

**UNESCO'S CONVENTION ON THE PROTECTION
AND PROMOTION OF THE DIVERSITY OF
CULTURAL EXPRESSIONS**

MAKING IT WORK

Culturelink Joint Publications Series No 9

With the support of

Croatian National Commission for UNESCO
Research Group Arts & Economics, Utrecht School of the Arts, the Netherlands
and Giep Hagoort

**UNESCO's Convention on the Protection and Promotion of the
Diversity of Cultural Expressions:
Making it Work**

Edited by
Nina Obuljen and Joost Smiers

Institute for International Relations

Zagreb, 2006

Culturelink Joint Publications Series No 9

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Printed and bound by

M.G.T. d.o.o.

Zagreb

Publisher

Institute for International Relations

Lj. F. Vukotinića 2

10000 Zagreb, Croatia

© Institute for International Relations

CIP - Katalogizacija u publikaciji
Nacionalna i sveučilišna knjižnica - Zagreb

UDK 32 : 008> (082)
316.72 (082)

UNESCO'S Convention on the Protection and Promotion of the Diversity of Cultural Expressions:
Making it Work / edited by Nina Obuljen and Joost Smiers. - Zagreb : Institute for International
Relations, 2006. - (Culturelink Joint Publication Series; no. 9)

ISBN 953-6096-40-4

1. Obuljen, Nina 2. Smiers, Joost

I. Kulturni pluralizam -- Međunarodne konvencije II. Kulturna politika -- Međunarodne konvencije

301017117

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Introduction

Introduction

On 20 October 2005, the General Conference of UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. This book provides the history behind the adoption of the Convention, analyses its legal value and potential impact, and tries to envisage the most appropriate strategies for its effective implementation.

Cultural production, distribution, exhibition and promotion worldwide are increasingly monopolised; fewer owners than ever before dominate the cultural market. At the same time, the choice available to consumers in many fields of the arts is less diversified. Cultural life is diminished when the variety of artistic expressions that can reach audiences and buyers of works of art is reduced. From a human rights perspective this is not a sound development. This reduction in the number of owners and the diversity of choices is also a threat to democracy, since a rich diversity of voices and images is essential for democratic discourse.

The UNESCO Convention is designed to be a legally-binding treaty that will confirm the right of nation states to intervene in the cultural market. It is meant to give states the possibility to take those measures they deem necessary for the protection and the promotion of the flourishing of the diversity of artistic expressions. This might be, for instance, to facilitate the production and distribution of works of art through tax measures or subsidies; it might include as well regulations to control the size of cultural enterprises, or to obligate firms to distribute the rich diversity of products created by artists in that country. It would certainly favour broad international exchanges of films, music, literature, works of visual arts and design, theatre, opera, musicals, and all the mixed, new and digitised forms that one can imagine. The (re)introduction of competition policies may be an important tool in that set of measures.

One of the purposes of this Convention is to prevent cultural life from being dominated by only a few players and to give consumers the possibility to choose from among the broad range of expressions that artists create and perform.

The Convention is necessary because in a world dominated by a neo-liberal economic agenda, any measure that distorts commerce is considered to be a barrier to free trade and runs the risk of being confronted by trade sanctions. This free trade context can be harmful for human rights, for environmental protection and for the maintenance of cultural diversity in our societies, the preoccupation of this book. Just as the Convention on Biodiversity tries to correct this harm for environmental questions, UNESCO's Convention on cultural diversity is meant to do this in the domain of artistic expressions.

The *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* represents an opportunity, but also presents a difficult challenge. Not only must it be ratified by a broad range of countries from every geo-political region, it must also be *made to work*. Making it work is essential if cultural diversity is to bloom and not be suppressed by multinational firms or trade sanctions. In Annex II the full text of the Convention can be found.

Part I of our book has two articles that trace the decades' long history of the struggle for more equal and balanced cultural relations the world over. Part II provides a realistic analysis of what the Convention gives us and some sobering observations of what it does not deliver. What kind of instrument is this? What rights and obligations does it give to member states? How will the Convention relate to the agreements administered by the WTO? What does it say about cultural relations between rich and poor countries? How did the negotiations proceed in UNESCO? Part III focuses on the implementation of the Convention. How will its implementation be monitored and how can countries learn from each other while trying to forge the right conditions for the development of cultural diversity? What kinds of regulations might be appropriate? The articles in Part IV focus on what civil society in all corners of the world can do, and should do, to make the Convention work. The final section, Part V, explores how the existing WTO framework cannot deal with the protection and promotion of cultural diversity and offers one possible alternative approach. We conclude the book with a text that speaks about why cultural diversity is so fundamental for human rights and a short reflection from Dr. Kadar Asmal about the importance of the Convention from his perspective. Dr. Asmal is a distinguished South African politician who chaired the UNESCO Intergovernmental Committee of Experts and played a significant role in bridging the differences between key proponents of the Convention during the challenging negotiating process.

We would like sincerely to thank all of the authors who have contributed to this work; they have given freely of their time and considerable expertise. Some authors take a theoretical approach to issues of cultural diversity; others are more practical. Some contributions are shorter and some are much longer but we thought we needed

to leave authors necessary space to express their concerns and ideas. Inevitably, some articles overlap, but what we tried to do was to create a book that looks at the Convention from many different angles. The purpose is to invigorate and inform citizens of all countries who respect democratic principles and human rights. We hope the book is useful for artists, members of civil society groups, civil servants and politicians as they struggle to make the Convention work. It is important to note that the contributors were among those who were strongly advocating and promoting the idea of the Convention, if they express criticisms of the outcome, it is because they wanted the instrument to be even stronger and more effective.

We understand that the Convention cannot remove all threats to cultural diversity; the future will bring new challenges to cultural diversity, both in the old media and the new digital world. Therefore, one will see described in the different chapters some of the pitfalls that lie ahead. However, the Convention and the struggle for cultural diversity – on the theoretical level and in daily practice – are extraordinarily valuable for those who do not want to live in a world where state censorship is supplanted by monopoly control of the media and cultural industries.

We believe we are at a critical crossroad. Down one road lies a flourishing of cultural expressions and more balanced global cultural exchanges. Down the other road lies increasing homogenisation of content and domination of markets by even fewer players. We believe it is make or break time for cultural diversity.

Nina Obuljen and Joost Smiers
Zagreb/Amsterdam
October 2006

Part I

Chapter 1

The curiosity of a cultural omnivore

Joost Smiers

It must have been in the middle of the 1950s, at the heyday of the cold war. The air was full of tension; any day we could have a war even worse than the Second World War. Besides this threat, my family life was not full of comfort and pleasure. I do not know whether the two were related. However, I can still feel how the cultural and political climate in which I was raised were dark and without perspective.

And then, one day, we went with our school class to the Museum of Contemporary Art in Amsterdam, the Stedelijk Museum, which was, while physically only a couple of hundred metres away from where my family and I lived, socially very distant. I had never before entered this building. On that day, I saw in that museum something that changed my whole life: the work of the Belgian, Danish and Dutch artists belonging to the Cobra group. The vibrant paintings of Karel Appel, Constant, Corneille, Asger Jorn, Carl-Henning Pederson, Pierre Alechinski, and many others, were a revelation for me. Their rage, the sharpness and directness of the colours, the bursting merriment captured on canvas and wood, was a sign that the darkness in which I was living was not inevitable. There could be an end to the tunnel. I became aware that another life – freer, wilder and more vivid – was possible. Of course this awareness was not spoken, it was the unconscious clarity a young child can have. But, the seed was sown and I became a cultural omnivore.

From then on I felt the urgency to see and read, and to listen to imaginations and their artistic expressions that apparently belonged to what I felt, that constituted my inner and outer world, that confused me, that offered me *my* kind of pleasure, that raised for me relevant questions, that explored my sentiments, that cheered me up, that connected me with my friends, and that came from unexpected sources. Later, I would add that they contributed, happily, to the formation of my identity. It took a

while before I recognized that what I liked was not necessarily the favourite of others. I could be sad when a performance that penetrated my body was played in a nearly empty hall. Why this lack of interest? Gradually, I began to understand that one positive aspect of democracy can be, and should be, that people can make a choice from among the broad artistic repertoire of films, theatre, dance, music, visual arts, design and books, according to their taste, sentiments and social affiliations.

Later, I learned that my desire as a cultural omnivore was guaranteed, in a broader context and formally, in the Universal Declaration of Human Rights which states in Article 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 27.1 declares that everyone "has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." At the end of the book, this opportunity of human rights for the blossoming of cultural diversity and its obstacles will be analysed more profoundly. Here it is sufficient to observe that I was in good company, the entire United Nations community, with my idea that people should have, amongst other rights, the opportunity to make a choice from among diverse artistic expressions.

In the same period, I learned that the newly independent countries, the former colonies, were discovering that they continued to be economically dependent on the Western world and that their means of communication were also subordinate to the rich parts of the world. They discovered that their independence was limited, especially concerning information and culture. The place to discuss this imbalance between the rich and the poor countries was UNESCO, the United Nations' cultural organisation. Three demands emerged in the 1970s: greater variety in sources of information, less monopolisation of the forms of cultural expression and preservation of some national cultural space from the pervasive commercialisation of Western cultural outpourings (Schiller 1989: 142). The desire to change the cultural and communication relations throughout the world became a movement that was called the New World Information and Communication Order (NWICO).

After many conferences and declarations on this topic, UNESCO asked for a report to investigate what this new order should look like. The Commission, presided over by the Irish law scholar Sean MacBride, published a book, *Many Voices, One World: Towards a more just and a more efficient world information and communication order* (MacBride 1980). One of the recommendations (number 58) concerning culture and information is that effective legal instruments should be designed to:

"(a) limit the process of concentration and monopolisation; (b) circumscribe the action of trans-nationals by requiring that they comply with specific criteria and conditions defined by national legislation and development policies; (c) reverse

trends which reduce the number of decision-makers at a time when the media's public is growing larger and the impact of communication is increasing; (d) reduce the influence of advertising upon editorial policy and broadcast programming; (e) seek and improve models which would ensure greater independence and autonomy of the media concerning their management and editorial policy, whether these media are under private, public or government ownership" (MacBride 1980: 266).

UNESCO was not given the time to develop the proposed legal instruments that would favour what today is called cultural diversity. At the end of the 1970s, the United States did two things. First, it fulminated against information and cultural policies that it claimed would hinder the so-called "free flow of information." Of course, freedom of expression is an important value, as long as it is freedom for everybody to communicate. But, in the U.S. view, the "free flow of information" principle mixed up economic and cultural freedom. The economic freedom might result in a dominant market position for a few cultural conglomerates that push aside the production, distribution, promotion and reception opportunities of many other different cultural initiatives. This is what was happening in the 1970s and the newly independent countries suffered the most from this "free flow of information" principle and practice.

The idea of a New World Information and Communication Order tried to reverse this trend. The demands became clear and it was time to take the next step, to formulate concrete policies on a global scale; the place to do so was within UNESCO. The development of alternatives for the "free flow" principle and practice is exactly what the U.S. strongly opposed and in the end the cultural superpower left UNESCO. The deathblow of the New World Information and Communication Order was delivered on 1 January 1985. New Year's Day in 1985 was a remarkable day. It is one of those moments in history in which the symbolic conclusion of a specific development can be observed. What happened on this day? It was the moment that the United States left UNESCO, followed later by the United Kingdom and Singapore (Preston 1989). This was not just a departure from an organisation, it was the symbolic expression of the desire of the U.S. to eliminate measures intended to protect and to promote local cultural life everywhere in the world, and to consider cultural expressions only as commercial products, whose trade should take place without constraints.

The United States did a second thing at the same time as it was preparing to withdraw from UNESCO. It had another new world order in mind, a new world order based on "free market" economic principles. The moment that UNESCO became toothless, was also the moment when a new round of negotiations inside the General Agreement on Tariffs and Trade (GATT), the Uruguay Round, was launched. It had trade liberalisation as its main aim and resulted in the establishment of the World Trade Organisation (WTO), which came into existence in 1995, with new treaties,

including the General Agreement on Trade and Services (GATS) and the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

The tendency of trade liberalisation within the Uruguay Round to affect culture became noticed first in Canada, but scarcely in Europe. Most Third World countries had to cope with their defeat in UNESCO and with the debt burdens that kept them busy and made them politically ineffective on a global scale. The European attitude changed at the end of 1992. Mainly in France, the awareness grew that subjecting culture to the future services agreement (GATS) would have serious consequences for French culture, and specifically for French filmmaking. This mobilised many artists and others who were concerned with the survival of French cultural life. Action groups published a two page advertisement against harbouring culture in GATS on 29 September 1993 in five major European newspapers: *le Monde* in France, the *Independent* in the U.K., *Le Soir* in Belgium, the *Frankfurter Allgemeine* in Germany and *El Pais* in Spain. There was also a big event in the Odeon theatre in Paris.

Europe thus entered into a huge cultural conflict with the U.S. Jack Valenti, president of the Motion Picture Association of America (MPAA), claimed that, under the pretext of culture, Europe was trying to protect its economic interests concerning film. This complete lack of understanding of the cultural values of many people in Europe added fuel to the fire. Artists demanded that the European Commission propose a cultural specificity clause that would, amongst other things, permit the continuance and extension of public aid and operational subsidies, allow screen time to be reserved for indigenous production of films and TV programmes, and permit the regulation of existing and future broadcasting and transmission technologies. However, the Commission declined to push that far, in order to avoid the failure of the whole negotiation process of the Uruguay Round (which had to be finished on 15 December 1993).

In the final hours before the deadline, the U.S. and the European Union reached agreement that culture would be regarded as one of the services under the new GATS agreement within WTO. However, the European Union, along with most other nations, did not make commitments concerning cultural services. A notable exception was New Zealand, which made commitments in broadcasting services. This meant that culture stayed a blank page within GATS for most countries. In France, and some other countries, this blank page was called the cultural exemption (*l'exception culturelle*). What this meant was that a country (or, in the case of Europe, the whole European Union) could continue to make regulations in favour of cultural diversity.

We must note that the use of the concept of "cultural exemption" is a misnomer. As a marketing term it functioned very well for a while, expressing the wish that culture should not belong to the field of trade and should be exempted from the liberalisation

in this field. But, the reality is different. Culture is not exempted from the WTO agreements. In 1993, the European Union and most other countries agreed with the U.S. that culture is an integral part of GATS, which means that it is also subject to the drive of the WTO to progressively liberalise markets. In 1993, Europe and many other countries merely declined to make commitments to liberalise cultural markets more than was already the case.

The idea that a cultural exemption exists is thus a dream and not the reality. In the GATS context, culture is less protected against the free trade wind than many people believe. And now, it is extremely complicated to get culture out of the free trade context of WTO, and out of its services agreement, GATS.

The central topic of this book is how to balance on a world scale the cultural and trade interests. The result of activities on the cultural side within UNESCO was the new international instrument on cultural diversity, adopted in October 2005. Such a treaty could be considered reparation for the 1993 mistake of bringing culture inside the trade-interests-only context of WTO. And this reparation provides the cultural omnivore with hope that an abundant supply of artistic creations will come within reach!

Chapter 2

**From *Our Creative Diversity* to the Convention on
Cultural Diversity:
Introduction to the Debate**

Nina Obuljen

My reflection on recent debates concerning cultural diversity starts with a very simple question – is this struggle only about trade, or is it more than that?

The two rationales for the adoption of the Convention have very different roots. The first is grounded in existing international cultural rights, including the human rights instruments. From this perspective, many countries saw the Convention as the next step in the long battle to promote cultural development and intercultural dialogue. Many saw it as a continuation of the movement for the New World Information Order. This root goes beyond understanding cultural diversity as an issue “within” countries, as I will describe later, but it was certainly not focused primarily on trade issues. The second rationale is the trade side, which provided the real urgency for developing the Convention. Thus, some countries came to the intergovernmental meetings on the new Convention expecting to negotiate a trade treaty, a culture-friendly trade treaty. Both aspects were important and both were advanced by supporters of the Convention. Understanding this dichotomy and the history of the debate is essential to understanding the clashes which occurred at the UNESCO meetings.

In the past decade, global discussions have tended to highlight, probably too frequently, the role of the World Trade Organisation, and the negative impact of bilateral and multilateral trade agreements on cultures, cultural policies and cultural exchanges. The concerns have been not so much about the trade agreements *per se*, but more about the fact that the changing legal framework and the trends of global exchanges, even when not dealing directly with culture, often indirectly have a corrosive affect on cultural diversity.

Numerous texts have described the negative affects of economic globalisation on culture. To illustrate the importance of protecting and promoting cultural diversity,

key players in the cultural diversity movement typically evoke the imbalances of trade by using the example of the dominance of Hollywood productions in most of the world's film markets. Others expound on the way cultural conglomerates, and vertical and horizontal integration of cultural markets, bring cultural homogenisation. The fact that roughly 80 percent of recorded music is distributed by only four giant companies is both easy to recall and a powerful argument in favour of "doing something".

The positive sides of globalisation are generally ignored. New technologies and new channels of communication can overcome physical distance and allow the works of arts to be shared more widely than ever before. Artists have the opportunity to exchange and blend the rich diversity of their cultural practices in ways our ancestors could only imagine. The rise of so-called "World Music" as a new music genre is an example of how much easier it is to have access to cultural contents from every corner of the globe. There is much more opportunity to travel, translate, get involved in co-productions, or sometimes even to create collaborative pieces by artists who have never met and who live thousands of kilometres apart. Some artists are on the verge of stardom exclusively through the Internet.

In this new era, there is yet another challenge that faces policy-makers around the world. The "welfare state" in the industrialised countries, which was important to the creation of the modern cultural policy system, has been in crisis for some time. In many other parts of the world the "welfare state" has never even come into existence. However, cultural policies have been designed and developed primarily in this context. Thus, there is a need to design new ways to give adequate support to contemporary cultural creations at all stages of the process, including production, distribution, consumption and preservation of cultural goods and services. Many of these policies, when looked at through the lens of free trade, might seem as protectionist, or sometimes simply inadequate to achieve the goals set by today's cultural community. This is why the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* had to be more than just a battle to preserve existing cultural policies; it had to be an inspiration to create space to look for alternative policy solutions.

In my view, it is a mistake to look at the Convention as an instrument whose only goal is to ensure special treatment of culture in trade negotiations or to confirm the sovereign right of states to adopt cultural policies. While these aspects are important, in assessing the possible impact of the Convention it is important to look at the broader debates that have been taking place over the past decade or more, which go well beyond trade concerns. In this chapter, I will look at some of these debates and at documents adopted in the past decade to illustrate how the movement for the protection and promotion of cultural diversity was gaining support and strength, and

outline all of the concerns that led to the adoption of an international legally-binding instrument on the diversity of cultural expressions.

I believe there is another reason to go beyond trade aspects of this debate. With the Convention, cultural diversity, or diversity of cultural expressions, has been embraced as a political concept by all the parties to the negotiations – those who supported the final text, those who opposed it, and those who abstained. There was unanimous agreement that the diversity of cultural expressions is something worth protecting, which is very important for the future of the cultural diversity movement. The adoption of the Convention is just a beginning, it is not an end. Whether the Convention will become a dynamic and significant part of international law, or fade into irrelevance, will depend on how it is used, on how developments are monitored, and on how its provisions are interpreted in response to real world situations and challenges. This is why it is so important to continue searching for principles and ideas shared both by the proponents and by the sceptics.

Difficulties with the definition(s) of cultural diversity

Cultural diversity, the term used in the UNESCO Universal Declaration, and diversity of cultural expressions, the term used in the Convention, are both political concepts which have different meanings and nuances depending on the circumstances in which they are used.

The term *cultural diversity* has been burdened by different understandings and specific challenges derived sometimes from history (such as colonialism), or from linguistic or semantic subtleties. This is why any attempt to write a résumé of the history of the cultural diversity discussion must start with the acknowledgement of the existence of multiple definitions of the term. The lack of a single definition, or rather the diversity of definitions, represents the major obstacle in identifying the most important instruments and fora in the past that have dealt with issues of cultural diversity.

A study entitled *UNESCO and the Issue of Cultural Diversity: Review and strategy, 1946-2000*, identifies four phases in the discourse and UNESCO documents in the evolution of the concept of cultural diversity. While some countries and regions were ahead in tackling these issues and some lagged behind, the four phases provide useful benchmarks since they reflect the consensus of UNESCO member states.

According to the study, the first phase is the post World War II period, when culture was still seen more in terms of artistic production and nation states were regarded as unitary entities. The concept of pluralism was connected to inter-national and not intra-national differences. The second phase is characterised by the broadening of the concept of culture to represent the “identity” itself. This phase

coincided with growing resistance to the domination of powerful states and the ideological imperialism in an emerging Cold War context. The third phase is when culture as a concept began to be associated with development. This brought a major shift both on the level of policy planning and in the field of research. The most recent period, according to this study, is characterised by a link between culture and democracy, and a growing awareness of the need to broaden the concept of cultural diversity in order to encompass all the challenges and meanings it has. This broad definition of cultural diversity is reflected in most of the documents I will review later.

We see cultural diversity primarily as a political concept embracing and carrying many different meanings, and we acknowledge the existence of numerous terms to describe the various aspects of cultural diversity, such as multiculturalism, cultural pluralism, interculturalism, interculturality and cultural fusion. However, we can distinguish two general approaches to cultural diversity. While they might appear distinct, these two approaches are now converging in such a way that they are no longer mutually exclusive.

