it establishes regions on its own and does not have any trade creative effect as such, it cannot be covered by the exception of Article XXIV:5. Instead, it runs counter to the spirit underlying the very idea of regionalism. This also applies to the case of advantages being granted to adjacent countries in order to facilitate frontier traffic (Art. XXIV:3) given that DVD-RCS, as was exemplified by the case of French Guiana, does have the exact opposite effect.

2. The Agreement on Technical Barriers to Trade (TBT Agreement)

Equally closely related to trade in goods is the TBT Agreement, which applies to all products including industrial and agricultural goods. In a trading environment where barriers to trade are gradually moving from the border to so-called “non-tariff barriers,” i.e., barriers restricting imports through measures other than tariffs, the TBT Agreement tries to “ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade.”¹⁰⁰ “Unnecessary obstacle to international trade” in the sense of the agreement means, in particular, that a regulation “shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create.”¹⁰¹ The list of examples of legitimate objectives mentioned in Article 2.2 of the TBT Agreement is not exhaustive, but explicitly mentions especially “national security requirements; the prevention of deceptive practices; protection of

¹⁰⁰ Agreement on Technical Barriers to Trade, pmbl. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120, available at http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf [hereinafter TBT Agreement].

¹⁰¹ *Id.* at art. 2.2.

human health or safety, animal or plant life or health, or the environment.”¹⁰²

To determine whether the regional coding system would qualify as such an “unnecessary obstacle to international trade,” it would first be necessary to know precisely what objectives the DVD-RCS pursues, such as, for instance, the control of the global release of movies, the prevention of piracy, the possibility of price discrimination or a combination of anticompetitive practices to maximise profits. Even if we assume that it is for instance the control of the global release dates of movies, the system still appears to be not the least trade restrictive because movies that are sold and that are older than one year still are vested with the regional coding system. The coding system could be limited to those films that are newly and globally released on DVDs instead of simply covering almost all films irrespective of whether they are old or new, or distributed locally or globally. Even for the alleged prevention of piracy, the opposite effect, namely a punishment of the consumer who wants to purchase a legal and not a pirated copy, was found to be the result. Equally, the DVD-RCS was even described as deceptive to consumers, which is why it can hardly fall into the category of the legitimate objectives mentioned in Article 2.2 of the TBT Agreement. Finally, price discrimination is a practice that Article VI:1 of the GATT condemns provided that certain conditions are met.

These and other reasons yielded by the present analysis of the regional coding system produce evidence that allow for the qualification of the DVD-RCS as such an “unnecessary obstacle to international trade.” This is true because it is certainly not the least-trade restrictive measure available, and its efficiency remains doubtful as much as its true objectives remain obscure or do not fall within the category of legitimate objectives referred to by the TBT Agreement. Notwithstanding this qualification, there are some principal complications involved that deserve to be mentioned.

First and foremost, the TBT Agreement aims at staying abreast of changes in the international trading environment and particularly of the said shift of trade-related measures from national borders to non-tariff domestic regulations. This shift, it is argued, unduly limits the scope of domestic regulatory autonomy of WTO Members.¹⁰³ In my view, however, the agreement does

¹⁰² *Id.*

¹⁰³ See Michael Ming Du, *Domestic Regulatory Autonomy under the TBT Agreement: From Non-*

not take into due account the parallel trend of shifting the origin of domestic regulations from various public or state authorities to (domestic, regional, or global) private (voluntary) standards or private standard setting bodies.¹⁰⁴ Still the agreement's central focus is on technical barriers adopted by states and not by private industries. Notwithstanding this default, it nevertheless indicates a first shift from measures of merely negative integration to those of positive integration, which also marks a transition from trade liberalisation to market integration as mentioned before. This emerges for instance in Article 2.4 of the TBT Agreement which encourages the use of international, uniform standards when they exist. Thus, in its main goal, the TBT Agreement attempts to ensure that technical regulations or international standards do not unnecessarily create obstacles to international trade by further fragmenting the global market which is already segmented along the boundaries of national jurisdictions. From the perspective of an emerging global market, this means that any fragmentation, such as the one caused by the DVD-RCS, is more likely to violate the letter and spirit of the rules governing not only the TBT Agreement, but also those of the entire WTO system.

