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Review of Dr Hassan Fartousi, A Portrait of Trade in Cultural Goods

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Abstract

This is a book review of: Dr Hassan Fartousi, *A Portrait of Trade in Cultural Goods in Respect of the WTO and the UNESCO Instruments in the Contexts of Hard-Law and Soft-Law*, Theses Series No. 40, Geneva: Globethics Publications, 2023. 493p. Online ISBN: 978-2-88931-529-1

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1. Introduction

In *A portrait of Trade in Cultural Goods*[1], it is clear that Hassan Fartousi focuses on approaches to reflecting the relationship between Trade and Culture within the international normative order. More specifically, the aim of the book is to establish a comprehensive legal framework for trade in cultural goods. In addition to emphasising the need for enhancing legal coherence and developing mutual supportiveness and mutual recognition, Fartousi assesses different proposals and mechanism to concretely reconcile the WTO Agreement, in the broad sense of the WTO's single undertaking, and the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (UNESCO CDCE). Thus, it is clear that the message of this book is that rather than focusing on the normative and institutional fragmentation between the WTO Agreement and the UNESCO CDCE, importance should be given to the benefits that could be derived from a potential multifaceted legal, and institutional, framework including both Trade and Culture – In particular with regard to trade in cultural goods.

2. A shared value for peace and sustainability

Dr Fartousi opens the discussion by highlighting the common values expressed from a trade perspective in the *General Agreement on Tariffs and Trade* (GATT) and the WTO Agreement, and from a cultural perspective with the UNESCO CDCE. The author focuses specifically on the common willingness to establish and maintain peace within the international community by acknowledging and respecting States' sovereign exercise of their right and to promote sustainable development.

With regards to trade, Fartousi affirms that the GATT was the first step toward globalization in a post-World War II environment in order to avoid

[1] Hassan Fartousi. 2023. *A Portrait of Trade in Cultural Goods in Respect of the WTO and the UNESCO Instruments in the Contexts of Hard-Law and Soft-Law*, Globethics Theses Series No. 40, Geneva: Globethics Publications, 493p. Online ISBN: 978-2-88931-529-1; URL=<https://www.globethics.net/theses-series>

State's withdrawal into themselves and the rise of protectionism in the trade of goods. For this purpose, the GATT established a principle of non-discrimination embodied by the Most-Favoured Nation Principle (MFN) and the National Treatment Principle (NT) and therefore "reduce the likelihood of war for control of international markets that grew out of State protectionism of domestic industry".[2] This firm willingness to establish and maintain a peaceful multilateral trading system acknowledging and respecting States' sovereign exercise of their right also be embodied later in the Marrakech Agreement establishing "a single undertaking of normative instruments" and creating the World Trade Agreement.[3] Furthermore, the objective of sustainable development figures undoubtedly in the preamble of the Marrakesh Agreement.

By analogy, Fartousi notes that by explicitly recognizing the diversity of cultural expression and establishing/identifying cultural diversity as a human right, the UNESCO CDCE similarly aims to reduce the likelihood of war for control under the guise of cultural uniformity and homogeneity.[4] As in the preamble of the Marrakech Agreement, sustainable development is also mentioned in article 2(6) of the UNESCO CDCE .[5] This novel approach focusing on common understandings rather than highlighting the well-known fragmentations allows the author to delve into underexplored aspects of the relationship between Trade and Culture. Such an analysis is more than necessary to propose innovative, practical and sustainable pathways to link these two fields.

Moreover, Fartousi demonstrates that trade has a significant role to play in the upholding of cultural diversity since there is a risk that products from economically stronger States prevail thus fostering cultural homogenization. Therefore, beyond their shared objective of avoiding international conflict, culture and trade are in fact intertwined. This entanglement between the two

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[2] Ibid., at 28.

[3] Ibid., at 28.

[4] Ibid., at 31.

[5] Ibid., at 141.

disciplines is further reinforced when it comes to traded cultural goods, which are *traded goods* subject to the principle of non-discrimination as well as vehicles for *cultural expressions* that need to be protected under the scope of both trade-related and culture-related legal instruments, i.e., the WTO Agreement and the UNESCO CDCE.