The first one looks primarily at issues concerning cultural diversity “within” a particular society. This approach regards individuals as potential denominators of multiple identities and heterogeneous cultural characteristics that together eventually build a national or other form of identity. It focuses on basic human rights, promotion of cultural democracy, equal participation of all minorities (ethnic, gender, linguistic, racial, sexual orientation, etc.). This approach is often referred to as “multiculturalism.” and although it appeared high in the list of issues debated during the last few decades, the world’s first national multicultural legislation was adopted in Canada in 1988. In that year the *Multiculturalism Act* acknowledged that cultural diversity is a fundamental feature of Canadian society, and gave impetus to a range of government policies and programs to reserve and enhance it. (Pérez de Cuellar 1996: 240)

The second approach that has been widely debated, especially in the past two decades, is the issue of cultural diversity “among” nation states, societies and/or cultures. In this sense, cultural diversity is regarded as a principle representing the need for balanced exchange of cultural goods and services between states and/or cultures. This approach is characterised by the development of links between culture and trade, or culture and the economy in general, and the ability of nation states to “intervene” in cultural markets in order to sustain “local” or “national” production and provide it with a space in markets, as well as balanced exchange among cultures. Advocating for a “new form of globalisation” is translated as a fight for the right of the state to develop, preserve or implement public policies necessary for the preservation and promotion of cultural diversity.

A number of the apparently contentious debates at the UNESCO intergovernmental meetings considering the draft Convention arose because of these very different roots of debates about cultural diversity.

The final text of the *Convention on the Protection and the Promotion of the Diversity of Cultural Expressions* proves that it was possible to take into account all these different aspects, and to arrive at a Convention that is concerned equally with the need to promote diversity within nations, to act collectively to protect forms of cultural expression that are threatened with extinction and to develop creative capacity and cultural industries in the developing world, as well as the need to find ways to encourage balanced exchanges between cultures and to preserve the right of nation states to take whatever measures they see fit to preserve and promote their own artists, cultural industries and cultural expressions.

The fact that so many countries agreed on the final text, and the broad and inclusive concept of cultural diversity, or rather the diversity of cultural expressions, proves in a way that we have come to understand it was time to leave some “conceptual” dilemmas aside. This represents one of the most important political victories achieved in this process.

Selected documents and international fora dealing with cultural diversity

The movement in favour of cultural diversity gained support quickly and in just a few years the topic of cultural diversity emerged as the most debated topic on the global cultural policy agenda.

The final definition of cultural diversity used for the purposes of this Convention reads as follows:

“‘Cultural diversity’ refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.”

This definition, together with many other notions and ideas formulated in the Convention, were derived from the ongoing debates and documents prepared in anticipation of, and prior to, the beginning of the negotiations in UNESCO.

The chronological account of the most important documents dealing with cultural diversity directly relevant for the negotiations and subsequent adoption of the Convention starts with the UNESCO’s report *Our Creative Diversity*, submitted by

the World Commission on Culture and Development in 1995. This report, the central project of the UNESCO's Decade for Culture and Development, reflects a new approach to the development of culture and cultural policies, away from a focus exclusively on preservation, towards a focus on cultural growth and the reinforcement of creative potentials. The issue of cultural diversity is regarded as one of the essential elements of overall sustainable development and this is reflected in the title. This report was also the first document to draw a parallel between biodiversity and cultural diversity, language used later in the draft ministerial declaration prepared for the WTO Seattle meeting, a declaration not adopted due to the challenges of that meeting.

“Just as policies of biodiversity preservation are needed to guarantee the protection of natural ecosystems and the diversity of species, only adequate cultural policies can ensure the preservation of the creative diversity against the risks of a single homogenising culture.

“Cultural diversity is the positive expression of the overarching objective to prevent the development of a uniform world by promoting and supporting all world cultures. Cultural exception is merely one of the possible means for achieving the objective of promoting cultural diversity. It must be acknowledged that these cultural goods and services (books, music, multimedia games, films, and audiovisuals) are different from other goods and services, and deserve different and/or exceptional treatment that sets them apart from standardised mass consumption. Obviously, this requires differential treatment in international trade agreements and possibly even effective strong regulatory frameworks to redefine cultural policies focusing on the promotion and development of cultural industries.” (Alonso-Cano, G.: 18)

It is worth mentioning that some find this link between cultural diversity and biodiversity to be inappropriate. The protection of biodiversity is seen as requiring differences to be maintained, even if artificially, and requiring that species be isolated from each other in order to avoid contamination. Cultural diversity, on the other hand, is seen as each culture having an opportunity to decide whether and how it wants to grow and develop, as a dynamic process involving internal changes and interaction with other cultures, a constant evolution. However, the primary focus of the link between biodiversity and cultural diversity was the concept that each is fundamental for sustainable development and fundamental to the future of humanity. This explicit notion of the importance for our future is essential to understand the guiding principles of the Convention and the recognition of the fact that the protection and promotion of cultural diversity should not be something static. In this context, culture cannot be seen as an instrument used for achieving a higher goal (such as economic or social development) but is rather an inherent element of development, a part that cannot be left aside.

The report *Our Creative Diversity* had a fundamental role in changing the perception of the role of culture in our societies and is certainly one of the most important benchmarks in building the international movement for cultural diversity.

The closing event of the UNESCO's Decade on Culture and Development was the Intergovernmental Conference on Cultural Policies for Development¹ held in Stockholm, Sweden in spring 1998. The conference gathered policy makers and representatives of civil society, primarily to reflect on the concrete follow-up of the report and the decade. The Action Plan adopted in Stockholm focused on the five objectives:

- to make cultural policy one of the key components of development strategy;
- to promote creativity and participation in cultural life;
- to reinforce measures to preserve cultural heritage and promote cultural industries; to promote cultural and linguistic diversity in the information society; and
- to make more human and financial resources available for cultural development.

In May 2003, UNESCO convened a follow-up conference in Stockholm to discuss the achievements and implementation of the Action Plan. While the extent to which countries have succeeded in implementing the recommendations of the conference is unclear, the conference itself was another benchmark in spreading the debate about cultural diversity globally.

Just a few months after the 1998 Stockholm conference, Minister of Canadian Heritage Sheila Copps convened, in Ottawa, an informal meeting of ministers of culture, which the following year established the International Network on Cultural Policy (INCP)². At a parallel meeting in Ottawa, representatives of cultural non-governmental organisations, artists, cultural producers, professional organizations and academics launched the process which established the International Network for Cultural Diversity (INCD)³, an international NGO dedicated to countering the adverse affects of globalisation on culture. Both networks have issued declarations and final statements from annual meetings⁴ held in parallel and each worked on the draft instrument for cultural diversity. The cooperation between the INCDP and the INCD is an example of a fruitful partnership between governments and the non-governmental sector that should continue to be encouraged and strengthened in future.

1 http://www.unesco.org/culture/laws/stockholm/html_eng/index_en.shtml

2 www.incp-ripc.org

3 www.incd.net

4 Santorini, Greece 2000; Luzerne, Switzerland 2001; Cape Town, South Africa 2002; Opatija, Croatia 2003; Shanghai, China 2004; Dakar, Senegal 2005.

This is the time when the idea of drafting a new international legally binding instrument began to emerge globally. Many of the principles evoked in *Our Creative Diversity* were put on the agenda in the discussions and by the promoters. The INCD adopted the concept at its annual meeting in Santorini, Greece in 2000, while the culture ministers endorsed the idea of drafting a new convention at their meeting in Lucerne, Switzerland in 2001.

In addition to the INCD, another civil society movement has been actively involved in the campaign, the Coalition for Cultural Diversity⁵, a Canadian network of artists organisations, trade associations of producers and other groups, which organised the First International Meeting of Cultural Professional Organizations in September 2001 in Montreal, Canada. The second meeting of this movement, held in Paris, France in February 2003⁶, was hosted by the *Comité de vigilance pour la diversité culturelle*. At the opening reception, French President Jacques Chirac repeated his statements from the 2002 Johannesburg World Summit on Sustainable Development when he urged UNESCO to start negotiations on a legally-binding convention on cultural diversity.

Following these developments the debates intensified and the protection of cultural diversity became one of the central themes of conferences and meeting of artists and cultural professionals globally. The idea that cultural diversity needed to be protected was introduced in other fora and it became a part of political discourse. Broad support was being built rather quickly.

A few other benchmarks that preceded or took place at the same time as these events can be identified:

In June 1999, UNESCO organized a symposium on culture, the market and globalisation entitled: *Culture: a form of merchandise like no other?* The symposium's final document was quoted repeatedly in all discussions calling for the special treatment of culture in the global economy. The conclusions were inspired in the shared understanding that "culture was not only a matter for the economy or an economic concept. It cannot be treated like any other merchandise; it should be subject to special treatment." The second *Roundtable of Ministers of Culture on Cultural Diversity: Challenges of the Marketplace* held at UNESCO Headquarters in December 2000, and recommendations of the UNESCO's Executive Board held the same year, both called for "the strengthening of UNESCO's role in the promotion of cultural diversity in the context of globalisation". This demonstrated there was a growing political consensus about taking onboard most of the concerns expressed and formulated by artists, cultural professionals, policy-makers and academics.

5 www.cdc-ccd.org

6 www.comitedevigilance.org/

Another important document, adopted in February 2000, is the *United Nations General Assembly Resolution 54/160: Human rights and cultural diversity*. This resolution provides a clear link between cultural diversity and basic human rights recognised in international instruments. It acknowledges that all human rights are universal, indivisible, interdependent and interrelated and that the international community must treat human rights globally in a fair and equal manner. In that respect it recognises that cultural diversity is a source of mutual enrichment for the cultural life of humankind, that it is essential for peace, understanding and friendship among individuals and people of different cultures and nations of the world. This resolution calls on States, international organisations and United Nations agencies to ensure that cultural diversity is respected and recognised and requests the Secretary General to prepare a report on human rights and cultural diversity.

This resolution is very important for understanding the context in which advocates of the Convention were building support for the idea. The Resolution gives a necessary link between the protection of cultural diversity and the protection of human rights as enshrined in the *Universal Declaration on Human Rights*. It draws a link to the long established concerns for the protection and guarantee of cultural rights focussing on individual rights. Although it was not cited often, this resolution was particularly important during negotiations on the Convention as some countries expressed their concerns that, if adopted, the Convention could be used as a pretext for abuses of human rights in the name of preserving cultural diversity, or cultural specificities of particular cultures and societies.

In December 2000 the Council of Europe adopted the *Declaration on Cultural Diversity*⁷. A year later, in November 2001, the UNESCO General Conference unanimously adopted the *Universal Declaration on Cultural Diversity*⁸, as well as the *Action Plan*, the main lines of action for the implementation of this declaration.

The UNESCO Declaration has a broad definition of cultural diversity that responds to the dilemmas that emerged from the discussions. Article 1 again uses the parallel between cultural diversity and biodiversity.

Article 1 – Cultural diversity: the common heritage of humanity

Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.

7 http://www.coe.int/T/E/Cultural_Co-operation/Culture/Resources/Reference_texts/Declarations/edecl_diversity.asp#TopOfPage

8 <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>

Article 2 - From cultural diversity to cultural pluralism

In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.

Article 3 - Cultural diversity as a factor in development

Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence.”

The preamble puts an emphasis on the interdependence of human rights and diversity, draws attention to the need for exchanges and dialogue and discusses the effects of globalisation and new technologies on culture. The Declaration is situated alongside other UNESCO documents, as well as the UN Charter and the *Universal Declaration of Human Rights*. The *Universal Declaration on Cultural Diversity* is concise and, more importantly, it advocates for concrete actions. The areas covered in the Declaration include science and agriculture, and there is a strong emphasis on education. The content of the Declaration reflects the broad concept of culture and cultural diversity, as well as the importance of culture as a crucial element in the overall development of each society, as outlined in *Our Creative Diversity*.

The scope and definitions used in the Universal Declaration were, in most cases, retained in the final draft of the Convention. But the importance of the Declaration went beyond that. It was adopted by consensus and it sent a very clear political message that all UNESCO member states at the 2003 General Conference were looking favourably at the idea of putting forward a legally binding international instrument for the promotion and protection of cultural diversity.

In the Action Plan, UNESCO resolved to consider the opportunity of a legal instrument on cultural diversity. This was the first point in the Plan and was strongly endorsed by civil society groups, government representatives, academics and others who had spent several years discussing the need and feasibility of developing such an instrument on cultural diversity.

Momentum in support of a new Convention continued to grow outside UNESCO. Several other fora issued final statements or declarations focusing on cultural diversity. Participants at the *Valencia Forum on Globalisation and Cultural Diversity*⁹ adopted a statement calling for the protection, nurturing and support of

9 <http://www.audiovisualforum.net/manifest/>

cultural diversity throughout the world. The Francophonie's Ministerial Conference on Culture held in Cotonou, Benin in June 2001 issued a *Final Declaration*¹⁰ that acknowledged the importance of preserving and promoting cultural diversity in light of the liberalisation of trade, and highlighted the role of UNESCO which should take the lead in discussing possible instruments.

Enumerating the meetings at national, regional and international levels organised around these issues permits us to see how ideas were embraced and support was growing. It can be stated that a new movement was created which included civil society and governments, individuals and organisations, politicians from various sides of political spectrum. Moreover, this support was growing not only in so-called "Western industrialised countries" often accused in such initiatives of simply wanting to protect their market share and continue their domination. Developing countries were also embracing the concept and became active promoters within UNESCO of the idea to adopt a new convention.

The topic of cultural diversity has also been discussed at several of the World Social Forum gatherings in Porto Alegre¹¹, as well as at regional fora. While most observers still believed that the impact of multilateral and bilateral trade negotiations is not as devastating on culture as it is on agriculture, health, environment, education or water policies, the discussions at the World Social Forum were important in confirming that cultural diversity deserved a place on the agenda wherever alternative strategies for development are discussed.

Moving forward towards the draft of the future treaty

Before 2001, the discussion was focused on **whether or not we need a legally-binding international instrument** on cultural diversity, by the middle of 2001 the discussion was switching to the question of **where** to house such an instrument and **what** timeframe would be reasonable for its development and implementation.

At the Lucerne meetings in 2001, both the INCP and the INCD considered several possibilities for housing the instrument. There was discussion about the drafting a stand-alone agreement, perhaps under the auspices of the ministerial network, however, there was agreement this would be very difficult to achieve, at least in the short term. The INCP is an informal group with few resources. There was some doubt about whether it could bring together delegates mandated by governments to negotiate a legally-binding instrument and some question about its capacity simply to organise and host such a meeting. Other possibilities were considered briefly.

¹⁰ <http://confculture.francophonie.org>

¹¹ <http://www.forumsocialmundial.org>

Discussion therefore began to focus on UNESCO. As the UN's cultural body, it certainly had the political and administrative capacity to develop a legal instrument, but there were some concerns about the inefficiency of UNESCO. Others believed it far too academic, which would make it difficult for UNESCO to deal with issues of trade in cultural goods and services, an essential aspect of the proposal. As we analyse the outcome of the UNESCO process, it is important to remember that UNESCO does not have a tradition of enforcement of its instruments. However, in the end, UNESCO was seen by all of the key players as being the only logical choice, especially because in 2001 the WTO launched a new round of negotiations that were to be completed by 2005, and many believed the outcome would create new challenges for the cultural field.

Around the same time, debate about the possible scope and parameters of the Convention were taking place, and several draft texts outlining the possible terms of a Convention were beginning to appear. The first of these was put forward by the International Network for Cultural Diversity in early 2002, based on a set of principles agreed at the Lucerne meeting. While there were balanced provisions calling for support for the development of creative capacity in developing countries, and provisions obligating countries to promote internal diversity, it was drafted with the assistance of a trade lawyer and left no doubt about its objective of carving out trade in cultural goods and services from the WTO agreements.

In early February 2003, ministers of culture brought together by the INCP in Paris, provisionally adopted the terms of a draft developed by an INCP working group. The ministers immediately presented their draft Convention¹² to the UNESCO Director General and requested that he put the issue on UNESCO's agenda. The third draft was put forward later by the Canadian Sectoral Advisory Group on International Trade¹³ (SAGIT), a private sector cultural industries advisory committee to Canada's international trade minister. Although the three drafts differed in their specific targets and priorities, all of the texts reflected the same basic objective – to preserve the sovereign right of states to formulate appropriate public policies for the protection, promotion and enhancement of cultural diversity.

Following two Executive Board meetings in April and September 2003, and after discussing the document entitled *Desirability of drawing up an international standard-setting instrument on cultural diversity*¹⁴, Commission IV (culture) of the General Conference adopted a decision in October 2003¹⁵ inviting the Director-General to submit to it at its next session (2005) a report and a preliminary

12 http://206.191.7.19/meetings/2002/instrument_e.shtml

13 http://www.dfait-maeci.gc.ca/tna-nac/sagit_paper-en.asp

14 <http://unesdoc.unesco.org/images/0013/001307/130798e.pdf>

15 Resolution 34 of the General Conference adopted at its 32 session (October 2003); <http://unesdoc.unesco.org/images/0013/001321/132141e.pdf>

draft *Convention on the protection and promotion of the diversity of cultural contents and artistic expressions*.

Before this report, in March 2004, the Director-General of UNESCO issued a document, *Preliminary study on the technical and legal aspects relating to the desirability of a standard-setting instrument on cultural diversity* (166 EX/28, March 2003), in which four options for the convention were proposed, namely: a) a new comprehensive instrument on cultural rights; b) an instrument on the status of the artist; c) a new Protocol to the Florence Agreement; or d) a new instrument on the protection of the diversity of cultural contents and artistic expressions.

At this point, all the options were seen as relevant and feasible even though the pressure on UNESCO from the global cultural diversity movement, and the three drafts put forward, favoured the fourth option. This was particularly the case with those advocating for the adoption of a new comprehensive instrument on cultural rights. During negotiations, a fear that the Convention could be misinterpreted to disrespect basic human rights was put forward by many delegates. It will be interesting to monitor developments once the Convention comes into force, to see how these concerns will be addressed.

UNESCO Prepares a Draft

The first step in the UNESCO process involved three meetings of fifteen independent experts convened by the Director-General to discuss the scope and main provisions of the future Convention. Topics identified as the most relevant by the panel of experts were also those around which most of the debates occurred during the intergovernmental meetings. According to the reports from these meetings, the main discussions led by the independent experts included following issues:

The first one was to identify the objectives of the Convention. Most considerations of the possible future international instrument highlighted the dual nature of cultural goods and services. While such goods and services have an economic value, they reflect the culture and time in which they are created and thus carry cultural meaning and values. One of the objectives of the Convention was to recognize that dual role, as well as to establish legal norms which could guarantee that both cultural and economic aspects are treated equally, especially if there is a concern raised in the context of trade and investment agreements. However, this had to be accompanied by full respect for fundamental human rights.

Experts also agreed on the need to establish a balance between protection and promotion of cultural diversity, they felt the Convention could not be a narrow *protectionist* instrument. It was also important not to let the Convention become an

instrument merely for the protection of existing cultural industries, their market share, and current positions and interests.

In order to give an incentive for participation in negotiations to those countries which have less developed cultural industries, experts included in their draft Convention strong measures to assist the development of cultural capacity in the South, including measures of positive discrimination, where rich countries of the North would agree to increase the market share for cultural goods and services from developing countries. Even though the term *market share* is borrowed from the language of trade, if applied with clear cultural objectives it can be used to achieve balanced cultural exchange. They also developed the concept of the Fund for Cultural Diversity and envisaged mandatory contributions to a fund that would finance significant development projects.

These preliminary discussions included reflections about appropriate obligations for future signatories of the Convention, both within their national borders and internationally, to accompany the sovereign right they would enjoy to implement measures that would guarantee diversity of cultural expressions. It was recognized from the beginning that, as a consequence of a great variety of cultural systems and policies, the Convention should not impose or introduce any uniform rules. However, one of the goals set by the group of experts was to include some provisions in the Convention that would aim at **reversing** trends of vertical and horizontal integration of cultural markets. Thus, they included articles which obligated States to support threatened forms of cultural expressions, including those existing on their territories; which sought to guarantee the right of access for all citizens to a wide variety of cultural goods and services; and which would have prevented States from closing their border to certain forms of cultural expressions in the guise of promoting domestic expressions.

Finally, the most sensitive issue and the only article forwarded by the experts in two different versions, was the article on the relationship of the future Convention with other international treaties. All arguments that were later discussed during inter-governmental negotiations were addressed by the experts. The two extremes were those who favoured subordinating the Convention to other agreements, including trade agreements in particular, by providing that nothing in the Convention could derogate from rights and obligations in other international instruments, and those who believed the Convention should ensure that any dispute dealing with cultural goods and services should be adjudicated exclusively under this new legal instrument, and thus be determined solely on the basis of cultural diversity principles and objectives.

This controversial article, even though written to regulate the relationship of this agreement with all other international treaties, was read from the beginning as

addressing the relationship of the new Convention with the WTO and bilateral trade and investment agreements.

Following the three meetings of independent experts, the Director-General undertook consultations with three international organisations: World Trade Organisation (WTO), World Intellectual Property Organisation (WIPO) and the United Nations Conference on Trade and Development (UNCTAD). All three organisations submitted comments on the draft convention prepared for the first intergovernmental meeting held in Paris in September 2004¹⁶.

Intergovernmental Negotiations

Three intergovernmental meetings were held in Paris – in September 2004, January/February 2005 and May/June 2005¹⁷. During the first intergovernmental meeting, government experts worked on the basis of the preliminary draft Convention prepared by the Director-General on the basis of the work of the independent experts. The first two meetings did not bring much progress in achieving consensus on the key issues among the majority of negotiators. In fact, it seemed that government experts were moving away from a consensus by putting forward a large number of new proposals that sought to expand the scope of the Convention (in areas such as intercultural and interfaith dialogue), and it seemed that the deadline set by the General Conference for the submission of the draft convention would be impossible to achieve. In general, there seemed to be little forward movement and the entire project seemed at risk.