In greater detail, the TBT Agreement distinguishes technical regulations from standards, the sole difference being that the former are mandatory, whereas the latter are merely voluntary.¹⁰⁵ From the available information on the origin of the DVD-RCS, it appears that the system – albeit its dominant position – is optional, which would support the characterisation of the regional coding system as an (international) “standard,” that Annex 1 defines as follows:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.¹⁰⁶

Discrimination to Harmonization, 6 CHINESE J. INT'L L. 269 (2007).

¹⁰⁴ It is believed that the problem of so-called “private voluntary standards” will resume greater significance, as can already be observed in the agro-food sector and as discussed in the Committee on Sanitary and Phytosanitary Measures. WTO Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 29-30 June 2005*, G/SPS/R/37/Rev.1 (Aug. 18, 2005).

¹⁰⁵ See also WTO Committee on Technical Barriers to Trade, *Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics*, 7-8, G/TBT/W/11 (Aug. 29, 1995).

¹⁰⁶ See TBT Agreement, *supra* note 100, Annex 1, Sections 1 and 2.

Such qualification, however, as such a recognised body would require more detailed information about the DVD CCA and then also be subject to a critical evaluation by a WTO Panel and/or the Appellate Body in line with the existing case law.¹⁰⁷

For the public/private divide, it is interesting to note that the Agreement establishes binding norms for the preparation, adoption and application of standards by central and local Government as well as non-governmental bodies. In particular it stipulates the following:

[Members] shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.¹⁰⁸

In this context it is not clear what the term “reasonable measures” entails and especially what would be considered an “unreasonable measure.” Furthermore, the Code of Good Practice, enshrined in Annex 3, is in principle binding only on those standardizing bodies which have accepted its substantive provisions. The language of the last sentence of Article 4.1 of the TBT Agreement, which is binding on all WTO Members, is equivocal in a sense that it could be read to mean that all WTO Members have both the legal obligation to ensure that such standardizing bodies comply with the said Code of Good Practice, and the legal obligation to prevent them from acting inconsistent with the Code of Good Practice, regardless of whether these standardizing bodies have accepted it. Among the substantive provisions of the Code of Good Practice, lit. E contains the following obligation, “The standardizing body shall ensure that standards are not prepared,

¹⁰⁷ See Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006); Appellate Body Report, *European Communities — Trade Description of Sardines*, WT/DS231/AB/R (Sept. 26, 2002); Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS/135/AB/R (Mar. 12, 2001).

¹⁰⁸ TBT Agreement, *supra* note 100, art. 4.1.

adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.”¹⁰⁹

In sum, the precise meaning of Article 4.1 of the TBT Agreement is the crucial question because it could establish a stronger point supporting the state liability of a WTO Member for private action in violation of international trade obligations. At this point, however, this question and whether a WTO Member could be held liable for the practice of the regional coding system as established by an initiative of various private companies must await a Panel’s and possibly the Appellate Body’s comments. It would certainly be interesting to see whether the DSB would qualify the DVD-RCS as a “standard” or “technical regulation” and the DVD CCA, if no sufficient degree of governmental connection or endorsement of the measure in question can be established, as a non-governmental standardizing body in the sense of the TBT Agreement. Eventually, it would then be highly informative to know whether the DVD-RCS constitutes such an “unnecessary obstacle to international trade.” Unfortunately, it must be recalled here that such a case is very unlikely to arise at the present time, given the wide absence of private parties’ direct access to the WTO Dispute Settlement Body.

3. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Yet another important agreement of the present WTO system, which resumes an important place in the regulation of international trade, is the TRIPS Agreement. Still stirring controversy, the TRIPS Agreement was negotiated during the Uruguay Round as a response to the increasing significance of technology-prone products in international trade. To this end, the negotiators felt the need to “reduce distortions and impediments to international trade” and to “promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights (IPR) do not themselves become barriers to legitimate trade.”¹¹⁰ Article 7 of the TRIPS Agreement sets forth the principal objectives of the agreement as follows:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innova-

¹⁰⁹ See the Code of Good Practice for the Preparation, Adoption, and Application of Standards; TBT Agreement, *supra* note 100, Annex 3.