The author highlights that, despite their common value for peace, it remains that two organisations with their own specific, and not necessarily compatible, norms exercise their jurisdiction over the same category of goods. This double jurisdiction, according to the author, results in normative incoherence or as called by the author, fragmentation of applicable legal norms as well as institutional overlap or fragmentation of institutional authority. The author then proposes three possible means to address fragmentation (i) a solely normative approach (ii) a solely institutional approach and (iii) a combination of normative and institutional approaches.

3. The role of interpretation

After assessing that the primary function of interpretation is to establish the principle of good faith, the context, the object and purpose of the treaty, and relevant rules of international law governing the relationship between the Parties[6], the author discusses the way the relationship between the WTO Agreement and the UNESCO CDCE should be interpreted. The author rightfully notes that both agreements are not *lex generalis* since they are a part of two parallel legal environments. Thus, the interpretation of one agreement will not modify or replace the interpretation of the other agreement.[7] Then, after noting that the UNESCO CDCE states that it should not be interpreted as modifying rights and obligations under other treaties, which would include the WTO Agreement[8], the author suggests that the relationship between the two legal instruments might, in fact, be one of two

[6] Ibid., at 85-87.

[7] Ibid., at 104.

[8] Ibid., at 106.

lex specialis. If so, a plain reading of the text would not be sufficient to assess the delimitation between the two legal instruments. Either a unilateral or reciprocal willingness would need to be expressed by the WTO and/or the UNESCO to integrate the other instrument into its own framework or such reciprocal integration would have occur by means of third-party determination using tools of interpretation.[9]

Furthermore, Fartousi observes that apart from its primary function, rules of interpretation will also determine if there is a genuine conflict between the WTO Agreement and the UNESCO CDCE.[10] In other words, interpretation is useful to identify situations where a State acting in good faith would not be able to comply simultaneously with the obligations under the WTO Agreement and the UNESCO CDCE.[11] The author then makes the distinction between broad and narrow interpretation of conflict.

If the presence of two legally binding instruments addressing the same subject-matter is a prerequisite for these two interpretations of conflict, the "narrow interpretation" covers situation where both instruments provide mutually exclusive obligations in the sense that complying with obligations arising from one instrument would necessarily result in a violation of obligations arising from the other instrument.[12] However, the "broad interpretation" covers situation where both instruments provide mutually exclusive obligations but also situations where the provisions of two different instruments are incompatible. For example, a situation where the same conduct of the State would be permitted by an instrument while being prohibited by the other.[13] In that case, even though obligations complying with one obligation arising from one instrument would not necessarily result

[9] Ibid., at 111.
[10] Ibid., at 118.
[11] Ibid., at 119.
[12] Ibid., at 120-121.
[13] Ibid., at 122.

in a violation of obligations arising from the other instrument, inconsistency remains.

According to Fartousi, this distinction is important since, as explained by the author, they bring into play different approaches. While the "narrow interpretation" may call for the principle of mutual supportiveness to enhance coherence between the WTO Agreement and the UNESCO CDCE; the "broad interpretation" approach may call for the harmonization principle to achieve perfect coherence between the two treaties.[14]Addressing the academic debate between narrow and broad interpretation is novel and valuable. However, the absence of concrete examples of WTO Agreement and UNESCO CDCE provisions where such a debate could be applied, makes it difficult to assess the importance of said distinction in practice.

4. Harmonization through hard law

Fartousi takes a particular interest in harmonization, i.e., "producing coherence through binding normative amendments and mandatory institutional approaches, as they address trade in cultural goods".[15] However, this harmonization is limited to Hard Law, which is used to describe

> "instruments and norms that are binding on States and international institutions. The obligations contained in these instruments are complete (or can be completed, by establishing comprehensive guidelines) and enforceable, while they assign authority to adopt and interpret the law (i.e., institutional authority).[16]

The author's analysis recognises that the UNESCO CDCE does not seem to contain provision that would be suitable for harmonization and the harmonization integrated with the WTO SPS and TBT Agreement does not

[14] Ibid., at 145.

[15] Ibid., at 154.

[16] Ibid., at 150.

cover harmonization of international norms but rather harmonization of national legislation.[17] The author, nevertheless, identifies hard law approaches to harmonization between the WTO and UNESCO regarding trade in cultural goods. To do so, the author uses the three possible means to address fragmentation, i.e., a solely normative approach, a solely institutional approach and a combination of normative and institutional approaches. The same three approaches are also used to study the possibility of 'mutual supportiveness' through Soft Law in later sections of the book.