However, prior to the third intergovernmental meeting, Dr. Kader Asmal, Chair of the Intergovernmental conference, together with the rapporteur and the chair of the Drafting Committee, were directed to prepare a consolidated and simplified version of the Convention, which they did with remarkable efficacy. This simplified version was accepted as the basis for the final negotiations and this step enabled the meeting to reach a final agreement on all matters on 3 June 2005.

From the beginning of negotiations countries seemed to be divided in several groups. The most active proponents included Brazil, joined by the majority of Latin

16 The WIPO and UNCTAD were positively disposed to the Convention highlighting some of the specific topics of interest for these two organizations. WTO's comments were mixed and in fact included individual comments of WTO Member States.

17 Following the first one held in September 2004, another two meetings took place in February and May/June 2005. In December 2004, between the first and the second meeting, a session of the Drafting committee, elected in September 2004, was held. However, because of the lack of clear mandate and divergent views of the member of the Drafting Committee, this body did not make much progress and was eventually dismissed during the February meeting.

American and Caribbean States, Canada, Costa Rica on behalf of the Group of 77, the European Union, Switzerland, China, South Africa, Senegal and Benin speaking for the African Group.

The position of the European Union member states was particularly interesting. The scope of this Convention, although it refers to culture, also touches on exclusive and shared competences of the Union (for instance, development policy, trade policy and intellectual property rights). It was therefore necessary for all member states to achieve a consensus and to ensure that they were represented during negotiations either by the current Presidency or by the European Commission in order to respect the provisions of the *acquis communautaire*. At first it was difficult for some Member States to accept that they needed this consensus, since they were accustomed to the principle that cultural matters were solely a matter for decision at a national level. However, while building the internal consensus, in the final analysis they strengthened their negotiating position.

Countries that were most active in searching for alternative wording and direction of the future Convention included Japan, United States of America, Australia, South Korea, India, Philippines, Thailand, Israel, as well as several states which have, in their bilateral and multilateral trade agreements, already made significant commitments in the cultural field, such as New Zealand, Chile and Mexico. It was clear that the main concern of these countries was that the wording and draft formulations of the Convention would interfere with other international instruments and obligations, primarily those dealing with trade.

Conclusions

During negotiations in UNESCO it seemed to be impolite to talk about trade and the WTO. In fact, it was interesting that only the Convention's opponents talked about trade agreements. Those governments that were in favour of the Convention, insisted that it was designed to tackle the broader position of culture in international law. This is just one of the reasons why it is so difficult to predict how the provisions of this Convention will be interpreted once it is signed and ratified by sufficient number of states.

If the purpose of the Convention was only to carve out culture from the WTO and other trade and investment agreements, it would have been a battle lost even before it began. No country could have been implicated in such an exercise. However, by extending the mandate, some things might have been lost, and the focus of the instrument may be unclear. With respect to the trade concerns, the key element will surely be how seriously signatories take their commitment to work together in other fora to achieve the objectives of the Convention.

The overview of the debate prior and during negotiations shows that even supporters had different ideas of the scope and the main purpose of the convention. This is again one of the reasons it was difficult during negotiations to determine the focus. In any case, the strength of the Convention will be determined very much by the number and range of ratifications and by the follow-up work.

It is certain that the Convention is, at the moment, a powerful political tool, but much more than simple political will is needed to turn it into an effective legal instrument. Much will also depend on the number and balance of ratifications, as well as on the willingness of UNESCO to take on the tasks assigned to it. This in turn depends also on the continuing work of non-governmental organisations and concerned governments. The measure of the success of the Convention down the road will depend on how effectively this tool has been wielded by those favouring cultural diversity.

It will take some time before the minimum numbers of signatories ratify the Convention and it can come into force. In the meantime, it is crucial to continue building awareness of the Convention's potential, especially in those countries, and among those groups, that do not regard this issue as an immediate priority. It is also important to build new partnerships between different civil society movements and governments, and to continue with research, monitoring and analysis of different developments in the field of culture. This is essential to be able to respond adequately to all challenges, including those arising from technological developments or political decisions, which might have a direct impact on culture, cultural policies and cultural diversity.

I have summarised in this overview only some aspects of the debate, but none should be left aside. It is very important for references to the Convention to be included in bilateral and multilateral agreements on cultural cooperation, as well as in declarations and papers emerging from various governmental and non-governmental meetings and conferences.

It is equally important to continue intensive debate about cultural diversity issues among artists and cultural professionals, policy-makers and academics. Continued monitoring and discussion of new challenges might lead to the creation of new instruments, or might inspire creative interpretations of the Convention.

Part II

Chapter 3

The Convention as a response to the cultural challenges of economic globalisation

Garry Neil

In a ground-breaking 1997 decision, the World Trade Organisation ruled that measures the Canadian government used to support Canadian periodicals violated international trade rules. This ruling and related developments exposed the illusion of “l’exception culturelle” and highlighted the difficulty of trying to exempt cultural policies from trade and investment agreements. After reflecting on the developments, cultural activists in Canada put forward a proposal for a new approach to deal with culture and trade issues that would be based on a legally-binding treaty specifically designed to protect and promote cultural diversity. This concept rapidly gained international support in civil society and among governments and the process culminated in the adoption of the *Convention on the protection and promotion of the diversity of cultural expressions* by UNESCO in October 2005.

This article will explore the extent to which the *Convention* can achieve the objectives of its proponents.

Canadian Magazine Policies and the World Trade Organisation

Canada has a small population spread over an enormous geographical area and shares a border and primary language with the world’s largest producer of cultural goods and services. Canada is also an open market for cultural products and cultural expressions; ideas and information in all media travel freely across the border. Canadians enjoy virtually unlimited access to arts, culture, and popular entertainment from abroad, most of which comes from their southern neighbour.

Cultural producers from other countries enjoy a competitive advantage over Canadian producers. U.S. producers have a substantially larger domestic market and benefit from economies of scale. Producers in other countries may enjoy a competitive advantage arising from the protection of a different language. Still

others, before the digital era, had an advantage because of their physical distance from other producers. Canadian producers do not have either the advantages, or the protections. To level the playing field and ensure there are Canadian choices available to consumers, Canadian governments of all political stripes developed what are probably the world's most comprehensive set of cultural policies, including financial subsidies, broadcasting regulations, ownership and competition measures, domestic content rules, and tax concessions.

The economics of Canada's magazine industry highlight the problem for Canadian cultural producers. Due to the size of their domestic market, the average print run of a U.S. magazine is many times greater than a Canadian counterpart and U.S. magazine publishers can amortize costs across a very large potential circulation. The cost of an additional copy of a magazine that can be easily exported to Canada is pennies. Some U.S. producers have developed a split-run edition, which uses primarily U.S. editorial content, inserts a small Canadian section, and then sells itself to Canadian advertisers. Because it has lower editorial costs and generally broader reach, it is able to sell its space to advertisers at a substantially lower cost than can a Canadian magazine.

Since U.S. magazines account for 80 percent of Canadian newsstand sales, Canadian magazines rely on subscription sales and advertising revenues to finance their operations. Canadian magazines have been world leaders in the development of strategies to maximize subscriptions, but this alone is insufficient. Since revenues from advertising are essential for the survival of Canadian magazines, the diversion of advertising to split-run editions is a critical issue.

In order to build the Canadian magazine industry, the importation of U.S. split-run magazines was prohibited by a tariff item introduced in 1965 and supported by an income tax provision preventing a business from deducting the costs of advertising it places in a split-run magazine. Since 1849, the government has also maintained a program which provides a preferential postal rate for Canadian magazines shipped across the country, in recognition of the challenges of producing a periodical for a population that is widely disbursed geographically. In the 1980s and early 1990s, this had been in the form of a financial subsidy provided by the ministry of culture to Canada Post.

In 1996, when technology allowed split-runs to circumvent the border measure by transmitting the copy electronically to be printed in Canada rather than importing the finished magazine, the tariff item was augmented with the introduction of an excise tax of 80 percent on each edition of a split-run magazine. This amount represents the government calculation of the savings for advertisers placing their ads in split-run magazines. To avoid a perception that it was discriminating against U.S. magazines, the tax was applied as well to magazines exported from Canada as split-run editions (including several published by Canadian publishers).

The U.S. appealed these measures before a WTO panel in 1997. Canada argued the measures addressed advertising and thus should be judged against its obligations under the General Agreement on Trade in Services (GATS), where Canada had made no commitments respecting advertising or publishing services. However, the panel and appellate body found that magazines are a “good” and the content qualifies as “services,” and they ruled that the obligations of both the GATT and GATS apply. The panel ruled that these Canadian advertising measures violated commitments Canada had under the General Agreement on Tariffs and Trade (GATT), which regulates trade in goods, to treat foreign products in a non-discriminatory manner in relation to domestic products. The appellate body upheld this decision and also ruled that the postal subsidy was not a direct subsidy of domestic producers, permitted under GATT, but was rather a subsidy of Canada’s postal service. Canada was ordered to bring the measures found to be “inconsistent with the GATT 1994” into conformity with its obligations under the Agreement.

An important element of the decision concerned the issue of whether Canadian and split-run U.S. magazines were “like products.” While the panel decided that indeed they were like products, the appellate body overturned this finding on the grounds the panel had based its decision on an unrealistic hypothetical comparison. However, in a key finding, the appellate body ruled, “But newsmagazines, like Time, Time Canada and Maclean’s are *directly competitive and substitutable in spite of the “Canadian” content of Maclean’s*” (emphasis added).

Maclean’s magazine is Canada’s leading newsmagazine and Times Canada is a split-run magazine. In a recent week, the 60-page Maclean’s contained 30 pages of articles about Canadian society, politics, business, media, sports and entertainment, written by Canadian authors. It also featured 14 pages of articles about international developments, all of which were written from a Canadian perspective. In that same week, the 58-page Time Canada magazine had only three pages devoted to Canadian items, two of which were authored by U.S. writers and the third by an expatriate Canadian working in the United States. The other pages dealt with U.S. society, politics, business, media, sports and entertainment, or were international stories written from a U.S. perspective.

The appellate body rejected Canada’s argument that the editorial content of a magazine is culturally-specific and is crucial to the consumers. It found that, under the trade agreements, it does not matter if the magazine is covering U.S. or Canadian news, or if it is covering international stories from a Canadian or U.S. perspective, all magazines dealing with news and current affairs are goods which are directly competitive and substitutable for each other.

Canada responded to the decision by rescinding the tariff item and the excise tax and reorganizing the postal subsidy so that it is paid into individual producer

accounts. The government also introduced a measure to prohibit the sale of advertising services directed solely to Canadians, except by Canadian publishers. The United States threatened retaliation against this measure and the parties negotiated a settlement bilaterally.

As a consequence of these developments, Canada now permits foreign magazines to sell advertising to Canadian businesses up to certain limits, which increase to the extent the editorial content in the Canadian edition is original and not recycled from the U.S. edition. Canada also agreed to increase its limit on foreign ownership of Canadian magazine publishers to 49 percent.

The WTO decision shook the Canadian cultural community, which had been assured by successive governments that the right of the Canadian government to implement and modify cultural policies was protected in international trade agreements. The Canadian government had argued that the “cultural exemption” of the Canada/United States Free Trade Agreement, which is continued in the North American Free Trade Agreement, was adequate for continental trade, and that there was no danger from the World Trade Organisation, since Canada had offered no GATS commitments for any cultural service. The WTO decision and related developments exposed the fallacy of the government’s position.

Cultural Policies and Trade and Investment Agreements

Around the same time as the Canadian Periodicals Case was being considered by the WTO, the Organisation for Economic Cooperation and Development was negotiating the terms of the proposed Multilateral Agreement on Investment. The MAI would have had a profound impact on virtually the full range of cultural policy tools used by many governments since all of them restrict, limit or regulate foreign investment, when that is broadly defined, as in the draft MAI, to include the movement of capital and intellectual property rights. Efforts to include a cultural exception, put forward by the French, would have been inadequate to preserve the right of governments to regulate new technologies and may have precluded government actions in the field of popular culture.

As a result of significant public opposition, the MAI was not concluded and thus the cultural challenges that it presented were not tested in practice. However, the potential implications of any investment agreement were exposed during this debate.

There are many ways in which bilateral and multilateral trade agreements can affect cultural policies.

When the visual artist paints or creates a multimedia piece, when the author writes, when the composer and lyricist collaborate on a new song, when the actor performs,

when the talent and technicians on a movie set are working, the artists are providing a service. But when they have completed the creative process, the artistic work is given a concrete form, as a painting, a novel, a film, a script, a musical score or any number of things. The embodiment of the artistic work then becomes a good that can be distributed, exhibited and enjoyed by others.

As the Canada Periodicals case shows unequivocally, this means that trade agreements covering goods and trade agreements covering services both apply to cultural products. In order to appreciate all of the consequences of this fact, we must first understand the underlying principles of free trade.

For many traditional goods and services, economies of scale can benefit consumers. In theory, manufacturers and producers have the potential to create a higher quality product at a lower price. They benefit from capturing a larger share of the market, but consumers benefit by obtaining better value for money. Free traders argue that removing barriers to the free movement of goods and services will extend these benefits globally. The theory holds that when you permit the most efficient producers to dominate global markets, consumers everywhere will benefit. While this may force inefficient producers in some countries out of business, free traders argue that these countries will either have an advantage in another economic sector or can specialize in a sector where their disadvantage is the smallest. On balance, they too will gain from free trade because incomes everywhere will rise.

However, this paradigm does not apply in the cultural field. Cultural goods and services embody cultural traditions, mores and values, and consumers benefit most from having a wider range of choices from a variety of suppliers. Cultural diversity is about ensuring there is a flourishing of local arts and culture, and about more balanced exchanges between cultures of the world. This increased trade will be in the same types of products, with music, films, books and other cultural products moving back and forth across all borders.

The economics of cultural production are also different from other sectors in a number of ways, the most significant of which relates to the cost of each individual unit produced. The cost of the first copy of a work can be substantial, for example, the average production budget of a major Hollywood movie today is more than \$60 million, with promotion and advertising, the total cost exceeds \$100 million. However, each subsequent copy of the movie can be reproduced for only a few dollars. This is unlike virtually all other goods, where there is little difference between the cost of the first and each subsequent unit produced. For the movie, this means that when it is distributed into foreign markets, it can be sold at substantially different prices depending on the circumstances of each market. In most cases, it is sold at a price that is lower than the cost of production of a domestic alternative. A broadcast license fee for a U.S. television drama series in Canada can be hundreds of

thousands of dollars, whereas a broadcast license fee in Nigeria will be substantially less, perhaps only a thousand dollars, despite the larger potential audience in Nigeria. This type of disparity in price simply cannot exist for traditional goods where the cost of each additional product will be much closer to the first one produced.

Public policies and measures have been developed by many countries to level the playing field for domestic artists and cultural producers who have difficulty competing against the imported works. These policies generally favour local artists and producers and provide them with preferential benefits compared to foreign artists, producers and their works. The objective is to increase choice for consumers and to ensure that domestic cultural products can have some space in local markets. Some of these products can also become available in the global markets.

But, what some view as culture, others view as business, and what some view as promoting choice, others view as erecting barriers. When the WTO decision in the Canadian Periodicals Case was announced, the Office of the U.S. Trade Representative said that the case “has nothing to do with culture. This is purely a matter of commercial interest.”

As the Canadian Periodicals Case reveals, writers, editors and illustrators provide services to a publisher, who transforms this work into a concrete form. The WTO trade panel and appellate body found that the magazine is a good, the trade in which has been covered by the GATT since 1947. One of the few exemptions from the original GATT was for cinema screen quotas, a clear indication that films are a good. The articles, advertisements and pictures in the magazines are services covered by the General Agreement on Trade in Services, and its obligations apply in certain respects.

The two most significant principles of international trade law are National Treatment (NT) and Most Favoured Nation (MFN) treatment. To one degree or another, these principles apply to all trade and investment agreements, whether they are bilateral or multilateral, whether they cover goods or services. We will now examine how they come into play in the WTO agreements and how they intersect with cultural policies.

The GATT covers virtually all trade in goods between the member States. It is sometimes known as a top-down agreement, since it applies to all goods and all government measures affecting trade in goods, except those which are explicitly excluded in the agreement itself, or are reserved explicitly by a member State if the GATT allows it in the circumstances. The GATS is structured differently. While it covers all services sectors, the full disciplines of the Agreement apply only to those services sectors which a State decides specifically to include, or to commit. Thus, it is sometimes known as a bottom-up agreement. Certain GATS obligations, such as transparency, which is the requirement for States to make public all of the rules and

regulations that can affect a service, apply to all services, whether they have been committed or not. These obligations are known as horizontal commitments.

National Treatment (NT) obligations under the GATT, and for service sectors that have been committed under the GATS, require that WTO members accord to the goods and services of all other WTO members non-discriminatory treatment relative to those produced domestically. Essentially, this means that member States must treat foreign suppliers identically to their own nationals.

Most Favoured Nation (MFN) under the GATS requires that, if a member provides preferential treatment to the services of any other WTO member, it must provide identical treatment to all other WTO members for those services. It is a horizontal commitment that applies to all services sectors, whether or not the member has committed the sector.

Cultural Policies and Trade Agreements Come into Conflict

Government cultural policy measures vary greatly and can be anything from direct financial support for individual creators, subsidies of arts and crafts businesses, preferential tax rules, restrictions on foreign ownership of domestic cultural businesses or properties, content quotas, public institutions, production subsidies, regulatory measures, support of cultural industries, use of competition policies, and many others. All of these are “government measures” as defined in the trade agreements and most are limited in application to domestic citizens and firms, or provided reciprocally to nationals of other countries.

Prima facie, many of these cultural policies would appear to be contrary to National Treatment obligations, since they discriminate in favour of domestic artists and producers. Thus, from the beginning of the multilateral trading system, the issue of whether or not cultural goods and services are covered, or should be covered, has been a sensitive one. When the WTO trade panel ruled that magazines are a good, they found that Canada’s magazine policies discriminated against foreign goods and concluded that Canada had violated its commitment to provide National Treatment.

Under the GATS agreement, the MFN provision is a horizontal commitment and applies to all services sectors, whether a member State has committed that sector or not. When GATS was implemented in 1995, this provision affected film and television co-production treaties. A number of countries have concluded such treaties to encourage partnerships between producers from specific countries, for example among the members of the *Organisation Internationale de la Francophonie*. Since they provide that producers from partner countries are treated more favourably than producers from other countries, generally equivalent to nationals, they violate MFN treatment.

States which maintain co-production treaties responded to this problem by taking a reservation against the NT obligation for these treaties, as they are permitted to do under the terms of the GATS. Thus, co-production treaties were listed as being not in conformity with NT obligations when the GATS came into force.

Special rules apply to non-conforming measures. While States have a right to withdraw from co-production treaties and thus to treat all foreign film and television producers equally, the treaties cannot be changed in a way that would make them less conforming. As a consequence, States might be unable to expand the scope of their co-production treaties to include digital media productions and they would be unable to conclude treaties with new partners. Furthermore, an underlying principle of the GATS is to seek progressively higher level of liberalisation and, when the GATS was implemented, it was agreed that MFN reservations were to be reconsidered in 2005. Negotiations on the continuation of MFN reservations are continuing in early 2006.

It is also critical to note that cultural policies are susceptible to services commitments made in other fields as well as to changes made to the horizontal commitments. If a State commits its distribution, telecommunications or computer and related services, it may be restricting its ability to implement policies and measures dealing with the cultural goods and services that are produced, distributed or transmitted through these services sectors. If negotiations on domestic regulations result in new horizontal commitments, these would apply to cultural services, whether States have committed them or not.

Technology is rapidly changing the way that cultural goods and services are created, produced, distributed, exhibited and preserved. Digitally-produced television programmes are now being delivered to handheld devices, often by telephone companies. In many countries, telephone companies are now competing with cable and satellite companies to supply a range of voice, data and entertainment services. In Japan, it is already the case that 59 percent of cell phone airtime is used to access entertainment content. In popular music, downloading to personal devices is now the most common form of distribution in western countries. Convergence of telecom, information technology, the Internet, media and entertainment, is here and changing dramatically the way we live.

But all of this means that commitments States may take in telecommunications services or with respect to electronic commerce may limit their ability to introduce policies that promote local artists and cultural producers. For example, if a State were to commit its telecommunications services under the GATS, it may be unable to apply content quotas on television programmes delivered to handheld devices by a telephone company. Beginning with the free trade agreement it negotiated with Chile, the U.S. has reached agreement bilaterally on clauses that prohibit or limit the introduction of measures that would regulate goods or services produced, stored or

transmitted digitally. Of course, this includes virtually all movies, music, television programmes, books and magazines. Discussions and commitments around electronic commerce may affect the right of States to regulate the electronic distribution of music, or films.

The Convention Concept Emerges and Gains Support

Key players in the Canadian cultural community and cultural industries looked at all these developments and realized that the battle to maintain a cultural exception was futile. The pressure for progressively higher levels of liberalisation is a fundamental part of the free trade philosophy and would continue to affect cultural policies both directly and indirectly. Even if language carving out “culture” could be included into agreements, technology was eroding the protection. They began to explore a new approach.

In February 1999, the Cultural Industries SAGIT (Sectoral Advisory Group on International Trade), a private sector advisory panel to the Canadian government, issued a report calling for the development of a new international cultural instrument that would:

- acknowledge the importance of cultural diversity;
- establish rules on what kinds of measures countries could use to protect that diversity; and
- establish how trade disciplines and measures adopted in conformity with these rules would co-exist.