¹¹⁰ Indent 1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

tion and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

The TRIPS Agreement basically sets minimum standards for the protection of copyrights, trademarks and patents, which may all show some relevance for DVDs. However, the most obvious connecting factor is the issue of parallel imports or what is also called “grey marketing,” which shall be prevented by adopting the DVD-RCS. Whoever might hope that a prohibition of parallel imports might – as a measure restricting international trade – mean a violation of international trade rules will be disappointed. As noted already, the TRIPS Agreement only establishes minimum standards and fails in certain areas to establish uniform rules. This is also the case of parallel imports and the so-called “first sale doctrine” or “exhaustion of intellectual property rights,” which means that once a product is licensed by the owner of an intellectual property right in one jurisdiction, the same may not be able to enforce its rights in another jurisdiction.

For this issue, Article 6 of the TRIPS Agreement stipulates that, “[f]or the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.”¹¹¹

In other words, this article leaves the territorial application of national regulations, either prohibiting or allowing parallel imports, untouched. In fact, WTO Members follow different approaches to the issue of parallel imports.¹¹² This means that, in this respect, the territorial fragmentation of the global market prevails even though it is already the subject of a heated debate, especially in the context of patents and public health. Against the background of the national territorial fragmentation of the global market, the DVD-RCS cannot be used as a good example for the prevention of parallel imports, since it does not even prevent parallel imports from countries within the same geographical region but only between the regions established by the DVD-RCS itself.

The principal rationale of intellectual property right protection is to grant authors and creators an exclusive right over the use of their creations for a limited time period as well as to allow the

¹¹¹ *Id.* at art. 6.

¹¹² *See, e.g.*, Alexander J. Stack, *TRIPS, Patent Exhaustion and Parallel Imports*, 1 J. WORLD INTEL. PROP. 657 (1998).

public to make use of these creations, while still providing incentives for the development of novel inventions in the future. As mentioned in the Preamble, the increase of social and economic welfare is one of the central objectives of IPR protection. As in the case of the prevention of parallel imports, an increase in social and economic welfare is theoretically possible but not very likely and certainly not guaranteed by use of the DVD-RCS.¹¹³ Equally, the other related goals of the TRIPS agreement, namely the “mutual advantage of producers and users of technological knowledge” as well as a “balance of rights and obligations” seem far away from being supported by the DVD-RCS.¹¹⁴

Finally, the TRIPS Agreement points out another interesting aspect related to both trade and intellectual property rights, namely their nexus with considerations of competition policy. Article 40 reads as follows:

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.
2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

This Article authorises Members to adopt legislation that prevents licensing practices that restrain competition, have adverse effects on trade, impede the transfer and dissemination of technology, and particularly, constitute an abuse of intellectual property protection. Given that the origin of the DVD-RCS appears to be a licensing agreement administered by the DVD CCA, it appears that all three conditions are met.

This Article is thus of great relevance to the issue of the DVD-RCS because it originates from a licensing agreement. Given that the list of examples in Article 40.2 of TRIPS is non-exhaustive, it is possible that the licensing agreement used for the DVD-RCS fulfils

¹¹³ See Dunt, *supra* note 37, at 1.

¹¹⁴ See TRIPS, *supra* note 110, art. 7.

the conditions laid down in Article 40. In this context, it is also interesting to point out the connection with Article 6 and the fact that Article 40 remains silent with regard to anticompetitive contract terms designed to prevent grey market or parallel imports. In the end and despite several open questions, it is important to note that Article 40 of TRIPS effectively allows a WTO Member to adopt legislation which would ban the DVD-RCS. Most of all, it points to the awareness of the drafters of the agreement of possible anticompetitive effects of licenses and the broader nexus between trade, intellectual property rights and competition policy. Competition rules are unfortunately not available at the global level, although Article 40, together with other antitrust provisions in the TRIPS Agreement, has been characterised as an “indication that the introduction of a systematic world antitrust law into the WTO framework is long overdue.”¹¹⁵

At last, it is in the absence of such global competition rules that the DVD-RCS also cannot be analysed further from an antitrust perspective. However, given the potentially private origin of the DVD-RCS and the present limitations on access of private parties to the WTO dispute settlement system, the absence of such global competition rules and perhaps a global competition authority must be deplored because they would allow for some of the private consumers’ interests to be taken into account.