Introducing a solely normative approach (or "Amendment Approach"), Fartousi suggests different proposals to amend the GATT such as directly modifying GATT Article I (MFN) and Article III (NT) to exempt cultural goods, adding *culture* or *cultural goods* to GATT Article XX (Exceptions) or adopting an Annex to the GATT, of goods exempted on cultural grounds from the treaty's provisions based on the UNESCO Framework for Cultural Statistics.[18] Similarly, the author suggests several proposals to amend the UNESCO CDCE. The author for example suggests adding a mention to UNESCO CDCE Article 20, defining its relationship with other treaties and noting that the UNESCO CDCE should be interpreted as possible exceptions to obligations under other treaties and would thus prevail in case of conflict.[19] The author also suggests amendments precisely and clearly defining Amendments to create *Culture*, *Rights*, *Obligations*, *and Protection*[20], prohibiting disguised protectionism using language similar to that of the chapeau of GATT Article XX[21] or creating enforcement mechanism such as a two-step proportionality test making sure that a cultural measure adopted by a State is effectively aimed at protecting and promoting culture and is

[17] Ibid., at 162.
[18] Ibid., at 183-184.
[19] Ibid., at 184.
[20] Ibid., at 185.
[21] Ibid., at 186.

necessary for that purpose.[22] However, Fartousi notes that the Amendment approach is not realistically feasible given the "time factor, and the high threshold of agreement required under the Marrakesh Agreement and GATT".[23]

Outlining a solely institutional approach (or "Construction Approach"), the author suggests harmonizing the WTO and UNESCO institutional frameworks regarding day-to-day matters arising from trade in cultural goods via the establishment of a Joint "Coordination Bureau for Culture and Trade".[24] This body would be mandated to address disputes regarding cultural goods and services by taking into account both the WTO and UNESCO legal framework and emphasising their common dispute settlement rules[25]; thus, avoiding potential conflicts between the WTO and UNESCO dispute settlement mechanisms. Apart from dispute settlement, the Joint *Coordination Bureau* should aim at establishing comprehensive practices and regulations relating to Culture and Trade while assessing potential conflict through the work of specialised commissions or working groups.[26] However, Fartousi also notes the potential difficulty of getting States, that would already be members of both international organisations, to delegate a measure of decision-making power to the Coordination Bureau[27] and to finance its day-to-day operation. [28]

Using a combination of normative and institutional approaches (or "Coordination Approach"), the author proposes harmonizing the WTO and UNESCO legal and institutional frameworks by establishing a dispute settlement mechanism for trade in cultural goods. According to Fartousi,

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[22] Ibid., at 187.
[23] Ibid., at 183.
[24] Ibid., at 189.
[25] Ibid., at 191.
[26] Ibid.
[27] Ibid., at 191-192.
[28] Ibid., at 190.

this mechanism, independent from the WTO and UNESCO, could be an effective solution for resolution of potential conflicts due to overlaps and incoherent measures.[29] However, this solution is only theoretical since the WTO legal framework, as currently established, does not provide WTO adjudicating bodies with the competence to enforce a non-WTO norm over WTO provisions.[30] Noting that the Coordination Approach is not feasible in practice, he proposes two alternatives, i.e., a Cultural Standards Agreement on Trade in Goods that would bind WTO and UNESCO[31] or the appointment of a cultural expert/panellist to WTO proceedings rather than establishing a new and independent dispute settlement mechanism.[32]

Even though their feasibility is challenged by Fartousi himself, these three approaches remain particularly interesting. However, they may need to be analysed more. While Fartousi gives quite detailed proposals of amendments for the "Normative Approach", his proposals are not as detailed when it comes to the "Coordination Approach" and the "Construction Approach" by which Fartousi advocates for the implementation of an institutional mechanism.