The Canadian government adopted the recommendation in October 1999. From this beginning, the idea of drafting a convention on cultural diversity burst onto the global scene.

Over the next few years a number of industrialised countries embraced the convention proposal and France became a leading proponent. They saw in it a means of protecting their own cultural industries by removing trade in cultural goods and services from the ambit of the trade and investment agreements, the same reason it had been put forward by Canada. It would confirm the right of countries to maintain content quotas and to subsidise cultural producers.

What was perhaps surprising was that countries which do not have well-developed cultural industries also embraced the concept for other, complementary, reasons. The challenges of globalisation and the threat of cultural homogenisation are differently experienced in countries that are struggling to develop their own cultural capacity in the face of an avalanche of imported cultural products that arrive from a handful of countries, some nearby and some far away. They are attempting to promote their own

artists and cultural producers in an environment in which government cultural policies are generally not well developed and few public financial resources can be directed to these activities. Unfortunately, in most developing countries, the predominant view is that arts and culture are a frill that must take a back seat to basic public health and economic development concerns. Culture ministers in most countries are marginal players in the political process, with far less influence over government policy than trade and finance officials.

When representatives from the developing world and least developed countries examined the concept of the convention, many considered it as an opportunity. They saw the convention not primarily as a defensive instrument, since they do not have established industries to protect, but as a tool to promote cultural policies and encourage cultural development. If the industrialised nations of the north were serious about promoting more balanced exchanges between cultures, this implied an understanding of the need to encourage countries which are rich in cultural traditions, stories and music, but lack the resources needed to make these available in the forms consumed in the north. Non-governmental organisations saw that, if the convention were to catalogue measures that states can utilize to promote local artists and cultural producers, this would become a positive model of cultural policies to which they could aspire, and for which they could advocate with their own governments.

Civil Society Groups Take the Lead in Promoting the Convention

From the beginning, civil society groups have been in the forefront of the campaign. The leading advocate has been the International Network for Cultural Diversity (INCD), launched in 1998. INCD is a worldwide network working to counter the adverse affects of economic globalisation on world cultures. Cultural organisations, artists and cultural producers from every media, academics, heritage institutions and others in more than 70 countries are now joined together around fundamental principles which motivate and guide INCD's campaigns to promote cultural diversity, cultural development and increased exchanges between cultures.

At its founding meeting in Santorini, Greece, in 2000, the INCD endorsed the proposed convention. At its 2001 meeting in Lucerne, Switzerland, it put forward basic principles and objectives for the convention and in early 2002 it published the first text of a possible convention to demonstrate its potential. When UNESCO decided to take on the task of developing the terms of a legally-binding treaty, INCD offered specific proposals and language to the expert panel that had been asked by the Director General to draft an initial version for UNESCO's consideration. INCD was an active participant throughout the 2004-2005 negotiating process, both at the intergovernmental meetings and in written communications to member States and delegates.

A key element of INCD's submissions concerned the basic objectives the convention should achieve, which responded to the full range of issues being raised by its widely dispersed membership. These were expressed in the following way in a submission the INCD put forward to the UNESCO intergovernmental meeting in 2005:

1. *The status of the convention must be equivalent to the trade and investment agreements and must prevail where the Parties are considering cultural policies and cultural diversity.* This was an essential objective since the core challenge to which the convention was meant to respond was the erosion of cultural sovereignty by commitments made in the context of trade and investment negotiations.
2. *The convention must be an effective tool for countries of the South to develop their creative capacity and cultural industries.* The proponents of the convention in countries of the global south supported the convention primarily because they saw it as an instrument to promote cultural development. This position was widely endorsed because others believe that cultural diversity will not be achieved until there is more balanced exchange between all cultures and this requires a development strategy.
3. *The convention must confirm the right of States to implement the policies to promote culture and cultural diversity that they deem appropriate. It must also acknowledge the broad scope of policy tools that are used to promote cultural diversity, and preserve the right of governments to adapt and adopt new ones in the coming years as circumstances require.* The primary purpose of the convention is to confirm the sovereign right of states to take action. Since GATS commitments that states make in distribution, telecommunications, e-commerce and other services can have an impact on policies that promote local artists and cultural producers, particularly as technology changes the way that cultural products are created, produced, distributed, exhibited and preserved, the scope of the convention must be broad.
4. *The convention must confirm the vital role of the creative sector, in particular artists, and enable players in the sector to counter the homogenising effects of globalisation on culture.* The role of artists and other creative participants in the production cycle is central to promoting cultural diversity. Proponents believe that the convention must acknowledge this and also provide a formal role for civil society in its administrative mechanisms.

These objectives constitute a check-list against which the final text could be judged.

INCD was not the only civil society organisation promoting the proposed convention. The Coalitions for Cultural Diversity, national coalitions of cultural professional organisations launched in more than 30 countries, have also been involved in the debate. The first Coalition was created as a national organisation in Canada in 1999. The international liaison committee of these coalitions was an advocate for the convention and a participant in the UNESCO process. Canada's Cultural Industries SAGIT prepared and circulated its own draft convention in 2003.

During the UNESCO intergovernmental committee process negotiating the text of the convention, a wide range of other non-governmental organisations joined the campaign and worked to make the convention text as effective as possible. Most of these NGOs were coordinated by the UNESCO NGO Liaison Committee, which played an active and positive role.

The Convention Comes to Life

Culture ministers organised in the International Network on Cultural Policy (INCP) took up the campaign in 2002. They also developed principles for a convention and published a draft in early 2003. They were instrumental in convincing UNESCO to take on the task of elaborating the terms of a legally-binding treaty, which was agreed at the 2003 General Conference. UNESCO then launched a two-year process to develop a text. The outcome of this work is a convention adopted in a near unanimous vote at the UNESCO General Conference in October 2005. It has a standard form for international agreements and takes much of its administrative language from other UNESCO instruments.

Introductory Clauses

The Preamble introduces the reasons for drafting a legally-binding instrument and outlines key developments affecting the exchange of cultural goods and services and international cultural cooperation. The Preamble notes that the processes of globalisation can both enhance interaction between cultures and challenge cultural diversity; reaffirms the fundamental importance of respect for human rights; acknowledges the need for greater cultural interaction; acknowledges that diversity is strengthened by the free flow of ideas, as well as freedom of thought, expression and information, and diversity of the media; and emphasize the need to preserve cultural and linguistic diversity as the common heritage of humanity.

The Objectives outline the main goals and primary focus of the Convention. The most important include the protection and promotion of the diversity of cultural expressions; recognition of the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning; recognition of the link between

culture and development; strengthening international cooperation to enhance the capacity of developing countries; and reaffirmation of the sovereign right of states to maintain, adopt and implement cultural policies.

The Guiding Principles are significant since they provide a legal framework for the substantive rights and obligations found in the Convention. The strongest of these have been made operational elsewhere in the text and certain others may act as a limitation on the rights. The principles are:

- respect for human rights and fundamental freedoms;
- sovereignty of states to adopt measures and policies;
- equal dignity and respect for all cultures;
- international solidarity and cooperation;
- recognition that the cultural aspects of development are as important as the economic aspects;
- acknowledgment that protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable cultural development;
- equitable access; and
- openness and balance.

The need to respect human rights and fundamental freedoms provides a strong and necessary limit on the sovereign right of states to implement policies and measures. It has been confirmed in Article 5.1, the general provision respecting the scope of governmental authority.

The principle of “openness and balance” may also act as a limitation, although it appears nowhere else in the Convention. The text provides that when they introduce measures, states should “seek to promote, in an appropriate manner, openness to other cultures,” and “to ensure that [measures they adopt] are geared to the objectives,” of the Convention. The concept of “openness” is a potentially important one since many fear that the Convention could be used to justify a closed society denying access to all foreign cultural products. The concept of “balance” in an international instrument normally prevents states from introducing a measure wildly disproportionate to the scope of the problem they are addressing, using the instrument as a justification. While the word “balance” appears in the title, the use of the term “geared to” in the body of the Article sends a different signal that is somewhat unclear.

What began as a statement of the right of individuals to have choice in cultural products was transformed into a principle of “equitable access”. In this process, what would have been a powerful limitation on the sovereign right of states was confused and weakened in the push to achieve a consensus, by the introduction of additional elements:

“Equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding.”

Elements of the principle are found elsewhere in the text. Article 7.1 provides that states “shall endeavour” to create “an environment which encourages individuals and social groups ... to have access to diverse cultural expressions from within their territory as well as from other countries of the world.” Article 2.1 provides that guaranteeing the “ability of individuals to choose cultural expressions,” is a fundamental principle in protecting and promoting cultural diversity.

Scope and Definitions

The Scope of the Convention is broad, it “shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions.” It is importantly not focused exclusively on “cultural” policies.

The most important Definition is certainly the definition of cultural activities, goods and services, as things which “embody or convey cultural expressions, irrespective of the commercial value they may have.” This is the first time that this dual nature of cultural goods and services is recognised in an international legal instrument.

The definition of cultural policies and measures is also significant. It is broad, referring to “those policies and measures relating to culture ... that are either focused on culture as such, or are designed to have a direct effect on cultural expressions ... including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.”

The definition of cultural expressions, significant for the operative provisions of the Convention, is: “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.” Cultural content in turn “refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.”

The definitions as a whole draw an effective perimeter around the Convention and confirm that it is dealing with a portion of the intellectual output of a society. Importantly, the Convention is not attempting to deal with agriculture, biodiversity, or other issues which can be considered part of “culture” in the anthropological sense.

Rights and Obligations of Parties

The heart of the Convention is the fifteen Articles which provide the rights and obligations of the Parties. The accent is on rights, rather than obligations, and the overriding focus is on the sovereign right of states to adopt policies and measures they deem appropriate to protect and promote cultural diversity.

This operational part of the Convention includes Articles about the extent of rights that Parties have at national level, the need for information sharing and requirements to implement educational campaigns to promote public awareness. There is also an Article which attempts to address the “special situations where cultural expressions ... are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.”

With only a couple of exceptions, the rights are expressed in the discretionary form, “Parties may” take certain actions favouring cultural diversity, rather than the obligatory form, “Parties shall.”

Article 6 is significant since it is specific about the nature of measures that a Party may employ to protect and promote the diversity of cultural expressions within its territory. These include:

- regulatory measures;
- measures that “provide opportunities for domestic cultural activities, goods and services” within the overall market, including “provisions related to the language used for such cultural activities, goods and services”;
- public financial assistance;
- public institutions;
- measures aimed at supporting artists and others involved in the creative process;
- measures aimed at enhancing diversity in the media, including through public service broadcasting;
- measures aimed at ensuring access for domestic cultural industries; and
- measures which promote the “free exchange and circulation” of ideas and cultural expressions and which stimulate the “creative and entrepreneurial spirit.”

Article 9 provides that Parties shall exchange information, report to UNESCO and “designate a point of contact responsible for information sharing.” While the title includes the word “transparency,” there is no obligation for measures to be made public. Article 10 provides that Parties “shall” implement educational and other programs to promote understanding. Article 11 provides that Parties acknowledge the

role and “shall encourage” the active participation of civil society in the protection and promotion of cultural diversity.

Articles 12 to 18 concern the promotion of international cooperation. Parties agreed on the need to integrate culture in sustainable development; to cooperate for development, including through technology transfers, capacity building and financial support; to encourage collaborative arrangements; and to assist each other where there is a “serious threat to cultural expressions.” There is agreement on the need to increase capacity in the public sector, public institutions, the private sector, civil society and non-governmental organisations, all of which have a role to play in fostering the diversity of cultural expressions.

The objective of the cooperation is to “foster the emergence of a dynamic cultural sector.” The tools to be used include:

- Strengthening the cultural industries through increasing production and distribution capacity, wider access to global markets, encouraging local markets, supporting creative work and facilitating the mobility of artists from the developing world and encouraging collaboration between the North and South.
- Capacity building through information, training and skills development.
- Incentives to encourage technology transfers.
- Financial support to be delivered through a new International Fund for Cultural Diversity.

Innovative wording is found in Article 16 which provides that developed countries “shall facilitate cultural exchanges with developing countries by granting through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.” Article 18 establishes the Fund. Despite the strong push from developing countries, contributions to the Fund are voluntary and not obligatory.

In the key Articles on international cooperation, the language provides that parties “shall endeavour to” achieve the goals of the Article. In other words, they need only make an effort to achieve the objective or to introduce the measure. There are three cases where the language is obligatory rather than discretionary. Article 15 provides that Parties “shall encourage” collaborative arrangements involving the private sector and civil society, Article 16 provides that Parties “shall facilitate cultural exchanges,” and Article 17 states that Parties “shall cooperate” if a state determines that certain “cultural expressions ... are at risk of extinction, under serious threat, or otherwise in need of safeguarding.”

Relationship to Other Instruments

Articles 20 and 21 regulate the relationship of this Convention to other international instruments. This was the most debated issue and the compromise solution was reached at the last moment. The solution is based on the principles of “mutual supportiveness, complementarity and non-subordination,” wording found in the title of the Article.

There is innovative wording in Article 20 which provides that “when interpreting and applying” other treaties or “when entering into other international obligations,” Parties “shall take into account the relevant provisions of this Convention.” This is a strong provision and the first time in international law that Parties agree to use one instrument as an interpretive tool when negotiating or applying others. It is reinforced by Article 21 which commits Parties to work together to promote the principles of the Convention in other international fora.

However, this language would appear to be circumscribed by Article 20.2 which states, “Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”

Organs of the Convention

The final articles outline the functional aspects of the Convention and establish a dispute settlement system.

The governing body of the Convention will be a Conference of Parties which is generally to be held at the same time as a UNESCO General Conference. The Conference will elect a regionally-balanced Intergovernmental Committee which will meet annually to review the operation of the Convention. UNESCO’s Secretariat will provide the necessary administrative support, including the information collection, sharing and analysis.

In case of a dispute between Parties about the interpretation or application of the Convention, the Parties agree first to attempt to resolve it directly through negotiations, failing which they may jointly request mediation by a third party. A compromise solution about what happens in case this process is unsuccessful provides that either party to a dispute may invoke a conciliation process. However, the report of the conciliation commission is not binding, it has only to be considered “in good faith” by the parties. In addition, when ratifying the Convention, a party may take a reservation against this Article and declare that it will not be covered by the dispute settlement system.

Beside states, regional economic integration organisations can also become a party to the Convention. There must be an explicit statement of how responsibilities are divided between the organisation and its constituent parts. A federal clause provides that the Convention is binding on the central government where it has jurisdiction, but is only to be recommended to the sub-national government where it has jurisdiction over the matters addressed by the Convention.

The Convention comes into force three months following the deposit of the thirtieth instrument of ratification. Ratification by regional economic integration organisations is not counted as additional to those deposited by Member States of such organisation.

Convention Proponents Celebrate a Victory

As soon as the draft convention was adopted by the Intergovernmental meeting in June 2005, negotiating parties and many of the NGOs concerned with the issue celebrated a victory.

The adoption of the Convention is regarded by most as an important step forward for the international movement for the protection and promotion of cultural diversity. The negotiations were completed within the timeframe set by the 2003 General Conference, which is remarkable given its controversial nature. A large majority of UNESCO Member States advocated for respecting the initial deadline, and the negotiations were completed with a broad consensus and few reservations. The final vote on the Convention in October had 148 States in favour, with only two opposed and four abstaining.

The Convention should have political importance. With the innovative wording of Article 20, and a political consensus achieved by such a large number of countries, there may be a different treatment and improved position for culture in other international discussions and negotiations. Signatories will be obliged to take into account the relevant provisions of this Convention when interpreting and applying the other treaties to which they are parties or when entering into other international obligations. This should help to put cultural objectives on an equal footing with other public policy priorities and improve the position of culture in international law.

Having put a huge effort into negotiating and adopting the provisions of the Convention, it is anticipated governments will work to have it ratified by a sufficient number of states in the near future. This will create a favourable environment for reflecting on current trends in cultural exchanges and cultural development, and considering opportunities for new instruments and measures to help achieve the objectives of the Convention.

The concept of the Convention was embraced by countries of the South, as well as those of the North, countries having different cultural systems, those with developed cultural industries, as well as those which are struggling to provide basic support to domestic artists and cultural producers. Regardless of their ability to fund, support and develop their cultures, governments recognised the fundamental importance of creating a legal framework. By enunciating the measures that Parties can use to protect and promote cultural diversity, the Convention can become a benchmark against which countries and their citizens can measure their own cultural policies.

Has the Convention Achieved its Promise?

In order to assess the extent to which the Convention has achieved its promise, it is necessary to determine what it is that the Convention was to have done. During the negotiating process, only the INCD offered a coherent list of fundamental objectives for the Convention, and it is useful to evaluate the final outcome against those objectives.

When the negotiating process concluded in June 2005, the INCD was less enthusiastic of the final text than other key participants. It issued a press release stating:

“If the objective of the new Treaty is to declare the right of States to implement cultural policies and to establish a new foundation for future cooperation, the Treaty has succeeded. If the objective is to carve out cultural goods and services from the trade agreements, the Treaty is inadequate, at least in the short term.”

INCD Objective I

The status of the Convention must be equivalent to the trade and investment agreements and must prevail where the Parties are considering cultural policies and cultural diversity.

The primary reason the concept of a legally-binding instrument on cultural diversity was developed was to get beyond the “cultural exception,” which has proven inadequate in the context of free trade negotiations. The proponents sought to create a situation where rules governing trade in cultural goods and services would be developed by cultural experts and disputes about these matters would be adjudicated in a cultural forum rather than under the trade and investment agreements.

While the ambiguous wording of Article 20 is likely the best that could have been achieved, it does not provide the clarity necessary to prevent further erosion of cultural sovereignty, let alone to begin the difficult process of rolling-back the extensive influence of the WTO and other bilateral and multilateral agreements.

Further, while the Convention is very strong and explicit in reaffirming the “rights” of sovereign states to adopt various measures and regulate policies in favour of cultural diversity within their territory, it does not provide correspondingly strong “obligations” on members to use these rights to achieve the agreed objectives. The strength of the WTO agreements arises from the fact States have made specific and concrete commitments to each other, the dispute settlement system is obligatory and the decisions are enforceable. The UNESCO convention falls well short of this standard.

In the Articles of the Convention which enunciate the mechanisms states can utilize to protect and promote cultural diversity, the language is generally the discretionary “may,” rather than the obligatory “shall.” Parties are thus free to define the challenges in their own territories and to respond to these with cultural policies, or to refrain from responding at all. It is entirely within their authority to determine if a particular form of cultural expression is at risk of extinction, there is no room for another Party, a human rights organisation or any third party to raise issues in this respect. In the area of international cooperation, Parties are generally obligated merely “to endeavour” to accomplish the objectives, they are under no statutory obligation to take any of the proposed actions.

If there is no obligation on a Party to act in a certain way, there can be no dispute about any failure to take action.

In the absence of statutory obligations, one might ask whether there are limits on the sovereign rights of Parties, since such limits could give rise to a dispute as a consequence of the provisions of Article 5.2. This provides that when a Party takes action, “its policies and measures shall be consistent with the provisions of this Convention.”

The strongest limit on the sovereign rights is the obligation to respect fundamental human rights. This is found in the Preamble and is explicitly contained in Article 5 which reaffirms the sovereign right of Parties to adopt measures to protect and promote the diversity of cultural expressions. The strongest confirmation is in the Guiding Principles:

“Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.”

These provisions create the possibility that a Party could object to a policy or measure of another Party on the grounds that it violates the fundamental human rights

of individuals. The Universal Declaration of Human Rights guarantees, among many other things, the right to “freedom of opinion or expression;” the right “to seek, receive and impart information and ideas through any media and regardless of frontiers;” and the right “freely to participate in the cultural life of the community [and] to enjoy the arts”

A dispute launched on this basis would have a large hurdle to overcome. The Party against which the dispute is launched would argue that the Convention confirms explicitly and repeatedly that it is free to identify the challenges in its own territory and to implement such measures as it sees fit to respond to these challenges. It is even solely responsible for defining whether or not a form of cultural expression on its territory is at risk. Thus, a complaint that a particular measure violates the human rights of individuals in the country which has implemented that measure, is likely to fail outright. A complaint that a particular measure violates the human rights of individuals in the country launching the complaint, for example as being a violation of the right to “impart information and ideas,” has a slightly greater chance of being considered.

Should either type of a dispute be launched, the Parties would be obligated to “seek a solution by negotiation,” or jointly to request mediation. But there is no obligation on the Party against which the challenge is made to participate in any form of binding dispute settlement, or to implement any decision of a Conciliation Commission. In the end, the dispute settlement system is not obligatory, binding or enforceable.

It bears repeating that third parties have no ability to launch a complaint and no standing in the process. Thus, civil society organisations, including the strongest supporters of human rights, can have no say. Only another Party to the convention can file a complaint.

The other concrete limitation on the sovereign right of Parties to do whatever they want in the cultural diversity field may arise from the provisions concerning “access and openness.” The Guiding Principle above covers “the ability of individuals to choose cultural expressions,” another provides that Parties “should seek to promote, in an appropriate manner, openness to other cultures of the world,” and still another provides there should be “equal dignity and respect for all cultures.” Article 7 provides that Parties shall endeavour to create an environment which “encourages individuals and social groups ... to have access to diverse cultural expressions from within their territory as well as from other countries of the world.”

Using a hypothetical example of a measure introduced by one Party which expressly prohibits the importation of cultural expressions from another Party, these provisions may create an opportunity for the aggrieved Party to object. *Prima facie*,

such measures would appear to contradict several objectives of the Convention and thus to be in violation of Article 5.2.