IV. THE DVD REGIONAL CODING SYSTEM AND CULTURAL DIVERSITY

On the whole, it is the unique dual, i.e., cultural and economic, nature of movies and other related goods and services, commonly known as “cultural industries,” which calls for a brief glimpse at the international law dealing with the issue of cultural diversity. Obviously, the regional coding system is capable of neutralizing many positive features that the new DVD technology introduced. For instance, DVD technology allows for the storage of several language versions, in both sound and subtitles, on one single DVD, thereby enabling linguistically diverse audiences to enjoy their content. We also know that the population of countries where films broadcast on television are not dubbed usually show stronger foreign language skills than in those countries where films are dubbed. Such positive effect on the learning and profi-

¹¹⁵ See Andreas Heinemann, *Antitrust Law of Intellectual Property in the TRIPs Agreement of the World Trade Organization*, in FROM GATT TO TRIPS – THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 239, 247 (Friedrich-Karl Beier & Gerhard Schricker eds., 1996).

ciency of foreign languages is therefore getting lost because of the DVD-RCS, if no version of a movie that corresponds to the respective region is available on the market. This amounts to a major flaw in the arguments that try to defend the coding system as necessary to make creative content available to consumers. Moreover, it also clearly hampers the cross-cultural exchange of films and other creative and cultural content, which is deemed constructive in the building of mutual learning and cultural exchange, as well as the preservation and promotion of international peace and prosperity.¹¹⁶ To this end, there exist several international agreements, notably the Beirut Agreement (1948) and the Florence Agreement (1950), both aiming at the facilitation of the circulation of cultural materials, including films.¹¹⁷ Obviously, the realization of the objectives of both agreements is being hampered by the DVD-RCS. More recently, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) also recognizes that “cultural diversity is strengthened by the free flow of ideas, and . . . it is nurtured by constant exchanges and interaction between cultures”.¹¹⁸

Hence the awareness about the broader links, or in fact the complementarity between culture and trade is slowly rising. This becomes manifest in the increasing combination of cultural with economic considerations, such as the recognition of the economic value of cultural content or of cultural diversity in general, for instance in the productive process or working environment. Still these links are however only slowly becoming recognized by the scientific community and international as well as national policymakers. Equally, the major players in the film industry should follow this trend and realize that the offer of greater diversity of titles and of content will ultimately also benefit them, since small and low-budget productions often provide the initial and original idea for a major blockbuster as the frequent practice of remakes

¹¹⁶ See also United Nations Educational, Scientific and Cultural Organization Const, art. 1, T.I.A.S. No. 1589, Nov. 16, 1945, 4 U.N.T.S. 275.

¹¹⁷ Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, Dec. 10, 1948, 197 U.N.T.S. 3; Agreement on the Importation of Educational, Scientific and Cultural Materials, Nov. 22, 1950, 131 U.N.T.S. 25; Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials, Nov. 26, 1976, 1259 U.N.T.S. 3.

¹¹⁸ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, pmb. 12, Oct. 20, 2005, available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>; see also Rostam J. Neuwirth, “United in Divergency”: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 66 HEIDELBERG J. INT’L. L. 819, 834 (2006); Tania Voon, *UNESCO and the WTO: A Clash of Cultures?*, 55 INT’L. & COMP. L.Q. 635 (2006).

shows.¹¹⁹

In this regard, I believe the DVD-RCS provides an excellent example for the potential complementarity between cultural policy considerations and trade policy considerations. Particularly when analysed from the perspective of their respective legal instruments, particularly the Convention on the Protection and Promotion of the Diversity of Cultural Expressions on the one hand, and most of the WTO administered agreements discussed *supra* on the other, the removal of the regional coding system would certainly be beneficial and largely in line with the spirit and the letter of their respective legal obligations. Both regimes also widely exclude the role of private parties.