For the "Coordination Approach", Fartousi discusses the mandate that would be given to the Coordination Bureau, which is undoubtedly a practical aspect not to be overlooked. However, it does not discuss the practical implementation of the Bureau's day-to-day activities. As an example, knowing that the WTO is located in Geneva and UNESCO is located in Paris would this mean that the Joint Coordination Bureau would have premises in both cities. For the Construction Approach, Fartousi does not give many insights on the way a "dispute settlement mechanism that would be external to both bodies"[33] would work out in practice. For example, the author does not mention if this would mean that the option of appointing adjudicators who

[29] Ibid., at 193.
[30] Ibid., at 197.
[31] Ibid., at 198.
[32] Ibid., at 200.
[33] Ibid., at 193.

previously WTO and UNESCO would be excluded for the sake of independence.

5. Mutual supportiveness through soft law

Dr Fartousi also explores the possibility of "mutual supportiveness" through Soft Law, i.e., "normative provisions contained in non-binding texts".[34] He first analyses different trends of mutual supportiveness in international law[35] and establishes that trade and human rights are mutually supportive[36] as are the WTO Agreement and the UNESCO CDCE through their common willingness to preserve peace and promote sustainable development.[37] Thereafter, he sets out approaches of mutual supportiveness through Soft Law between the WTO and UNESCO regarding trade in cultural goods. As previously done for harmonization through Hard Law, the author uses the three identified approach to address fragmentation earlier, i.e., a solely normative approach, a solely institutional approach and a combination of normative and institutional approaches.

Introducing his solely normative approach (or "Interactive Approach"), Fartousi encourages mutually supportive positive interactions between the WTO and UNESCO relating to trade in cultural goods.[38] This approach focuses on increasing complementarity in the WTO and UNESCO legal frameworks with the aim of preserving peace and advancing sustainable development. Since this approach covers a wide range of interactions between, inside and outside the WTO and UNESCO, the author affirms that it could be easily implemented.

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[34] Ibid., at 207.
[35] Ibid., at 218-225.
[36] Ibid., at 234.
[37] Ibid., at 235.
[38] Ibid., at 238.

Outlining a solely institutional approach (or "Consultation Approach"), the author encourages non-binding consultative forums or groups between the WTO and UNESCO.[39] This could be in the form of a "Consultation Forum" that would serve as a temporary, unfixed platform for experts of both organizations to regularly discuss matters regarding trade in cultural goods.[40] These discussions could facilitate a common understanding on trade in cultural goods as well as other issues of relevance for the WTO and UNESCO. As it was suggested for the Joint "Coordination Bureau", Fartousi suggests assessing potential conflicts between the two legal regimes through the work of specialised commissions or working groups.[41]

It could also take the form of a closed, and potentially informal, "General Consultation Group" composed of experts supported by informal commissions or working groups to facilitate dialogue and exchange of views or concerns relating to the 'cultural' aspects of cultural goods in international trade. Thus assessing potential conflict and ways to handle them.[42] Since this group would be limited to a narrower group of people and be virtually constituted, the author thinks that it is more implementable than the Consultation Group in practice.[43] Finally, the Consultation Approach could take the form of a "Consultation Group Concerning Dispute Settlement", which would solely discuss dispute settlement matters related to trade in cultural goods.[44]

This last proposal is very promising. Such advisory consultation groups have already been explored in the context of Trade and Sustainable

[39] Ibid., at 239.
[40] Ibid., at 240.
[41] Ibid., at 241.
[42] Ibid., at 242.
[43] Ibid.
[44] Ibid., at 243.

Development chapters in Free Trade Agreement[45]. Therefore, the author's innovative proposal to draw upon the approach addressing the relationship between Trade, Labour, Environment and Sustainable Development that has been used mainly on a bilateral basis by States to implement a multilateral mechanism for Trade and Culture is very interesting. It seems not only theoretically interesting but also practically feasible.

Using a combination of normative and institutional approaches (or "Guidance Approach"), the author suggests establishing mutual supportiveness between the WTO and UNESCO legal and institutional framework through flexible guidance to States. This could take the form of a Memorandum of Understanding between the WTO and UNESCO regarding traded cultural goods[46]; It could also take the form of action plans and international programs outlining the future joint activities of both institutions, declarations of Principles or action plans adopted at international conferences similar to the WTO Ministerial Declarations for example[47], or the international recommendations on the status of traded cultural goods jointly issued by the WTO and UNESCO[48]. The author also raises the possibility of having non-binding ad hoc standards[49] but also joint Guidelines on operational procedures and protection policies for traded cultural goods.[50]

After reading Fartousi's analysis of harmonization through Hard Law and mutual supportiveness through Soft Law, it appears that the Soft Law approach is more likely to be implemented in practice. This conclusion is not surprising. It is well known that the absence of legally binding norms allows

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[45] For example, Art. 13.12 of EU – Korea (2011) provides for a Committee on Trade and Sustainable Development composed of senior officials from within the administration of the Parties.