Assuming that the Party which introduced the measure has not taken a reservation against the dispute settlement system when it ratified the Convention, a dispute could be launched. That Party would no doubt defend its exclusionary measure by pointing to the numerous articles which enunciate the right of Parties to introduce whatever measures they need to protect and promote cultural diversity within their own territory. While a panel of objective cultural policy experts appointed to a Conciliation Commission may be inclined to find that such a measure is contrary to the spirit of promoting cultural diversity, any proposal they put forward is not binding, it needs only to be considered by the parties "in good faith".

What would be the outcome of the Canada Periodicals Case if the Convention had been in place?

Given the genesis of the convention concept was the decision of the WTO in the Canada Periodicals Case, it is instructive to consider how that case may have been adjudicated if the Convention had been in place. To begin this analysis, it is assumed that the Convention has been ratified by a reasonable number of countries and has been implemented. It is also assumed that Canada's magazine measures are identical to those considered by the WTO panel and that the U.S. action is identical to the one it took earlier.

The first scenario further assumes the U.S. will not join the Convention, which is almost certainly to be the case, since the U.S. opposed the Convention at each stage of the process and voted against it at the General Conference. A number of senior administration officials, including Dana Gioia, Chairman of the National Endowment for the Arts and Secretary of State Condeleezza Rice have spoken publicly against it, as has Dan Glickman, Chairman and CEO of the Motion Picture Association of America.

The outcome of the U.S. action would have to be identical to the earlier WTO decision.

Because the United States is not party to the Convention, there is nothing in it that could in any way affect the rights it has under the WTO Agreements, nor affect the obligations that Canada has assumed relative to the U.S. under those agreements. At best, Canada could wave the Convention before the trade panel and argue that international law now confirms its right to implement cultural policies. The panel and appellate body would, however, reach an identical conclusion to 1997, since there is nothing that could alter the reasoning of those decisions.

The second scenario, however unlikely from a practical perspective but crucial from a theoretical perspective, would have the new periodicals case re-considered with the U.S. as a Party to the UNESCO Convention.

Unfortunately, there is every reason to believe that the outcome would be identical to the earlier scenario.

Canada would use Article 20.1(b) and argue that the U.S. and Canada have agreed to interpret other treaties taking into account the relevant provisions of the Convention. Canada would argue that Article 5.1 confirms the right of Canada to formulate and implement cultural policies and otherwise to adopt measures to protect and promote the diversity of cultural expressions. It would argue that magazines are goods and services that are “cultural expressions” containing “cultural content” as defined in the Convention, and that Canada has a sovereign right to introduce such policies and measures that it determines are necessary to promote Canadian magazines.

Canada would point to Article 6.2(a) and (b), which specifically authorise the use of regulatory measures and “measures that provide opportunities for domestic activities, goods and services” among all those available in Canada. Canada would argue that its magazine support measures are thus fully in conformity with the Convention, since they do not violate any of its provisions, including the limitations around respect for human rights, openness and access. Canada could unilaterally launch a dispute under the Convention and seek a Conciliation Commission report to support its position.

In this hypothetical scenario, the United States could still argue that Canadian and U.S. magazines are “like products.” This argument would have to be rejected by the trade panel, since the U.S. will have agreed to a convention under which a strong argument can be made about magazines as “cultural products.” This is likely to be confirmed by a Conciliation Commission report under the Convention. However, it is critical to recall that the WTO appellate body did not uphold the trade panel’s finding that Canadian and U.S. magazines are “like products,” finding instead that the examples used were “directly competitive and substitutable in spite of the ‘Canadian’ content.” In other words, they are distinct from each other and could be considered “cultural expressions” within the meaning of the Convention on cultural diversity, but they are nonetheless competitive for purposes of obligations states have assumed under the GATT.

The United States would further argue that Article 20.2 precludes the parties from interpreting the Convention in a manner that would modify their rights and obligations under other treaties.

Thus, the trade panel and the appellate body would be presented with a convenient way to resolve the apparent contradiction between Article 20.1(b) and Article 20.2 of the UNESCO Convention. They could confirm that Canada does have a sovereign right to implement policies respecting magazines as cultural expressions, but to confirm also that there is nothing in the Convention that prevents Canada from agreeing to limit its sovereign right through commitments it makes under other treaties.

Therefore, the WTO panel could reasonably find that Canada is free to support its magazines, but it must do so in a manner that is consistent with the commitments it has made to the United States under the WTO agreements. They could point to financial subsidies and content quotas as examples of the kind of policy tools that Canada could use to support its magazines that would be consistent with its GATT obligations. Other tools, such as the prohibition on the sale of advertising services directed solely to Canadians, except by Canadian publishers, which Canada introduced briefly after the initial WTO decision, are likely also to be acceptable, since they would be determined under a different GATT Article, where the narrower "like products" test would apply.

The second scenario gives far greater weight to the moral argument that Canada would put to the trade panel, since both it and the U.S. would be Parties to the Convention. However, this is unlikely to be sufficient to defeat a U.S. argument which conveniently resolves an apparent contradiction within the UNESCO Convention.

One must conclude that the language of the Convention fails to provide any immediate comfort for those seeking to reduce the threat to cultural policies from the trade and investment agreements. It is not the legal shield that its most ardent proponents wanted. Indeed, in a press release issued on 20 October 2005, the European Commission, one of the strongest proponents of the convention, explicitly acknowledges this reality:

"The Convention does not call WTO commitments into question. *There is no objective nor effect to remove or exclude cultural goods and services from the WTO agreements.* (Emphasis in original)....

"The Unesco (sic) Convention will not alter the WTO agreements (which is not possible in any case – only the Organisation's members can do this by following the established procedures) but will require parties to consider the objectives of cultural diversity and the terms of the Convention when applying and interpreting their trade obligations, as well as negotiating their trade commitments...."

When the terms of the Convention were concluded in June 2005, the Motion Picture Association of America seemed to take a similar approach. The Hollywood Reporter interviewed Bonnie Richardson, MPA vice president, who said she does not

believe there are any “immediate commercial ramifications from this [convention], nor do I believe it will lead to any immediate or even long-term decisions by governments to restrict Hollywood imports.”

However, there is hope in the longer term since Parties are obligated to work together in other fora to achieve the objectives of the Convention. Article 20.1(b) provides that “Parties shall take into account the relevant provisions of this Convention,” when they are “entering into other international obligations” and Article 21 provides that “Parties shall consult with each other” as they are working to promote the Convention’s objectives and principles in these other fora.

Thus, the Convention should provide a focus for continuing efforts to limit the application of the trade and investment agreements to cultural policies and to begin to roll back existing provisions that have restricted cultural policies in several countries. Further, while the efforts will have to be carried out in the other fora, such as the WTO, the Convention should also provide a forum for the coordination of these efforts.

UNESCO has a central role to play in determining how effective the Convention will be in this respect. Since the organisation will provide the secretariat for the Convention governing bodies, will be the focus of the exchange, analysis and dissemination of information, and will be responsible for convening the meetings of the governing bodies, it will be the focus of these collaborative efforts. If Article 20.1(b) and 21 are to have meaning, UNESCO must monitor bilateral and multilateral trade and investment agreements and the ongoing negotiations and provide this information to the Parties to the Convention so that they can implement their commitment.

The Convention was approved by an overwhelming vote and has been welcomed by a broad range of countries. There is clearly a political will to make it effective and if this translates into action, it may yet be possible to begin to carve out trade in cultural goods and services from the trade and investment agreements. In the same way WTO negotiators now regularly discuss the relationship between trade agreements and MEAs (Multilateral Environmental Agreements), in future they should be obligated to discuss the relationship between trade agreements and the CCD (Convention on Cultural Diversity). One can speculate that it is in response to these political considerations that the MPA changed its position on the convention’s potential impact.

Clearly, civil society also has an important role to play. If it continues to raise awareness of the ongoing problems, and challenges the Convention’s signatories and UNESCO to live up to the commitments in Articles 20 and 21, the issues will be kept on the agenda.

INCD Objective II

The Convention must be an effective tool for countries of the South to develop their creative capacity and cultural industries.

Although the ideas behind the Articles referring to international cooperation and cooperation for development were embraced by all negotiations, the wording is extremely weak. In the key provisions, states are obligated only to “endeavour” to do the things outlined; in other words, they only have to try.

Given the number of competing priorities for government spending, the absence of mandatory contributions and the fact UNESCO already has a similar fund, the creation of the International Fund for Cultural Diversity is unlikely to make a difference. Perhaps it can become a forum for the collection and exchange of information about best practices in cultural development, technology transfers and culture exchanges, or the home to a few significant individual projects. But, it is unlikely to become a primary vehicle for transferring significant resources from the North to South.

Because there are no concrete obligations on Parties to take actions in these areas, there are unlikely to be disputes between member states of the Convention. As with the cases discussed above, if any dispute could arise from one of the few commitments posed as mandatory rather than discretionary, it is unlikely to succeed because the dispute settlement is not binding in any case.

It would also appear that the innovative language of Article 16, which establishes that developing countries shall provide preferential access to their markets for the artists and cultural products from developing countries and is perhaps the strongest obligation on member states, will be difficult to enforce without appropriate data and statistics which would in a reliable manner compare market size and market share of a particular country or groups of countries. It is important also to note that several countries that supported the Convention also read into the record statements to the effect that this provision could not be interpreted as requiring them to change their current policies and practices relative to the importation of foreign works, or the cross border movement of artists.

While the rights of states to implement their cultural policies are reaffirmed, there is a legitimate concern about what can be done by countries that lack the resources to develop their cultural industries through cultural policies and subsidies. It is clear there could have been more incentives for countries of the South in the Convention.

While the Convention does not contain strong provisions obligating member states to collaborate to promote cultural development, it is an important political instrument.

Article 6 provides a shopping list of measures that other countries use to promote their local artists and cultural producers. Articles 12 to 18 outline ways in which developed countries should be assisting developing countries as they seek to increase their cultural capacity and build creative industries. Particularly if UNESCO is able to compile information on best practices, as provided in Article 19, the Convention and accompanying information sharing will establish benchmarks to which states can aspire and against which they can be judged.

This would be a useful advocacy tool for civil society organisations in the south which are working to promote cultural development and for their government officials responsible for cultural policy. In developing countries, civil society groups can use the commitments as an advocacy tool and can appeal to the moral obligation states have assumed to take the actions contemplated by these articles.

Finally, the market access requirements of Article 16 should be pursued aggressively by interested parties. Member states of the Convention should be challenged to introduce new and creative measures to provide access to their markets for cultural products and artists from the south.

INCD Objective III

The Convention must confirm the right of States to implement the policies to promote culture and cultural diversity that they deem appropriate. It must also acknowledge the broad scope of policy tools that are used to promote cultural diversity, and preserve the right of governments to adapt and adopt new ones in the coming years as circumstances require.

The Convention has achieved this objective. The right of Parties to develop, implement and amend policies that affect the diversity of cultural expressions is the central focus of the Convention. It appears as an Objective, a Principle and is the centrepiece of the operative provisions of the Convention. The Scope of the Convention is very broad and the definitions should be adequate to ensure that future policy measures fall under the provisions, regardless of the technologies in use at the time.

If a Party enacts policies in telecommunications, e-commerce, or retail and distribution services in order to protect or promote cultural diversity, these would be considered cultural policies as long as they “are either focused on culture as such, or are designed to have a direct effect on cultural expressions.” Regulations which require telephone companies to ensure that some domestic television shows are available to subscribers using hand held units would no doubt be considered to be measures “related to the protection and the promotion of the diversity of cultural expressions” and thus fully compliant with the Convention. Similarly, if a Party has laws or regulations limiting media concentration or restricting foreign ownership, or

if it uses competition laws to regulate anti-competitive behaviour by giant international entertainment companies operating in their market, such measures would fall within the parameters of the Convention, as long as they are designed to have a direct effect on the availability of cultural expressions.

INCD Objective IV

The Convention must confirm the vital role of the creative sector, in particular artists, and enable players in the sector to counter the homogenising effects of globalisation on culture.

Within the range of measures enunciated in Article 6, Parties may adopt “measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions.” Parties have also agreed to “endeavour to create an environment that encourages individuals and social groups (a) to create, produce, disseminate, distribute and have access to their own cultural expressions.” Article 7 also commits Parties to “endeavour to recognize the important contribution of artists, others involved in the creative process ... and their central role in nurturing the diversity of cultural expressions.”

The article on Participation of Civil Society is also relevant here. Parties both acknowledge the fundamental role of civil society and agree to encourage its active participation.

Finally, in the articles addressing international cooperation, Parties commit to working to strengthen “cultural production and distribution capacities in developing countries;” to provide “support for creative work;” to facilitate the mobility of artists from developing countries; and to promote collaborative arrangements to build capacity. Article 16 provides that developed countries shall provide “preferential treatment to artists and other cultural professionals and practitioners.”

While these provisions are useful, the commitments are generally not obligatory on the Parties to the Convention and thus there is no guarantee they will be acted upon. However, the Convention can be seen as an important political tool in these respects.

Conclusions

As envisaged by its original proponents, the Convention was to carve out trade in cultural goods and services from the trade and investment agreements; it was to be a legal shield. The concept of the Convention was embraced by civil society and governments in the South because they saw it as a potentially powerful tool to promote the development of cultural capacity and creative industries. INCD, the leading civil society advocate of the Convention, built on these views and enunciated

four basic objectives to mentioned and discussed above, which its members wanted the Convention to achieve.

The Convention adopted by UNESCO in October 2005 is an important political tool which confirms the right of states to take actions in support of their own artists and cultural producers, and in favour of cultural diversity. It confirms in international law the dual nature of cultural activities, goods and services, as having both economic and cultural value. The Convention defines the issues in a way that clarifies the challenges, and gives states the scope to respond to the changing technological and political environment. While it effectively remains subordinate to existing trade and investment agreements in the short term, it provides a focus and a forum for states to continue to work together and with civil society to achieve, in the longer-term, the objective of carving out cultural goods and services from the trade and investment agreements.

The Convention is also an important political tool for cultural development. By outlining a range of measures that states can take to promote their domestic cultural capacity, it can act as a model for countries which do not yet have developed cultural policies. Civil society groups can use it in their advocacy work. By enunciating detailed measures that developed countries should use to support the development of cultural capacity and creative industries in countries of the global South, it has established benchmarks for these countries to meet. It may well exercise moral persuasion on these states to undertake the actions contemplated.

Challenges and opportunities

There are certainly important challenges ahead. The first is to have the Convention ratified, not only by the minimum 30 countries required for the Convention to come into force, but by a sufficient number to demonstrate the existence of a strong international political will to tackle the problems, and to achieve more balanced exchanges between cultures. This requires the chief proponents, both within governments and civil society, to continue to collaborate to raise awareness of the challenges of globalisation and the opportunities afforded by the Convention.

UNESCO also has a critical role to play and the Convention's proponents will need to work to ensure it fulfills its responsibilities. UNESCO must encourage ratification, convene an early meeting of the Conference of Parties and the Intergovernmental Committee, and be proactive in collecting, analysing and sharing information. It must also be proactive in circulating information about the potential consequences of the ongoing multilateral trade negotiations.

In many respects, the UNESCO convention is a remarkable achievement. It went from conception to adopted text in less than a decade. However, it is only one small step in the long campaign to achieve cultural diversity. However flawed, it remains only a tool, which must now be wielded by its proponents and used to develop a range of initiatives, measures and activities that will bring about a flourishing of arts and cultural activities in every community, in every language and in every corner of the globe.

Chapter 4

Reflections on possible future legal implications of the Convention

Hélène Ruiz Fabri

It is well known that the prospect of further liberalisation of trade in goods and, especially, services within the context of the WTO heavily influenced the negotiation, in UNESCO, of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. A quick look back is enough to show that the development of the topic of cultural diversity and thinking on the formulation of a corresponding body of rules was largely, though not exclusively, linked with the failure of the “cultural exception” during the negotiations that led to the establishment of the WTO (not exclusively, because the question of cultural diversity is not confined to the problem of trade in cultural goods and services; largely because the modalities of this trade play an important part in the maintenance of cultural diversity). This prompted a shift away from the WTO in favour of an external international instrument capable of exerting an influence on WTO law. Thus, from the legal standpoint, the issue became one of relationship between rules of international law, it being understood that for such a solution to be credible the international instrument in question would have to have the same legal force as WTO law, that is to say, be binding. Thus, it was eventually decided to elaborate a full-fledged international convention.

This project ended in the adoption of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* by the UNESCO General Conference at its 33rd Session in October 2005¹. In the end, the elaboration process went quite quickly. Begun on the basis of the Action Plan that accompanied the

1 I do not propose to dwell on the various scenarios envisaged, whether they concern the place of the negotiations or their precise subject-matter, but see I. Bernier, H. Ruiz Fabri, *Evaluation de la faisabilité d'un instrument international sur la diversité culturelle*, Rapport pour le groupe de travail franco-québécois sur la diversité culturelle, Bibliothèque nationale du Québec, 2002, 50 p. and http://www.mcc.gouv.qc.ca/international/diversity-culturelle/106145_faisabilite.pdf

Universal Declaration on Cultural Diversity adopted in November 2001², it included a *Preliminary Study on the Technical and Legal Aspects relating to the Desirability of a Normative Instrument on Cultural Diversity* prepared by the UNESCO Director-General³ which set out the various options available. It was decided to opt for a binding instrument that would protect the diversity of cultural contents and artistic expressions⁴. Accordingly, in 2003⁵, the 32nd General Conference invited the Director-General to submit to its 33rd Session, in 2005, a preliminary report accompanied by a preliminary draft of a convention. The Director-General set up an international drafting group of independent experts and then, once this phase had been completed⁶, sent UNESCO's Member States his preliminary report, together with a preliminary draft text for comments and observations. This preliminary draft then formed the subject of negotiations conducted within the framework of three meetings of intergovernmental experts⁷ held in September 2004, January-February 2005 and May-June 2005, before the Executive Board recommended to the 33rd General Conference that the preliminary draft be converted into a draft and adopted, which it was by a very large majority of 148 votes to two⁸.

Thus, the text received very broad support, a reflection of the interest its negotiation had aroused. However, the rapidity of the process, a sign of the determination associated with the objectives it was supposed to help achieve, should not be allowed to obscure either the opposition expressed in the course of the negotiations – which did not always flow smoothly – or the fact that its future effectiveness depends on its being widely ratified by the UNESCO Member States. Moreover, the text, in its final version, needs to be evaluated with reference to the objectives themselves, in order to assess whether it can enable or duly facilitate their realisation.

It is in the nature of all negotiations, and these were no exception, to arrive at compromises which result in the provisions being toned down in varying degrees or

2 The Declaration itself invited UNESCO to pursue its activities in standard-setting, awareness-raising and capacity-building in the areas related to the present Declaration within its fields of competence 94 - article 12 (c). The first paragraph of the Action Plan also committed the Organization to 93 taking forward notably consideration of the advisability of an international legal instrument on cultural diversity.

3 Document 166 EX/28 of March 2003.

4 Decision 166 EX/3.4.3.

5 By Resolution 32 C/34 of 17 October 2003 adopted after examination of Document 32 C/52.

6 At the end of three so-called category VI meetings held between December 2003 and June 2004.

7 So-called category II meetings.

8 United States and Israel.

even rendered totally ineffective. Thus, formal success in obtaining a finally adopted text is not necessarily the same thing as substantive success in obtaining a text that makes it possible effectively to achieve the intended objectives. Almost inevitably, legal analysis leads to an assessment more qualified than that to be found in the political speeches, no matter whether they be made in favour or against the Convention. Although the Convention may not be the legal monstrosity deplored by the United States, neither is it an impenetrable shield against the decline of cultural diversity brought about by globalisation and the brutal liberalisation of trade. On the one hand, the subject-matter of the text, however important it may be, is limited and does not cover all the issues relating to the preservation of cultural diversity. Moreover, from the legal standpoint, the text is only weakly binding. Nevertheless, inasmuch as it provides legal support for the equal dignity of cultural concerns alongside other, especially commercial, concerns and gives the parties certain leverage, it possesses a considerable potential.

1. The subject-matter of the text

The Convention applies “to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions” (art. 3). Thus, it is not restricted to cultural policies, or policies described as such, and it gives precedence to a substantive approach, that is, an approach based on the content of the policies and measures rather than their formal description. This is the traditional way of doing things in international law while, at the same time, it prevents the subject-matter of the text from being too narrowly confined. Nevertheless, the text goes on to speak of “cultural policies and measures” (for example, in article 6) and gives a definition. However, this definition provides confirmation of a rather comprehensive approach since these terms are said to refer to “those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services”.

This choice of subject-matter has several aspects that merit closer attention. First of all, the text concerns the protection and promotion of the diversity of cultural expressions. Here the negotiators took up the suggestion made by the group of experts that prepared the preliminary draft to replace the notion of diversity of cultural contents and artistic expressions by the simpler notion of diversity of cultural expressions, defined as covering both the components previously envisaged. Nevertheless, to some extent, the evolution of the definitions in the course of the negotiations led to the reference to artistic creation creeping back in. Moreover, this

trend went hand in hand with the insertion of elements more closely linked with an anthropological conception of culture, in particular in the preamble to the Convention⁹. It remains true that, being focused on cultural expressions defined as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content”, cultural content itself being defined as referring to “the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities”, the text is essentially concerned with content, that is to say, the messages transmitted and not the precise forms or vehicles of expression.