In the future, the phrase “live and let live” must hence be recognized not only as a nice saying but as a hard economic principle underlying the reasoning of competition laws and guaranteeing a sustainable economic as well as cultural development. Today, however, the sufficient common consideration of economic and cultural aspects is still far from being achieved; it is further aggravated by the ongoing institutional rift between the economic and political organisation of global affairs, exemplified in the fragmentation of international law debate in the context of the continuing tensions between free trade and cultural diversity.¹²⁰

CONCLUSION

Unequivocally, the present discussion has tried in brief but comprehensive terms to cast light on different aspects of the DVD-RCS that were deemed relevant for a legal analysis in light of the WTO rules presently in force and in view of its detrimental effect on greater cultural diversity. In sum, it can be said that *prima facie* – despite its openly trade restrictive and market distorting effect – no direct incompatibility of the DVD-RCS with the rules of the various special agreements administered by the WTO could be established. Notwithstanding this finding, the DVD-RCS still appears to contradict in several ways not only the letter but especially

¹¹⁹ See NEUWIRTH, *supra* note 93, at 216 (2006). See also Information about Movie Remakes, DOP MAGAZIN, http://www.dopmagazin.com/file.asp?area=14&pd=20060409_214946&print=print (last visited Sept. 21, 2009) (stating “in the lack of a good idea, the major studios can always turn to some hit from the past within it’s [sic] own archive, within the European (especially French) or World production or the not-so-famous works of the good U.S. authors, even the flocks that had a good potential in their core. That is how the initial idea of the remake is born.”).

¹²⁰ See Jan Wouters & Bart DeMeester, *The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law*, 42 J. WORLD T. 205, 221 (2008).

the purpose and the spirit of the laws governing the international trading system established under the WTO. In sum, the various aspects of the DVD-RCS that were mentioned, in fact, invite its qualification as an “unnecessary obstacle to international trade.” Such general qualification is also supported by an economic analysis of the DVD-RCS and becomes even more persuasive when considered in the context of broader considerations related to the protection and promotion of cultural diversity.

Why, in spite of such general qualification, the DVD-RCS still does not directly violate the respective laws in force, is a question that remains to be answered. One powerful argument suggests that the answer lies in the structure and orientation of the international trading system itself, which is highly flawed or already obsolete in light of the present business and trading practices as well as technological innovations, which have shaped and continue to shape international trade in goods and services. The major flaw in this system is clearly the predominant perception of the system as an organization of public international law only (“WTO as a bargain”), and with it the wide neglect of private law issues. A mutual approach between the public and the private sphere in international law, announced long ago in the form of concepts such as “transnational law,” “*lex mercatoria*,” or a “*droit mixte*,” still has not materialised to a satisfactory extent. Instead, the rapid pace of technological development and the fast changes in our societies work as centrifugal forces, drifting the two areas further apart.

In the context of the DVD-RCS this means first of all, that the reasons for which no direct violations could be established are due to the principle *nullo actore, nullus iudex* (no complainant, no judge). In this respect, it has been shown that the one group of persons that is most negatively affected by the DVD-RCS is consumers, because producers of DVDs and of hardware that may be negatively affected can still shift the burden of additional costs from their shoulder to those of consumers. Consumers, however, have no direct or indirect way of accessing the WTO’s dispute settlement system.¹²¹ A further reason for it is that the origin of the measure that instigated the DVD-RCS is – unless a respective government’s endorsement of the measure can be effectively established – presumably located within the realm of the private sector. However, to briefly recall, the WTO system generally only targets

¹²¹ For an indirect access within the E.U. to the WTO, see, for example, Council Regulation No. 3286/94, 1994 O.J. (L 349) 71 (EC) (laying down community procedures in the field of the common commercial policy in order to ensure the exercise of the Community’s rights under international trade rules, in particular those established under the auspices of the World Trade Organization, 1994 O.J. (L 349) 71.

measures allegedly inconsistent with the international trading regime which were either adopted by the government of a WTO Member or have at least been endorsed by some degree of governmental action. A third related problem is that the only substantive rules which are able to efficiently control the practice of the DVD-RCS and, more generally, other problems related to the continuous drastic technological innovations in the information and communication sector, such as competition rules, are widely absent in the WTO system. Or else, in the case of the law on cultural diversity, such rules are vested in the hands of another international organisation, namely UNESCO, to which the WTO has hardly any formal institutional ties and which their respective substantive laws may even conflict with each other.