[46] Ibid., at 244.

[47] Ibid., at 247.

[48] Ibid., at 249.

[49] Ibid., at 251

[50] Ibid.

a certain institutional and normative flexibility that is particularly useful for advancing discussion on complex subjects. However, since Soft Law does not give rise to enforceable rights and obligations, such an approach may be less effective when it comes to dispute settlement.

This last point is all the more relevant in the context of this book. Indeed, beyond the institutional collaboration between the WTO and UNESCO, Fartousi mainly focuses on finding ways to establish a functioning, coherent and effective legal framework for traded cultural goods. To do so, the implementation of the Hard Law approach is indispensable. Thus, the book would have benefited from an analysis providing a detailed comparative assessment not only of the likelihood of implementation, but also of the comparative effectiveness of each approach. In any case, it would definitely be interesting to study this aspect as part of further research.

6. Conclusion

With this work, Fartousi offers an innovative re-conceptualisation of the (otherwise underexplored) relationship between Trade and Culture. The author demonstrates that despite the apparent normative and institutional fragmentation that still exists, there are nonetheless various prospects for reconciling between Culture and Trade. For example, the author rightly notes that effective protection of traded cultural goods while taking into account the established principles of the multilateral trading system need to be supported by enhanced legal coherence and the development of mutual supportiveness between the two legal regimes. However, the way to implement these proposals not only theoretically but also in practice could have been explored in more detail.

Although attention is being given to the chances of successfully implementing these theoretical approaches, the practical considerations in their implementation are understudied. It would be interesting to think about concrete steps or guidelines so that the various recommendation, in particular, those proposing institutional mechanisms could be made possible practically. Furthermore, it would be interesting to further analyse whether the implementation of these several theoretical proposals would be the sole

responsibility of the WTO and UNESCO's Director General or whether governments and other relevant stakeholders should also be involved in the process.

Nevertheless, it is undeniable that this book is a valuable catalyst for discussions that could form the foundation of future research. The coming together of Trade and Culture through traded cultural goods could definitely open the door to exploring and studying other interactions between the two fields such as Trade in services, Movement of Persons and Culture or Trade, and Intellectual Property Rights and Culture. By providing theoretical solutions while taking into account their potential for implementation, Fartousi leaves policy space and encourages other academics and expert to take part in the exercise and keep the discussion going until a sustainable and comprehensive solution is found.

7. The Bibliography

Hassan Fartousi. 2023. *A Portrait of Trade in Cultural Goods in Respect of the WTO and the UNESCO Instruments in the Contexts of Hard-Law and Soft-Law*, Globethics Theses Series No. 40, Geneva: Globethics Publications, 493p. Online ISBN: 978-2-88931-529-1; URL=<https://www.globethics.net/theses-series>

8. Short biography

Gabrielle Marceau, Ph.D., is Senior Counsellor in the Research Division (ERSD) of the WTO Secretariat, where she has worked since May 2020. In September 1994, Dr. Marceau joined the GATT Secretariat and for several years her main function was to advise panellists in WTO disputes, the Director-General's Office, the Secretariat and WTO Members on WTO-related matters. From September 2005 to January 2010, Dr. Marceau was Legal Advisor in the Cabinet of former WTO Director-General Pascal Lamy and from September 2016 to January 2017, she was acting Director, Officer in Charge for the Legal Affairs Division.

Dr. Marceau is also Associate Professor at the Law Faculty of the University of Geneva. She has been Visiting Professor at the Graduate Institute in Geneva, the Sorbonne in Paris, Monash University in Melbourne, the World Trade Institute in Bern, and many other institutions. Dr. Marceau is also involved with associations and groups promoting international (economic) law. She has published extensively in WTO law and international economic law. Before joining the GATT/WTO, Dr. Marceau worked in private practice in Quebec, mainly in civil, insurance and labour law.

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