However, and this is a particularly important point, it clarifies the meaning to be given to the notion of cultural goods and services, enriched by the incorporation of the term “activities”, by stressing, in particular, their inclusion “irrespective of the commercial value they may have”, which echoes the reference in the preamble to the “dual nature” of cultural goods, services and activities “because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value” and the recognition of the “distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning” mentioned among the objectives of the Convention¹⁰. This is not so much a normative statement as an acknowledgement whose importance should not be underestimated. On the one hand, it constitutes a precedent, whose significance will be the greater the more widely the Convention is ratified. On the other, it provides a basis for challenging an exclusively commercial treatment of cultural activities, goods and services.

Secondly, the text concerns both the protection and the promotion of the diversity of cultural expressions. We know that the use of the term “protection” gave rise to bitter discussions during the negotiations, ending in the insertion of a definition¹¹. This definition may be of dubious legal interest (although it could serve as a literal interpretation), but its presence reveals the underlying tensions between an approach that links the maintenance of cultural diversity almost exclusively to the development of the free circulation of cultural goods and services and one that allows for the need to intervene to regulate that circulation, or offset its effects. However, the incorporation of protection measures within the scope of the Convention does not signify the triumph of one approach over the other. On the contrary, the text invites a more subtle reading. Thus, where protection measures are considered separately, it is

9 Thus, “the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples” (8th recital), “[the] potential [of culture] for the enhancement of the status and role of women in society” (10th recital), the references to “traditional cultural expressions” (13th and 15th recitals), etc.

10 Article 1 (g)

11 “‘Protection’ means the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions. ‘Protect’ means to adopt such measures”.

in relation to “special situations where cultural expressions, on [the] territory [of the Party concerned], are at risk of extinction, under serious threat or otherwise in need of urgent safeguarding”¹². Otherwise, protection is always considered alongside promotion, which broadly incorporates the idea of openness to other cultures and the development of cultural exchanges, whether at the level of the Convention’s objectives (in particular, dialogue among cultures and interculturality), its guiding principles (in particular, the principle of equitable access and the principle of openness and balance) or its working rules.

Thirdly, the subject-matter of the text is focused on the policies and measures adopted by the Parties with a view to protecting and promoting the diversity of cultural expressions. In other words, the text is mainly aimed at the means of action of States (or groupings, such as the European Community, which can be parties to the Convention), so as to ensure that they do not inadvertently depart from it in favour of liberalisation commitments whose extent they may have failed to appreciate. Indeed it is within this context that the reaffirmation of the “sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory”¹³, reiterated in the form of a principle¹⁴ and then under the heading of rights and obligations of the Parties¹⁵, acquires its full significance. From a strictly legal standpoint, such a statement was unnecessary. In any event, it does not prevent States from choosing to limit or waive this sovereign right, for example by entering into liberalisation commitments, the assumption of which corresponds to the exercise of sovereignty¹⁶. It is therefore more a question of drawing the attention of States to the future consequences of such commitments, insofar as in practice they prove to be more or less irreversible.

Focused as it is on the means of action of States, the Convention is not intended to regulate various other matters, even indirectly. Thus, it is not its purpose to proclaim cultural rights, even though it indicates that individuals and peoples have “the fundamental right” to participate in and enjoy the cultural aspects of development as well as its economic aspects. And although the notion of human rights does make an appearance, it is to recall, in the form of principles, that the protection and promotion of the diversity of cultural expressions are inseparable from respect for human rights. Thus, it is a question, on the one hand, of ensuring that the Convention is not invoked

12 Article 8.1.

13 Art. 1 (g)

14 Article 2.2: Principle of sovereignty.

15 Article 5.1.a

16 In accordance with the most classical approach of international law. According to the Permanent Court of International Justice (Decision of 17 August 1923, *SS Wimbledon* case) “the right to enter into international engagements is an attribute of State sovereignty”.

to justify, on the pretext of protecting cultural diversity, measures that infringe internationally guaranteed human rights¹⁷, and, on the other, of affirming that the diversity of cultural expressions cannot be effective if human rights and fundamental freedoms, such as freedom of expression, information and communication, and the possibility of choosing cultural expressions are not guaranteed. It is, in fact, fairly obvious that cultural expression could scarcely exist without freedom of expression; that it could not easily become known without freedom of information; and it would be hard put to survive without freedom of communication. Moreover, the Convention is concerned only with the rights of individuals, to the exclusion of any reference to group or collective rights, even though there are several mentions of minorities and indigenous peoples¹⁸.

Moreover, the text is not intended to clarify the legal status of authors and artists or to grant prerogatives to civil society in general. At the most, these categories are mentioned as stakeholders whose important contribution to the protection and promotion of the diversity of cultural expressions States should recognize¹⁹, which is no more than they deserve but of little normative significance. This is true, in particular, of the notion of “civil society”, the meaning of which may be intuitively clear but which is legally wholly undefined.

Last but not least, the text does not deal with certain issues essential to the diversity of cultural expressions such as intellectual property rights or the rules governing the economic structuring of the cultural industry sector. However, the decision to leave them out, which is understandable in terms of relative effectiveness, since the negotiation of an instrument incorporating these dimensions was doubtless out of reach, should not be allowed to obscure the fact that if the protection of the diversity of cultural expressions is to be effective, it will not be possible to elude them for very long²⁰, especially as this is a matter of particular concern for the developing countries. Moreover, among its objectives the Convention includes a reaffirmation of the link between culture and development and, similarly, proclaims a principle of “the complementarity of economic and cultural aspects of development” and a principle of international solidarity and cooperation, which envisages, in particular, the need to

17 Article 2.1.

18 In the preamble and in articles 2.3 (principle of equal dignity of cultures) and 7.1 (a).

19 Articles 7.2 and 11.

20 See J. Smiers, *Arts under pressure Promoting cultural diversity in the age of globalization*, Hivos/Zed Books, 2003; J. Smiers, “Regulating the Cultural Market in favour of Cultural Diversity at the same time cherishing the Freedom of Communication”, in *La diversité des changes culturels dans le cadre de la globalisation*, Brussels, CGRI, 2005, pp. 85-101; R. Wallis, “Trade and Cultural Diversity. Technological Opportunities, Legal Regimes and Threats from Collective Dominance”, in *La diversité des échanges culturels dans le cadre de la globalisation*, Brussels, CGRI, 2005, pp. 65-77.

enable developing countries to create and strengthen their cultural industries. Clearly, then, the cultural industry issue is a vital one, considering the nature of the present modes of production and dissemination in the cultural sphere.

2. Principles and means

The Convention seeks to control the exercise of the sovereign right of States to take the measures that they consider necessary to protect and promote the diversity of cultural expressions, so as to ensure that the corresponding policies are consistent with the objective of diversity as conceived in the text. To this end, the text states a number of principles, then, while formally claiming to establish “rights and obligations of Parties”, actually formulates certain rights and incentives and sets up machinery for following up and monitoring the Convention.

a. Principles

Over and above its objectives, the text lays down quite a few “guiding principles”. As their name implies, they are intended to constitute a framework and to guide the implementation of the operative provisions of the Convention, to which they may sometimes be directly linked²¹. However, they do not all have the same normative reach. Undoubtedly, the most rigorous is the principle of respect for human rights and fundamental freedoms, in that it allows no one to invoke the Convention as a smokescreen for measures that infringe human rights guaranteed by international law. Moreover, it is positively echoed in article 5 on the general rule regarding rights and obligations which makes “universally recognized human rights instruments” one of the foundations on the basis of which States affirm their right to protect the diversity of cultural expressions. The other principles, while expressing ideas of importance in defining the spirit of the Convention (international solidarity and cooperation, complementarity of economic and cultural aspects of development, sustainable development, equitable access, openness and balance), are too generally worded or too vague in the designation of their beneficiaries or too cautious in their formulation, to constitute real limits. In other words, and to put it bluntly, they are more like statements of principle than principles in the legal sense.

21 The principle of equal dignity of cultures is reflected, in particular, in article 8 on measures to protect cultural expressions. The principle of international solidarity and cooperation is reflected in a series of provisions aimed at ensuring effective cooperation, in particular for the benefit of developing countries. The principle of openness and balance, which prohibits States from taking excessive measure, is reflected in monitoring arrangements for verifying that there has been no abuse.

b. Rights and incentives

The Convention has a Part IV formally entitled “Rights and Obligations of Parties” but it must be acknowledged that the former are given precedence while the latter are only weakly binding and, in general, more like incentives. Moreover, although the distinction between the national level and the international level may have disappeared from the structure of the text, traces of it remain, the rules on international solidarity and cooperation being essentially programmatic and procedural.

The normative heart of the Convention lies in the reaffirmation of the “sovereign right [of Member States] to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention”²². The text does not offer a general definition of the measures that Parties can take in this respect, which leaves them free to choose their own remedies, but it avoids the trap of being simultaneously too vague and too restrictive by giving an illustrative list. The importance of this list is obvious. It sets out, with variable clarity, the principal types of measures that Parties may use. These include, in particular, support measures, which enables the economic dimension of cultural diversity to be taken into account, and, under cover of a rather abstruse formula, content quotas. There is also an explicit reference to public institutions, which may be established and supported and be a means of enhancing diversity of the media. Finally, there are references to measures on behalf of domestic independent cultural industries and the informal sector aimed at providing them with effective access to the means of production, dissemination and distribution, as well as measures aimed at supporting artists.

Thus, all the measures listed gain legitimacy, subject to their being applied in a manner consistent with the objectives of the Convention. However, there can be no denying that in some respects the text gives rise to uncertainty. Thus, although subsidies are allowed, there is no attempt to identify possible criteria for granting them. Similarly, it is not clear what is meant by domestic independent cultural industries or by the informal sector. However, the disadvantages of this lack of precision are relative. On the one hand, it could make it easier to reconcile the Convention with other more detailed instruments. On the other, the list is only for guidance and thus leaves States a certain amount of discretion to choose the measures most appropriate for them, in the light of their own situation, their own resources and their other commitments. At most, one might question the precise scope of the reference to “measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists and other cultural professionals, to develop

²² Article 5.1.

and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities”, and inquire whether it might not “give rise to a ‘boomerang’ interpretation”²³ with regard to a number of existing protection mechanisms.

Whereas the preliminary draft envisaged the affirmation, at the same level as the sovereign right, of a general obligation to protect and promote the diversity of cultural expressions, subsequently broken down into positive substantive obligations that gave it a minimum content, there is no trace of any truly binding formula in the final text, as far as measures to be taken are concerned. Except in relation to information sharing and transparency and, in particular, the obligation to report to UNESCO, every four years, on the measures taken, it is always a question of “endeavouring”, “fostering”, or “encouraging”, that is to say, formulas typical of *soft law* in the substantive sense of the term, even where intervention on behalf of threatened cultural expressions is involved. The argument invariably put forward to justify this kind of formulation, and one which could therefore be used in defence of the Convention, is that account has to be taken of the fact that not all Parties have the same resources and, if the obligations are too strict, they could discourage those economically least well endowed from acceding to a Convention requiring them to assume commitments beyond their means. However, it is not certain that this is the real or principal cause of the softening of the Convention. Nonetheless, the measures envisaged play an important part in the maintenance and development of the diversity of cultural expressions and their identification, and hence recognition as such, is useful in itself. It is, in fact, a good thing to point out that the diversity of cultural expressions may call for measures concerning not only creation but also production, dissemination and distribution, that it implies a diversity of players of equal importance, that public education and awareness-raising help to create a favourable environment, and that civil society plays a “fundamental role” and must be involved in the action.

The provisions relating to international cooperation, which formed the subject of in-depth negotiations, are fairly well developed. In addition to establishing general objectives, the text sets out more detailed arrangements with two essential characteristics. First of all, in keeping with the recognition of the link between culture and development reflected in article 13, special emphasis is placed on cooperation with and assistance for developing countries, to enable them to strengthen their cultural industries. This cooperation may take various forms (information sharing, technology transfer, capacity building in the public sector, conclusion of

23 S. Regourd, “Le projet de Convention UNESCO sur la diversité : Vers une victoire à la Pyrrhus...”, *Légipresse* No. 226, November 2005, pp. 115-120, espec. 119.

co-production and co-distribution agreements, etc.) and may include financial assistance. In particular, the text encourages developed countries to grant preferential treatment to developing countries in connection with cultural exchanges²⁴ and, more especially, proposes, as a means of cooperation, “innovative partnerships” between States and their private partners²⁵. This type of arrangement is designed to ensure effective assistance with the development and strengthening of the cultural sector in the developing countries.

Secondly, the Convention provides for the establishment of an International Fund for Cultural Diversity and for mechanisms for the exchange, analysis and dissemination of information, to be managed by UNESCO. In particular, this should enable States to adopt measures with full knowledge of the facts and adjust them where necessary. The advantages of such an arrangement are not inconsiderable, since studies have shown that the data usually in circulation are extremely variable and sometimes depend on chance, to such an extent that they leave the door open to disputes. Thus, even a modicum of harmonisation could be of real benefit.

Nevertheless, we again find, with regard to international cooperation, the same legal characteristics as previously noted. Innovative cooperation formulas are certainly identified and it is useful to list the ways and means of achieving effective cooperation. However, from the normative point of view, it is still a question of “endeavouring”, “encouraging”, etc. Moreover, the International Fund for Cultural Diversity depends on voluntary, and hence uncertain, contributions. The enthusiasm of a number of developing countries for such a fund overcame the doubts about the usefulness of an arrangement of this type but never completely dispelled the fairly widely shared conviction, especially on the part of potential donors, that other modes of cooperation were preferable. All in all, the fact remains that the question of the resources needed to implement genuine policies for the protection and promotion of the diversity of cultural expressions by the developing countries is by no means settled, although it is essential to show that their involvement in the negotiations was not solely intended to obtain their support for a text that was subsequently confined, in practice, to protecting the right to support cultural industries which they themselves often lack.

c. Follow-up and dispute settlement

Just as they stripped the text of its normative constraints, the negotiators did everything they could to rid it of as many institutional and procedural constraints as possible. True, the Convention has organs, notably a Conference of Parties, which meets, in principle, every two years (as far as possible in conjunction with the General

24 Article 16.

25 Article 15.

Conference of UNESCO, a reflection of the understandable concern to minimize operating costs) and an Intergovernmental Committee, which will be the executive organ, with the UNESCO Secretariat providing the necessary assistance. Moreover, the Intergovernmental Committee has a number of functions, such as establishing procedures for consultation between the parties and preparing operational guidelines for the implementation of the Convention, which could put it in a position to contribute to some fairly effective monitoring of the implementation of the Convention. This should not be ignored, particularly as it is known that, in general, follow-up and/or dispute settlement arrangements – though in most cases non-binding, which means that States are more inclined to accept them – make a positive contribution to the effectiveness of the commitments contained in the agreements or accompanying recommendations. However, as we shall see, everything depends not only on when they are set up but also, and above all, on the firmness of the intention to make them work.

As for the dispute settlement mechanism, during the course of the negotiations it became particularly “lightweight” since, should negotiation and/or mediation fail, it merely provides for possible recourse to conciliation, in accordance with a procedure laid down in an Annex to the Convention. This is far from being a mechanism as powerful as that to be found, for example, in the WTO, if only because, like all conciliation, the outcome is not binding on the parties to the dispute. However, we should refrain from judging it too harshly. Indeed, one might wonder what disputes are likely to arise out of a Convention with so few obligations. For all that, the mechanism has the virtue of existing, albeit at the price of an opt-out clause which allows any party to refuse to recognise it. It also has the merit of being a compulsory conciliation, that is to say, one that can be activated unilaterally, while providing for a possible disagreement to be reviewed by a body composed of specialists in cultural matters. Their decisions, even though not legally binding, may still be useful, in particular for proposing interpretations of a text which, like all international conventions, has its share of ambiguities. This could be all the more important in that the Convention has to fit in with the rest of international law.

3. Relationship to other instruments

The context in which the Convention was negotiated and the objectives assigned to it immediately focused attention on the importance and sensitivity of the question of its relationship to the rest of international law, particularly international trade law. International conventions do not necessarily contain provisions for regulating this situation, the lack of which triggers an implicit referral to the rules of general international law contained in article 30 of the 23 May 1969 *Vienna Convention on the Law of Treaties*, although this concerns only treaties relating to the same

subject-matter. However, it is hard to see how the present Convention could have remained silent on this point. Indeed, a clause was deliberately included not just for legal reasons but also, and above all, for political and symbolic reasons. More particularly, it forms the subject of article 20, which was bitterly negotiated and supplemented by article 21.

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

The first sentence of paragraph 1 merely recalls an obligation that always exists even if not expressly stipulated. The second sentence can be broken down into several components. It proclaims the non-subordination of the Convention to other treaties and then clarifies two implications. One is mutual supportiveness between the Convention and other treaties. To be mutually supportive they must be non-contradictory, which leads to a logic of conciliation and complementarity. Admittedly, it is only a matter of “fostering” but this rather soft language should be read in the light of non-subordination. The second implication can itself be broken down into two situations since both existing and future agreements need to be considered. In both cases, the “relevant provisions” of the Convention (no criterion for identifying them is given, which leaves room for discretion) must be taken into account. The obligation to “take into account” may seem rather vague. It is weaker than an obligation to “comply” but the use of this term would have produced a barely conceivable state of subordination to the Convention. It would have gone far beyond the usual formulas of international law and the ordinary law rule of equality between conventions. Moreover, the “taking into account” formula should also, and again, be read in the light of non-subordination. This presupposes an effective “taking into account”, within a context of conciliation. Finally, the second paragraph is both the reverse and the complement of the first. Taken in isolation, it corresponds to a so-called “without prejudice” formula that prevents the Convention from producing effects on other treaties. However, it cannot be read in isolation. It is also necessary to consider its literal meaning and situate it in time. It is a question of “modifying” rights and obligations under other treaties.

The Convention does not claim to revise existing agreements and, considering its provisions, it cannot be used as a basis for calling into question commitments such as those that some States may have undertaken within the WTO. However, paragraph 1 applies. Thus, existing agreements are not modified, but the Convention, once it has entered into force, will have to be taken into account in interpreting and applying them. One problem which has not been solved (and which the Convention could not solve) is that of the extent to which such an approach might usefully be adopted in a forum other than that of the Convention, for example, before the dispute settlement body of the WTO. There is no guarantee of this, even though one might reasonably seek to plead the utilisation of article 31.3 (c) of the 1969 *Vienna Convention on the Law of Treaties*, according to which “there shall be taken into account, together with the context...: (c) any relevant rules of international law applicable in the relations between the parties”. But much certainly depends on the relative backing for the Convention. This might also be the advantage of the Convention having its own dispute settlement mechanism which allows for the initiation of a specific process of assessment of the way in which the Convention should be applied.

With respect to future treaties, *a priori*, there can be no modifying what does not yet exist. Paragraph 2 is only triggered for agreements in force. On the other hand, paragraph 1 acts upstream since the Convention must be taken into account when entering into other obligations. If paragraph 1 is observed, the question dealt with in paragraph 2 does not arise since, if the Convention is taken into account upon entering into an agreement, it cannot subsequently be said to “modify” it. Nevertheless, here again, one problem that has not been solved (and which the Convention could not solve) is that of the extent to which such an approach might usefully be taken in a forum other than that of the Convention, for example, before the dispute settlement body of the WTO. Certainly, the latter is not competent to judge compliance with article 20 and would not be bound by it either. It should be understood that before the DSB the Convention can, at most, serve to justify the absence or restrictive interpretation of commitments undertaken by States. It is only in this context and from this standpoint that article 20 can produce its effects.

However, it is also possible to envisage forestalling this type of effect by means of more political and preventive articulation procedures. In particular, this is the objective of article 21 according to which “Parties undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles”. Furthermore, the Intergovernmental Committee is responsible for establishing “procedures and other mechanisms for consultation aimed at promoting the objectives and principles of this Convention in other international forums”²⁶.

26 Article 23.6(e).

This type of provision has the advantage of refocusing attention on the real challenges of fitting the Convention into the rest of international law. Indeed, the question is not so much one of knowing whether, in itself, the Convention is going to prevail over other treaties, in a spirit of competition, as of making sure that its objectives will not be sacrificed, or indeed forgotten, but are and will be positively taken into account, in a spirit of complementarity. In other words, it is a question of acting in such a way that the effort to reconcile the various aspects and implications of cultural diversity made in the text does not remain confined to the text but spills over into other fora in which the issue might be dealt with directly or indirectly.

From this point of view, responsibility for the articulation of the Convention with the rest of international law lies essentially with the Parties, which must not only be consistent in their commitments but also endeavour to promote the principles and objectives of the Convention in other fora. To assist them in this, the text proposes consultations between Parties. Thus, it expresses the realistic and pragmatic view that collective positions will carry more weight and be more effective, by virtue of being common and shared. It also reflects a positive and conciliatory approach capable of preventing competition by acting upstream of the processes of discussion. However, at the present stage, these conciliatory intentions concern only the Parties to the Convention and the terms in which they are expressed are only weakly binding.

4. The outlook

As this commentary has consistently shown, the text which finally emerged from the negotiations, though firm as regards the sovereign right of States, is generally only weakly binding, in strictly legal terms, as regards their obligations. Admittedly, objectives, principles and remedies have been formulated and established, and that is in itself an achievement, but the effectiveness and, above all, the efficacy of the Convention depend on data that are still uncertain including, of course, the number of ratifications. Only 30 are needed for the Convention to enter into force, and it may reasonably be assumed that this figure will be fairly easy to reach. However, a much larger number will be required for the Convention to be regarded as a benchmark. Moreover, it is not only the number of parties to the Convention but what they decide to make of it that will determine its true significance. An early sign of sufficient political will to support effective implementation would be organs that were rapidly up and running²⁷, but if this will were to be lacking, the Convention could well have exhausted its effects in the negotiating process. If so, it would not be the first of its kind.