Finally, the situation is aggravated by the fact that the coding system does not follow national boundaries of jurisdiction, rendering most legal remedies provided by the domestic legal system either useless or inapt. This situation calls for changes in the future since the trend of an increasing complexity of the links between public and private actions in the international trading system, combined with the ongoing conflict between so-called “developing and developed countries” and between “trade and trade-related values” (i.e., the trade linkage debate), is certainly going to persist and even intensify. This trend has already rendered and will continue to render former well-established distinctions useless.

For these reasons we must permanently dedicate our energy to carefully pondering the possibilities for rendering the system more efficient, more legitimate, and especially apt to deal with the present and imminent challenges. Such endeavour connotes a more holistic approach which first of all aims at mitigating the negative effects that flow from the conceptual separation between public international and private international law. Similarly, it requires the simultaneous consideration of the question of access of private individuals to the law of the WTO, the relevance and legal status of trade-inconsistent measures adopted not by states but by private actors and corresponding amendments to the WTO agreements’ substantive laws. The last point can also be achieved or be accompanied by a further opening of the WTO DSB to the rules of general international law.

Thus, the DVD-RCS should be ended and also not extended to new technologies in the future, because none of the arguments used in its favour appear to carry substance or at least stand in proportion to the objectives it allegedly pursues. To recall briefly, the DVD-RCS impedes the efficient enforcement of intellectual

property rights and even appears to punish those who intend to legally purchase original copies, forcing them into the market of illegal or “pirated” copies. Equally, it cannot be expected to raise social and economic welfare, and it is not even necessary to protect the normal order of economic exploitation of movies before their release on the video rental market. Most of all, it increases costs for the manufacturers of DVDs of hardware devices, ultimately hurting the consumer while at the same time reducing his access to the supply with a greater diversity of titles and creative content.

Regardless of the reasons for the abandonment of the regional coding system, it gives some useful points for consideration for amendments to the WTO system in the near future. There is a real need to enhance private parties’ access to the WTO dispute settlement system. This will become necessary because the WTO is moving from trade liberalisation towards market integration affecting more and more the domestic regulatory autonomy of its Member States. At the same time, the world is becoming increasingly interdependent with the help of technology, and global business is conducted more and more across national borders. These and other factors will have the effect of more cases slipping through the web woven solely on the basis of public international law considerations.

Paradoxically, private persons are already and will increasingly be directly affected by international trade regulation in the future, which was not even adopted in their national legislative assembly. At the same time, private action will also gain greater importance in the creation of unnecessary obstacles to international trade as protectionism and anticompetitive behaviour move from the border to the inside and sometimes even to regional levels as can be seen in the present case of the DVD-RCS. Most of all, private individuals have always been, and continue to be, the cornerstone for the creation and consumption of cultural content. This explains why, in the immediate future, serious thoughts should be given to considerations addressing the question of trade inconsistent measures that originate not exclusively in the realm of WTO Members’ governments, but instead solely or at least partly within the realm of the private sector. In other words, if all efforts by state and public authorities to remove obstacles to trade are rendered null, or become impaired by actions of private parties, then eventually the focus must shift to trade inconsistent measures of private origin, and ultimately, greater weight must be given to the interests of private persons and affected citizens.

If this proposal appears unrealistic at the moment, there is

still a way to counter the negative effects through a different legal mechanism, which sooner or later will need to be more seriously addressed at the global level. This mechanism consists of the body of competition rules. Competition rules are the only way of mitigating some of the most urgent problems caused by the negative effects of unfettered economic power and anti-competitive behaviour on consumers, the public interest and the protection and promotion of cultural diversity. The improvement of the enforcement of competition rules at the global level will allow for some of the negative effects deriving from openly anti-competitive behaviour, to be mitigated, helping the international trading system to live up to its more noble ideals.