27 I. Bernier, H. Ruiz Fabri, *La mise en oeuvre et le suivi de la Convention de l'UNESCO sur la protection and promotion de la diversité des expressions culturelles*, see chapter 8 of this book.

However, one should not be unduly pessimistic. There can be no doubt that the negotiations had an important awareness-raising effect. In this respect, the Convention has already performed a highly significant pedagogical function by alerting States to the risks and consequences of their commitments, especially in the area of trade liberalisation. The maintenance of the state of mind thus created calls for great vigilance, particularly as the trade negotiations are part of a continuing process, even though they may occasionally suffer setbacks, and there may be a gap between the desire to avoid liberalisation in the cultural goods and services sector and the ability to resist concessions with a more immediately perceptible economic return. This consideration is not one that applies to the developing countries only. In these circumstances, precedence should doubtless be given to encouraging the rapid development of the consultation mechanisms as one of the more positive courses of action available and a means of promoting substantive convergence between the Convention and other bodies of rules.

Chapter 5

Empowering audiovisual services for the future

Verena Wiedemann

From the point of view of the European media, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (the Convention on Cultural Diversity) adopted by the UNESCO General Conference on October 20, 2005 can be considered as a great achievement.

To assess this Convention, one needs to step back in time just a few years and look at the situation faced then by scriptwriters, film directors, producers, musicians, public service broadcasters, and indeed the entire audiovisual sector in Europe and elsewhere.

The challenge was whether a choice needed to be made between two very different paradigms for the audiovisual sector in a globalised world. The Canadian sociologist Marshall McLuhan characterised this world as the “global village” some 40 years ago. And, in this global village, trade between countries has become ever more intensive and a positive trade balance is a key component of a country’s economic wealth. This explains the calls for free trade, for the abolition of all trade barriers that may impede the free flow of goods and services across borders. The demise of the Soviet Union has further strengthened the conviction that only liberal market economies with as little state intervention and protectionism as possible will maximise the wealth of nations.

Impact of free trade negotiations

In order to understand what all of this has to do with filmmaking and broadcasting, one needs to look at the year 1994. In that year, the most potent global instrument was adopted by the greater part of the world community, an instrument designed to make liberal economics the binding priority of countries’ trade policies around the world. It was in April 1994 that the World Trade Organisation, the WTO, was born. It was a successor of the old international trading system GATT, but much more powerful and

much more comprehensive. For the first time in history, a multilateral trade agreement did not only cover goods, but also services and intellectual property rights.

Services are covered in the WTO's General Agreement on Trade in Services, or GATS. Under this agreement WTO members have committed to enter into consecutive trade rounds with the goal ultimately to abolish all restrictions on trade in services among them. The GATS covers all services sectors with no exceptions. In other words, filmmaking, music and broadcasting are covered by the agreement, because the making of a film, the creation of music or the production and transmission of broadcasting programmes are considered services for purposes of international trade law.

Not everybody in Europe agreed at the time that audiovisual services were the same and should be treated in exactly the same manner as financial services, postal services, maritime services or telecommunication services and should be covered by the GATS. It was the French government and a few isolated allies that claimed that audiovisual services should be left out of the trade agreement. They called for what came to be known as the "exception culturelle" or the cultural exception from the GATS. Their argument was that audiovisual services belong to the cultural sphere rather than the economic sphere and thus should not be subjected to the same rules as other, non-cultural, services. In fact, as they pointed out, the audiovisual media are one of the most powerful tools to express cultural identity and diversity. European countries have long recognised the particular role of the audiovisual media for democratic decision making, for media pluralism and for cultural diversity. European audiovisual regulation reflects this special role. Firstly, the Community has limited competence in the realm of culture; most of the competence is left to Member States. Secondly, Article 151, paragraph 1 of the EC-Treaty recognises the importance of cultural diversity among and within Member States and requests the Community to help enhance and foster this diversity. It is based on this provision that the Community is providing funds to the European film industry under the MEDIA programme to help them produce films of European origin that represent and reflect the unique cultures and linguistic diversities across the EU. There is also the horizontal clause of Article 151, paragraph 4 of the EC-Treaty which requires the Community to take cultural aspects into account under other provisions of the Treaty.

But the calls for an "exception culturelle" were not taken on board by the rest of Europe and other WTO member states. For them, this call smacked of protectionism. EU member states also feared that this request could cost them too many concessions in other trade sectors where Europe clearly has an offensive trade agenda and wants other countries to make far reaching concessions. So in the end, audiovisual services were covered by the GATS, but Europe made no offers to the other WTO members to liberalise its markets in this sector. At the end of the Uruguay Round in December

1993, the Europeans had found something of a Solomonic solution: they had not too much alienated their other trading partners by calling for a cultural exception, but they had made no trade concessions in this sector either, so they were facing none of the possible consequences.

But it was clear back in 1993 that the deal the EU – and most other WTO members – had struck, namely not to liberalise audiovisual services, had only postponed the challenges of the question whether, in future, audiovisual services would be treated like other commodities for the purposes of international trade law. With each new trade round, the question of whether and to what extent to liberalise audiovisual services would be back again on the international agenda. Given that GATS members had already committed to increase substantially their level of liberalisation commitments in each trade round, it was safe to predict that the pressure would increase on Europe and other countries with interests in promoting their cultural industries, to commit to giving up such discriminatory cultural policies in favour of free trade principles.

Since the attempt to get an “exception culturelle” had failed, it was all the more important in the years following the conclusion of the Uruguay Round to raise global awareness of what would happen to the cultural role that audiovisual services play, if large scale liberalisation of these services under GATS would take place during the next trade round. Some international organisations, quite a number of governments, and a growing number of cultural activists and NGOs took part in what would prove one of the most successful campaigns for an international treaty which was aimed at finding an answer to these challenges.

There were a number of main messages around which the debate took place:

- 1) Cultural goods and services are unlike any other commodities in that they play a unique role in their societies for cultural identity and diversity. The use of the term “cultural diversity” is significant in this debate, because it replaced the term “cultural exception.” While “cultural exception” was a defensive concept, accused of disguising protectionist and possibly even xenophobic policies, “cultural diversity” is a positive concept recognising the validity of not just one culture to the detriment of others, but a peaceful coexistence of cultures worldwide.
- 2) Globalisation is both an opportunity and a challenge for cultural diversity. The new information and communication technologies, and most notably the Internet, bring our societies ever more closely together. The global networks distribute information within seconds to the most remote corners of the world. This is good for freedom of information and for freedom of speech, and it can foster our mutual understanding of the rich diversity of our cultures. However, information is not neutral. When we communicate with each other, we express who we are and what

we believe. As communication changes from being just local, regional or national to becoming global, cultural content, in other words the messages, also changes. For example, we may use a different language to make ourselves understood in the global environment, the images and stories we receive from abroad are new and different. This is fine as long as there is no dominant culture, as long as everybody who participates in this global exchange operates on equal terms. But it becomes problematic if there is a dominant culture which, because of the laws of economics, is helped much more than its rivals by economies of scale and scope in global markets. Such is the case with audiovisual productions from large countries like the United States.

Against this background it is felt that governments have a right and even an obligation to help preserve and foster cultural diversity in the audiovisual sector by appropriate means. Within the European Community, such measures consist, for example, in establishing and operating public service broadcasting with special obligations to offer diverse programmes with local, regional and national content of high quality. Europe also grants a whole range of subsidies to its film industries. Through its Television without Frontiers Directive, the European Community has established quotas in favour of European audiovisual works which television channels operating in Europe must respect.

However, in its negotiation guidelines on the audiovisual sector for the Doha Round, the United States argues that, since the Uruguay Round, the situation of the audiovisual media has changed totally due to the Internet which allows for audiovisual markets to turn global. Because of the new technologies, consumers have world-wide access to a multitude of information offers and thus there is no justification any more for state intervention, according to this argument¹.

The European Community agrees that, since Uruguay, significant technological developments have taken place, but no structural changes of the sector have occurred. The Community is pointing to the high market share of U.S. audiovisual productions in Europe. In the cinema sector, this ranges from 65% to 85% according to the member state. In 2000, the overall market share of U.S. audiovisual programmes on European TV channels amounted to 69%². In the same year, the EU trade deficit with the United States in the audiovisual sector amounted to U.S. \$8.2 billion³. The Community points to the high market share of U.S. audiovisual productions in Europe, where up to 60% of films shown in European movie theatres are of U.S. origin. This is ample evidence that the European markets are open and its policies in this sector are not protectionist. It

1 World Trade Organisation, Communication from the United States, Audiovisual and Related Services, WTO Document Nr. S/CSS/W/21.

2 European Audiovisual Observatory, Press release of 9 April 2002.

3 Ibid.

also demonstrates that the lack of liberalisation commitments of the Community under GATS does not represent a market barrier for foreign audiovisual service suppliers in Europe. But while the Europeans do not fight the influx of foreign audiovisual works into their markets, they also want to preserve the right to foster and nurture their own audiovisual industries⁴.

- 3) The third main argument that has been advanced since the end of the Uruguay Round is that preserving cultural diversity is as important for humankind as biodiversity is for the world of plants and animals. This argument was inspired by the environmental movement and the concept of sustainable development. Until recently, it was recognised that sustainability of our planet, the goal to preserve our planet in a way to make it liveable also for future generations, had three dimensions: environmental, social and economic sustainability. Now the argument was made that sustainable development had a fourth dimension: cultural diversity, as a precious good of mankind⁵.

In order to understand the challenges that any liberalisation under the GATS regime poses to audiovisual services, it is necessary to look at the pertinent provisions of the instrument. Under the GATS Most Favoured Nation (MFN) clause, advantages granted to services suppliers in one country must be extended to all other WTO members. The EU member states and the Community itself have concluded special agreements for preferential treatment of cultural and audiovisual services with other countries, for example with the member countries of the Council of Europe. One of these agreements is the European Convention on Cinematographic Co-Production, another is the Eurimages Programme. If the exemption from the MFN clause that the Community negotiated during the Uruguay Round were to fall, the benefits that EU member states grant to film creators from member states of the Council of Europe under the Co-Production Agreement would have to be extended to all other WTO member countries. In other words, the Hollywood studios, for example, would enjoy the same benefits from this Agreement of the Council of Europe as the European film industry. This would render meaningless the whole purpose of this policy instrument, namely the promotion of European audiovisual content⁶.

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- 4 For a longer discussion of these arguments see Verena Wiedemann, Gesamtziel: Vielfalt Audiovisuelle Medien in den GATS-Verhandlungen, *epd medien* No. 92, 23 November 2002.
- 5 The link between cultural diversity and sustainable development was specifically recognised by the Council of Europe, Declaration on Cultural Diversity, December 2000, point 1.3; and UNESCO in its Universal Declaration on Cultural Diversity, November 2001, article 11, first sentence.
- 6 See Council of Europe, Council for Cultural Co-operation, Culture Committee, A Strategy Document on cultural diversity and international trade agreements, Secretariat Memorandum prepared by Directorate General IV (Education, Culture, Youth and Sport, Environment) with contributions from Verena Wiedemann and Jukka Liedes, Strasbourg, 22 August 2000.

Another example is the national treatment principle. It requires governments to treat foreign services suppliers no worse than domestic ones. If this principle were to apply to the audiovisual sector in Europe, the quota system in favour of audiovisual works of European origin in the Television without Frontiers Directive would need to fall, because quotas in favour of European works are directly opposed to any commitment to treat all audiovisual services from all WTO member states in the same way. Similarly, all the benefits of the media programme of the European Community would have to be extended to film producers, directors, scriptwriters, distributors, etc. from around the world. The very purpose of these instruments, namely to foster European content in order to strengthen European filmmaking, would be defeated.

A third example of the GATS mechanism is the subsidies clause. So far, the GATS does not contain a rule restricting subsidies that governments may grant to different services sectors. But this is about to change, because such a clause is presently being negotiated in Geneva. Depending on how the new rule is written, the funding for public service broadcasters might one day be considered by a GATS panel of trade experts, who decide about all trade conflicts, as distorting trade in services.

The potentially far-reaching impact of subsidies rules applied to the remit and financing of public service broadcasting is already being felt within the European Union. Under Community law, any state aid (subsidies) is prohibited, except if it can be justified, for example, if it serves to provide services of general interest, as is the case with public service broadcasting. This legal framework invites commercial media companies routinely to challenge the activities and the financing of public service broadcasters on the European level. Consequently, there is a growing case law on the decisions of the European Commission scrutinising the funding schemes of public service broadcasters in the Member States and, lately, a tendency by the Commission to limit the activities of public service broadcasters, in particular in the new on-demand media. The Commission's increasingly critical approach to public service broadcasting in the digital environment reflects its general emphasis on free markets in the information and communication sectors (ICT), an emphasis also evident in the decision taken by the European Commission presided by Barroso in late 2004 to deal with media policy issues in the context of the Community's ICT policies instead of, as had been the case in the past, in the context of the Community's cultural policies.

A final example of the impact of the GATS on audiovisual services is a trend of questioning transparency and proportionality of domestic regulations. If European regulation of the audiovisual media were to be subject to this proportionality test, all regulations, including measures safeguarding media pluralism, would in principle be subject to the scrutiny of a GATS dispute settlement body. Unlike in the EC Treaty, there is no horizontal "cultural clause" in the GATS which would require that trade

experts who decide about any relevant WTO trade dispute need to take into account the special characteristics of cultural services.

For the purposes of the negotiations on the liberalisation of audiovisual services during the Doha Round, the United States has come up with a proposal for the present round of trade negotiations which it says strikes a balance between the interests of governments to maintain certain cultural policies and the interests of others to achieve a significant level of services liberalisation. It does not request that WTO members abolish their existing TV quotas or film funding schemes. But, under the so-called stand-still clause, they should commit to not adopting any new cultural measures of this or a similar kind, and in particular no measures which would lead to preferential treatment of audiovisual services transmitted digitally. While traditional forms of television and cinema services could be subject to some preferential treatment of local artists, film directors and the like, the U.S. intention in the present negotiations is to liberalise all new audiovisual services delivered on-demand, as well as all multimedia content delivered over the Internet.

As explained above, for the U.S. government the Internet is not a sphere where cultural concerns are valid. From their point of view the Internet is a market place and thus must not be burdened with any cultural policy considerations. It wants all services delivered via the Internet to be considered as e-commerce and argues that what is being transmitted is not really a service, but instead a “virtual good”. The significance of this argument is that a “good” is covered by the WTO GATT agreement which is much more liberalised than trade in services and does not allow for the preservation of the same cultural policies as the GATS. Given that in just a few years time all audiovisual services will be produced digitally and delivered electronically on-demand, this approach would mean not just a stand-still for audiovisual policies, but in effect a quick abolition of all such measures, because the traditional regulatory frameworks, unless they are adapted to the new technologies, will de facto soon become irrelevant. The U.S. negotiating position for audiovisual services in essence implies that Europe and all other trading partners accept a paradigm shift for how they treat audiovisual services in the digital world. They are to be taken out of their cultural context and submitted to the prerogative of the laws of economics just like any other economic activity.

Looking at the Internet, the European Community defends the concept that all products delivered electronically should be classified as services. The Community insists on the principle of technological neutrality on which the GATS is based. This means that the technology used to transmit an audiovisual programme does not make any difference with respect to the content and the rules governing this content. In other words, whether a film is shown in the cinema or broadcast on television or transmitted online via the Internet to a multitude of users does not change the

character of the service as an audiovisual production which carries cultural significance. This view is also supported by the WTO Council for Trade in Services in Geneva⁷. The approach for the WTO negotiations is essential, if countries want to keep their regulatory options open in the digital information society.

Against this background, Member States of the European Union have given a qualified negotiating mandate for the audiovisual sector to the European Commission which negotiates in Geneva on their behalf. This mandate reads:

“During the forthcoming WTO negotiations the Union will ensure, as in the Uruguay Round, that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audio-visual policies for the purpose of preserving their cultural diversity.”

The mandate is understood to mean that the European Community will make no liberalisation commitments on audiovisual services in the present round just as they did not enter into any commitments during the Uruguay Round. The Commission has recently confirmed this view explicitly in a public statement⁸.

Given that much is at stake during the Doha Round for the future of audiovisual services, there are some key questions. How long can the European Community and other countries that share their views withstand the neo-liberal pressures by the United States and other trading partners with offensive interests in this sector? How long can they successfully refuse to liberalise audiovisual services? What if more and more WTO members from around the world would make far-reaching commitments in this sector? Such a development would increasingly isolate the Community in WTO and would make it ever more difficult to maintain this position in future.

UNESCO and negotiations on the Convention

This is where the UNESCO Convention on the protection and promotion of the diversity of cultural expressions enters. The idea was to establish the principle that cultural goods and services are unlike all other goods and services and deserve to be treated differently, as a legally-binding principle on the global level. In other sectors relevant for sustainable development, international instruments have been in place for years, starting with the multilateral trade regime under the auspices of WTO for economic development, continuing with an international agreement on social issues setting up the International Labour Organisation (ILO), and concluding with numerous international treaties on the protection of the environment, like the

7 World Trade Organisation, Council for Trade in Services, Progress Report to the General Council Relating to the Work Programme on Electronic Commerce, 19 July 1999.

8 European Commission, Press Release of 20 October 2005, MEMO/05/387.

Convention on Biodiversity and the Kyoto Protocol. But there was no equivalent in the cultural domain.

As the history of the debate over the past ten year evidences, however, the time was ripe for such a Convention on cultural diversity (although nobody knew that in the early years,, and even the closest observers remained sceptical until the end). Still, it is most extraordinary that such a novel and comprehensive binding international treaty could be drafted and passed by the UNESCO General Conference in just two years, the time it took from the mandate the General Conference gave the Director General in 2003 to prepare a text and the final adoption of the Convention. What lead the way were a number of earlier milestones: the 1995 Report of the World Commission on Culture and Development entitled *Our Creative Diversity*, also known by the name of its chairman, the Pérez de Cuéllar Report; the Intergovernmental Conference on Cultural Policies for Development 1998 in Stockholm; the creation of the International Network for Cultural Policies (INCP) in 1998, an informal network of cultural ministers under the leadership of Canada's then culture minister Sheila Copps; the Declaration on Cultural Diversity of the Council of Europe in December 2000; and finally UNESCO's Universal Declaration on Cultural Diversity in November 2001.

However, all these initiatives by international organisations and cultural ministries were political in nature and in no way legally binding. It was long doubted that anything more would be possible than a few well-meaning policy declarations and resolutions. But alongside the discussions among cultural ministers a popular movement formed. A growing number of cultural activists from around the world actively accompanied and heavily influenced the entire political process and called for a binding international instrument for the protection and promotion of cultural diversity. They also formed their own organisations to support this cause, such as national coalitions for cultural diversity and the International Network for Cultural Diversity (INCD).

For a while it looked like UNESCO was not going to do more than to pass the declaration on cultural diversity of 2001, because the idea of an international treaty that would address the challenges that globalisation and trade policies pose to cultural diversity appeared too controversial for this UN body to pursue. After all, countries like the United States and Japan warned early on that it did not fall within the competence of UNESCO to deal with matters outside cultural policies. They charged that what was being discussed in this context were trade policy matters which on the international level are the competence of WTO. In essence, of course, the dispute was not a procedural one so much as it was about the notion that any such international cultural initiative, and particularly one spearheaded by UNESCO, could undermine the economic paradigm for cultural and audiovisual services set up in the WTO.

Sheila Copps, the Canadian culture minister who launched the informal network of culture ministers of the INCP, contemplated initiating the drafting of a new international legally binding instrument on cultural diversity outside of UNESCO, should that organisation fail to bring a treaty on its way. But, when the question of a convention was formally put before the General Conference in 2003, the negotiating mandate was given by consensus⁹. The same year, the United States, which had left UNESCO years earlier because of disagreements over its policies, rejoined the Organisation as a member. And it was well understood that the United States, which vehemently opposed the project, would do its utmost to stop it or at least to water down its content so much that the convention could never hurt its trade interests in this sector. Indeed, the United States did just that, it tried to torpedo the negotiating process every step of the way and it did that with all instruments it had available, including complaining to the WTO that UNESCO was interfering with its competence in trade policy¹⁰.

But how successful was the United States with these efforts? Well, 148 UNESCO members voted in favour of the Convention. There were only two votes against it in the General Conference on 20 October 2005, the United States and Israel, while four governments abstained, Australia, Honduras, Liberia and Nicaragua.

In the words of the European Commission, the Convention on Cultural Diversity “is the first of its kind in international relations, as it enshrines a consensus that the international community has never before reached on a variety of guiding principles and concepts relating to cultural diversity [It] forms the basis of a new pillar of world governance in cultural matters.”¹¹

The Convention is based on certain key principles, namely:

- 1) That cultural diversity is an essential component of sustainable development.

9 UNESCO General Conference, 33rd session, Paris 2005, Preliminary report by the Director-General setting out the situation to be regulated and the possible scope of the regulating action proposed, accompanied by the preliminary draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic expressions, p. 1.

10 Government of Quebec, Culture et Communication, Publications/Studies 2005/06/28-29, Trade Treaties and Cultural Diversity, foreword to Ivan Bernier, Simposio international, Santiago, Chili, 28-29 June 2005, accessible under <http://www.mcc.gouv.qc.ca/international/diversite-culturelle/eng/publications-studies/> (date: 20 November 2005); Sabine von Schorlemmer, Kunst und Freihandel. Der UNESCO-Streit um kulturelle Vielfalt, Blätter für deutsche und internationale Politik, 5/2005, p. 619-626, 624-625.

11 European Commission, Press Release of 20 October 2005, MEMO/05/387.

- 2) In order to ensure the right of individuals to disseminate their ideas and cultural creations, it is legitimate for countries to adopt policy measures that protect and promote the diversity of cultural expressions within their territories.
- 3) The signatory countries acknowledge that they have a positive duty to protect and promote cultural diversity within their borders which means not only to take measures in favour of their own citizens, but also to create the framework for a lively exchange of cultural expressions across their borders and to be open to cultural goods and services from abroad.
- 4) Given that the pressures on cultural diversity stem very much from international developments and in particular from technological developments and globalisation, it is essential for governments to cooperate internationally in order to foster cultural diversity.
- 5) Since the cultures under most pressure are those of developing countries and countries in transition, it is essential for the world community to cooperate in this field in the spirit of international solidarity and to help these countries in building their own cultural industries.
- 6) The Convention must be able to adapt to developments in this field through mechanisms set up under the Convention and rules to settle disagreements among its signatories¹².

Audiovisual

The title of the Convention is significant, because it describes the scope of the agreement as covering “cultural expressions”. This scope refers to creations of the mind: it is thus obvious even from the title that the audiovisual sector is covered, because cinematographic films, music and broadcast programmes are considered cultural expressions.

Nonetheless, representatives of the audiovisual sector who attended the negotiations at UNESCO and submitted comments and suggestions to the negotiators felt that it was important to leave no doubt that the Convention covered not only traditional forms of cultural expressions, like painting, theatre, literature or music, but also the media, and that the specific policies enhancing and promoting the diversity of audiovisual services were as legitimate as any other cultural policies aimed at cultural

¹² Ivan Bernier, *Traits de Commerce et Diversité Culturelle*, speech given at the Simposio internacional Diversidad Cultural: el valor de la diferencia, Santiago, Chili, 28-29 June 2005, accessible at <http://www.mcc.gouv.qc.ca/international/diversite-culturelle/eng/publications-studies/> (date: 20 November 2005).

diversity. These requests were taken on board, and the Convention now contains a number of explicit references to the media.

The preamble and article 2.7 of the Convention acknowledge that cultural diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures. This “principle of equitable access” ensures that cultural diversity is not misunderstood as an excuse to erect barriers for free cultural exchange. Instead of barring entry of cultural goods and services from other countries, the idea is to be open to cultural exchanges but to also create space for indigenous cultural products. An example of such a balanced policy would be that the European Community does not ban U.S. films from being distributed in Europe. Instead, it uses subsidy schemes for European productions and a quota system imposing, “where practicable”, a majority of European works (51 percent) on certain programming genres of European television channels, and thereby ensures that its citizens have a choice whether they want to watch audiovisual content of non-European origin or works with European topics, actors, and narratives. The Chinese policy of imposing on Chinese television channels a 90 percent quota in favour of Chinese productions, however, appears questionable under this principle of balance, because it seems to pursue the aim of blocking out foreign audiovisual programmes, curtailing freedom of information and nearly banning access to cultural creations from abroad.

In other words, the concept of balance implies cultural policies which embrace curiosity and openness for foreign cultural expressions, but not at the expense of one's own cultural creations. As the Convention mentions in article 1(c), the aim is to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace. This *balance* in the international cultural exchanges makes the difference from a world trade system based solely on free trade principles. The trade regime is indifferent to the actual outcome of free trade: it does not object to the laws of economics working in favour of a dominant culture crowding out the cultural creations of another people.

The preamble and article 2 of the Convention also reaffirm that freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies. This principle clarifies that human rights relating to cultural expressions, such as freedom of expression and of information, are paramount and may not be compromised under the disguise of policies that claim to promote cultural diversity. Thus, the practice of North Korea to block any access to the Internet for its citizens could not be justified under the Convention.

Article 6(h) of the Convention, as well as the preamble, contain specific references to media pluralism as a prerequisite for cultural diversity. Media representatives felt

that this reference to the legitimacy of policies strengthening and preserving media pluralism was of particular importance given that media diversity is one of the keys for an environment in which cultural diversity can flourish and given that policies aimed at safeguarding and fostering media pluralism can sometimes be regarded as discriminating against foreign media service providers. An example of such policies in EU member states are the must-carry rules for cable television operators which allow governments to ensure that certain local, or national, or minority language TV channels which are of particular relevance to local audiences are carried on cable networks. From the point of view of the GATS, such policies could raise questions, for example, under the market access principle, and could therefore be subject to requests for liberalisation. These rules could also be vulnerable under the proportionality test which is foreseen to apply to domestic regulation.

Article 2.2 of the Convention lies at the heart of the Convention because it expressly recognises the sovereign right of states to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory, subject only to the Charter of the United Nations and the principles of international law. Article 4 of the Convention defines the term “cultural diversity” as “the manifold ways in which the cultures of groups and societies find expression.” As a result, and in line with UNESCO’s 2001 Universal Declaration on Cultural Diversity, cultural diversity is defined in the broadest of terms. This is followed by a description of the various modes through which cultural expressions find their purpose, such as artistic creation, production, dissemination, distribution and enjoyment. Again, the list of activities mentioned is not a finite one and leaves ample room for countries to adapt their audiovisual and other cultural policies as circumstances change.

In this context, it is also highly relevant for audiovisual policies that article 4.1 of the Convention acknowledges that all these modes of artistic creation, production, dissemination and distribution are covered “whatever the means and technologies used.” In other words, the principle of technological neutrality so vehemently defended by the European Community in the GATS negotiations and of such significance for audiovisual policies in the age of the Internet, has been recognised explicitly in the Convention. It will be interesting to study how this principle enshrined in the UNESCO Convention may ultimately impact even on internal Community law. Once the Convention has come into effect and the European Union itself (and not just its Member States) has become a party to it, the legitimacy of cultural policies extending to the Internet, including the offers of public service broadcasters, will be recognised as a legally-binding principle and not just a simple policy option.

From the standpoint of the audiovisual sector, and in particular its artistic creators, the reference in the preamble to the importance of intellectual property rights in

sustaining those involved in cultural creativity, is also helpful. While rightly refraining from covering copyright, the UNESCO Convention establishes the link to international treaties on intellectual property rights, especially those of the World Intellectual Property Rights Organisation (WIPO) and reminds signatory countries of the importance of such policies for individual cultural creations as well as for the sector as a whole. Similarly, the Convention comes out strongly in favour of policies promoting the interests of artists, others involved in the creative process, cultural communities and organisations that support their work, proclaiming that “parties shall endeavour to recognise the important contribution” they make “and their central role in nurturing the diversity of cultural expressions” (article 7.2).

The term “others involved in the creative process” applies to cultural industries, namely industries producing and distributing cultural goods and services. Cultural industries are explicitly mentioned in article 4.5 of the Convention. Thus, cultural policies relating to broadcasters, film producers, publishing houses for the printed press, for books or music are deemed legitimate. It is unusual for a UNESCO cultural instrument to include *industries* in its scope. This recognises, however, that the global exchange of cultural goods and services cannot be successful by focussing solely on artists and other individual creators, but requires facilitators as well. It is also indicative of the fact that UNESCO members understand that cultural exchange can be “big business” and can contribute significantly to a country’s GDP, as is already the case, for example, with the U.S. film industry. This is particularly true given the relevance of cultural goods and services for knowledge-based societies. Against this background, article 4.4 of the Convention completes this approach by stating that cultural activities, goods and services, are covered by the Convention “irrespective of the commercial value they may have.” In other words, there are no two classes of audiovisual productions under the Convention, for example, art films on the one hand which may benefit from subsidies, and blockbuster movies that may not. The Convention acknowledges that both types of production are cultural expressions and can thus legitimately be promoted by relevant audiovisual policies. Another way of looking at this text is to understand that UNESCO negotiators acted with a keen sense of business as well as out of a genuine concern for cultural diversity.

Article 14 of the Convention, which obliges parties to endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, contains the ultimate recognition of how much the Convention is rooted in the notion of the important economic implications of successful cultural policies. The clause talks about the importance for signatory countries to help parties from developing countries to strengthen their cultural industries through “facilitating wider access to the global market and international distribution networks for their cultural activities, goods and services”; “enabling the emergence of viable local and regional markets”; and “encouraging

appropriate collaboration between developed and developing countries in the areas, *inter alia*, of music and film."

The recognition of the important role of cultural industries for development policies is in line with work in other international fora, and in particular the work done in the United Nations Conference on Trade and Development (UNCTAD). In recent years, UNCTAD has placed considerable emphasis on helping developing countries understand the economic potential of cultural industries. The UN organisation has begun actively to support these countries in setting up, developing and growing cultural industries of their own with meaningful export potential¹³.

The European Commission clearly sympathises with the aim to provide for special assistance for developing countries to develop their own cultural sectors into cultural industries with export potential. On the day of the adoption of the Convention by the UNESCO General Conference, the Commission pointed out that article 151 of the EC Treaty already obliges the Community to promote cultural diversity not just internally, but also in its foreign policy¹⁴. The Commission then recalled its existing "ambitious" development policies for certain regions, namely the countries of Africa, the Caribbean and the Pacific (ACP), as well as towards the Mediterranean countries and all its neighbouring countries, which already comprise "clear cultural components". Against this background, the Commission cites the Convention and pledges to support developing countries to build their own sustainable local cultural industries and to help them find export markets for their cultural productions.

Another relevant provision in the context of international cooperation and audiovisual policies is article 12(e) of the Convention. It encourages signatory parties to conclude co-production and co-distribution agreements. This clause covers multilateral agreements like the Convention on Cinematographic Co-Production or the Eurimages Programme concluded by the Council of Europe, as well as bilateral agreements of this or a similar kind.

Apart from individual artists and cultural industries, the Convention also recognises the role of public institutions and organisations for cultural diversity. Article 6.2, which contains a non-exhaustive list of measures which member states may employ at the national level to safeguard and promote cultural diversity, makes an explicit reference to "measures aimed at establishing and supporting public institutions, as appropriate". More specifically, the same paragraph also recognises the legitimacy of measures "aimed at enhancing diversity of the media including

13 UNCTAD: Eleventh session, São Paulo, 18 June 2004: High-Level Panel on Creative Industries and Development, available under:

http://www.unctad.org/en/docs/tdximisc1_en.pdf (date: November 28, 2005)

14 European Commission, Press Release of 20 October 2005, MEMO/05/387.

through public service broadcasting". Given that public service broadcasting in Europe and elsewhere has come increasingly under attack from commercial media operators claiming that public service broadcasters distort competition and are no longer needed in a global communications environment¹⁵, the legal principle contained in the Convention that public service broadcasting may contribute to cultural diversity and media pluralism may be regarded as something of a global equivalent to the 1997 Amsterdam Protocol on Public Service Broadcasting adopted by European member states as part of the EC Treaty.

Article 6 of the Convention also mentions other legitimate policy measures with particular relevance to the audiovisual sector:

- Measures to provide the availability for domestic cultural goods and services within the national territory and relating to their creation, production, dissemination, and distribution, including measures in support of languages. This clause would support, for example, quota systems applying to domestic television channels in favour of domestic content.
- Measures aimed at providing domestic independent cultural industries, and activities in the informal sector, effective access to the means of production, dissemination and distribution of cultural goods and services. The notion of *effective access* is a particularly novel and potentially controversial one. It appears to apply to measures relating, for example, to access of cultural content to the means of distribution, such as communications networks, electronic programming guides, and other gateway technologies.
- Measures providing public financial assistance. This clause covers all film funds, and other public financing aimed at the production, promotion, and distribution of audiovisual content, including TV and multimedia productions, music, and public service broadcasting.

While the Convention addresses a wide range of traditional as well as novel cultural policies that signatories may direct at cultural expressions, the question remains about its significance with respect to the WTO. Does the Convention supersede and replace commitments signatories made under the WTO in the audiovisual sector? Does it provide protection against possible trade disputes in WTO?

The Convention does not exclude audiovisual and other cultural services from the scope of WTO agreements and, for reasons of international law, it could not have

¹⁵ See for more details, Verena Wiedemann, "Emerging Case Law of the European Commission on State Aid and Public Service Broadcasting: Will Public Service Activities be Permitted on the Internet?" *European State Aid Law Quarterly*, available under http://www.ebu.ch/CMSimages/en/_online_47_e_verana_bis_tcm6-18562.pdf (date: 28 November 2005)

achieved such a goal. This is because the UNESCO Convention on Cultural Diversity is a cultural treaty and not a trade agreement, and also because not all the parties to the WTO are likely to become signatories to the UNESCO Convention. This principle of international law has been expressed in article 20.2 of the Convention. However, article 20.1 explicitly states that this instrument is not subordinated to any other treaty. The Convention thus has the same legal standing as any other international agreement, including those administered by the WTO. It does not conflict with it, but complements other international obligations. In particular, it calls on the signatories to foster mutual supportiveness between the Convention and other treaties to which they are parties, and when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, parties shall take into account the relevant provisions of the Convention.

A key obligation in this context is article 21 of the Convention according to which signatory parties have agreed to promote the objectives and principles of the Convention in other international fora and to consult each other, as appropriate, bearing in mind these principles and objectives. Together with the commitment in article 19 according to which parties will exchange information and share experiences concerning best practices for the protection and promotion of cultural diversity, the Convention in effect provides for a mechanism for signatories to consult with each other and to support each other in WTO negotiations, when it comes to calls to liberalise audiovisual and other cultural services. As a consequence, the Convention and the mechanisms set up under it, should have an impact on the way its signatory parties act in new bilateral, plurilateral and multilateral trade rounds and how they respond to requests to liberalise their audiovisual services.

The main effect of the Convention for the purposes of the WTO is thus not legal but political. It creates a common reference point for all signatory countries that want to protect and promote their cultural industries. Common approaches on how best to achieve this goal can be discussed and worked out in the Intergovernmental Committee to be set up under article 23 of the Convention. Also, recommendations concerning best practices for cultural policies would make these policies less subject to criticism, because they would be more predictable and no longer dismissed with the accusation of protectionism. With these arguments and procedural structures working in their favour, it should be much easier, even for weaker countries, in future trade negotiations, to defend their cultural policies against requests to liberalise these sectors. Cultural ministries of signatory parties should find a friendly forum where they can consult with experts and with each other about future challenges, such as the significance of policies relating to the digital, on-demand environment of the Internet, and about how to ensure that trade obligations do not prevent them from keeping the necessary regulatory flexibility to protect and promote their cultural industries adequately in a fast changing environment.

It should be mentioned, however, that there has been criticism of the Convention, not just by the United States, but also, for example, by cultural activists. They rightly point out that the WTO mechanism is at least *de facto* much more powerful than the UNESCO Convention, because only the trade agreements have binding enforcement mechanisms backed by sanctions. It is also true that the Convention does not help countries such as New Zealand, which has undertaken wide-ranging liberalisation commitments in broadcasting services under GATS and later regretted its decision terribly. And it is equally true that the dispute settlement mechanism foreseen in the Convention does not help in cases of disputes over audiovisual policy measures where the complainant country has not signed the Convention and will be certain to bring the dispute before a WTO trade panel¹⁶.

However, the implications of this Convention are nonetheless enormous and they were well worth the effort. For the first time in history the world community has recognised the legitimacy of cultural and audiovisual policies by an overwhelming majority of votes of UNESCO members in a legally binding treaty. These countries supported the text despite the political pressures of the United States, and they have done it with full knowledge of the challenges to cultural diversity from new technologies and WTO trade liberalisation. The Convention documents the express will of governments around the world to protect and promote cultural diversity actively and to resist the calls for economic policies to reign supreme. The world community has come a long way in only a few years.

¹⁶ Jane Kelsey, Speech at the 4th Meeting of Cultural Professional Organisations, Madrid, 9-11 May 2005 (unpublished manuscript).

Chapter 6

Co-operation for Development: Building cultural capacity

Olaf Gerlach Hansen

Background

The agenda of a number of developing countries was one of the driving forces behind the adoption of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (hereafter the Convention).

Developing countries, like other countries, have a rich and thriving cultural diversity. A very large part of the informal economy in developing countries is already related to the cultural sector and creative industries. The fact that cultural industries can foster economic development in developing countries is already evident on a large scale in China and India; increasingly, medium-sized and smaller developing countries are becoming aware of the economic potential. An enabling environment for the cultural industries in these countries can build on a strong informal economy in the sector and an existing strong domestic market among all income groups. By developing the capacity of the cultural industries, the domestic market can be enlarged, and the opportunities to access the international market can be increased. Some cultural products from developing countries have a comparatively good starting point for competing internationally¹.

Indigenous peoples and cultural minorities, heavily concentrated in the developing countries, also have a strong interest in the Convention. The linguistic genocide² is described by, for example, the Linguistic Society of America³, which estimates that, unless interventions are made today, a century from now only hundreds or low thousands of the world's existing 5-6,000 languages will continue to exist. The

1 For some example the music industry in Africa, e.g. refer to article (chapter 4) by Frank J. Penna, Monique Thormann, and J. Michael Finger in *Poor Peoples Knowledge Promoting Intellectual Property in Developing Countries* (2005), World Bank, Washington, USA.

2 Tove Skutnabb-Kangas: *Linguistic Genocide in Education -- Or Worldwide Diversity and Human Rights?* (2000). Laurence Erlbaum Associates, NJ, USA.

3 The web-site of the Linguistic Society of America:
<http://www.lsadc.org/info/ling-fields-endanger.cfm>

disappearance of languages and cultures of indigenous peoples is a key issue. An important factor in maintaining diversity among indigenous peoples is whether their language and culture are given a chance to flourish through the development of modern and indigenous content production in radio, television, the Internet and books, and through visual art, music, design, literature, sports, etc. This again requires fostering an enabling environment in developing countries for cultural industries of small cultural and linguistic groups, which to a large extent means indigenous peoples. It is self-evident that it also requires the basic respect for the rights of indigenous peoples in the respective countries where they live. Developing capacity for the cultural industries of indigenous peoples and other cultural minorities, and upholding respect for their rights, are mutually interdependent – one is worthless without the other.

The reality however is that most – but not all – developing countries have weak or non-existent cultural industries. Cultural industries and cultural producers in developing countries are facing a very difficult situation.

1. If they exist at all in the formal economy, they are normally challenged by the global media and cultural industries; or, in other cases, by the comparatively few, strong and dominant players from other developing countries, for example, the Indian and Egyptian film industries.
2. The cultural and media industries of most developing countries are easy prey in bilateral trade agreements, for example, the U.S./Chile Free Trade Agreement prevents Chile from introducing regulations in relation to digital content. Active cultural policies, including interventions such as regulations in digital content in the future will be a key instrument for the long-term development and flourishing of local content production in film, music, creative writing, etc.
3. The cultural infrastructures needed to develop cultural industries are weak. Factors include arts and culture in general education and media; training of artists and cultural entrepreneurs; protection of intellectual property rights of artists and producers and developing copyright collecting societies; development of culturally-appropriate tourism; micro-credit systems for artists and small and medium-sized cultural enterprises (SME); venues and public facilities for arts and culture; the use of local cultural content production in public projects such as construction and communications campaigns; etc.
4. Very many developing countries have not formulated a strong cultural policy which is solidly placed in the priorities of the economic and social development of the country. In principle, there is a political desire to develop the creative industries, but few countries have translated the rhetoric about cultural self-determination into active cultural policies which make a difference for local

contemporary cultural industries and producers. This has only been slowly emerging over the last decade.

It is against this background that Articles 14-18 of the Convention have been formulated. These Articles stress Co-operation for Development (Article 14), Collaborative Arrangements (Article 15), Preferential Treatment for developing countries (Article 16), International cooperation in situations of serious threat to cultural expressions (Article 17) and the International Fund for Cultural Diversity (Article 18).

These Articles do not provide solutions for any of the core problems. States are obliged only to “endeavour” to do the things outlined in Article 14; in Article 16, preferential treatment for developing countries is not related to any concrete targets or incentives. Articles 15, 17 and 18 are also fully dependent on the good will of developed countries. The articles express relevant norms, but do not give effective tools for developing countries and civil society. As a consequence, the International Network for Cultural Diversity (INCD), in its assessment of the Convention, concluded that these articles do not meet the objective of being an effective tool for cultural development.

The question now is how to proceed. Even if they are not effective tools themselves, how can Articles 14-18 be integrated in a strategy to build cultural capacity and creative industries to alleviate poverty and promote a more just and fair world based on the values of the Convention? What strategies are necessary to promote the objective of Article 14: “...to support co-operation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector...”?

What is next?

A strategy needs to be based on the existing recognition and understanding among the key actors (cultural producers, civil society, national governments and the international development community) about the relationship between culture and development. This can be the foundation for recommendations on how artists and cultural producers can act most productively. Their actions can be through their own enterprise, whether in their daily lives they see themselves as primarily civil society, market or state operators, or as a fourth force. Their actions can also be collective *vis-à-vis* the broader development policy framework which is formulated by governments on the one hand, and the international donors and development banks on the other hand.

To begin to develop a strategy, I will examine:

- The current status of culture in development policy;
- Increased understanding of the dual role of culture in development: I will argue that artists, cultural producers and those who can speak for the sector can be better at preparing and making the case for culture *vis-à-vis* the decision-makers in economic and development policy;
- Inclusion of culture in the Poverty Reduction Strategy Papers of developing countries as a strategic goal; and
- The need to build new alliances and partnerships

The status of culture in development policy

Since the 1980s, culture has gradually increased its visibility in the rhetoric of development policy making. This culminated in the early nineties with the World Commission on Culture and Development, which published *Our Creative Diversity* in 1996. The report pointed to many ways to strengthen the recognition of culture in the broader development process; for example, it contained chapters relating culture to economic development, gender and environment.

Since culture has historically been used for different interests (and by the more dominant), it was significant that the commission provided a forward looking and global value framework for the world community to consider: cultural diversity based on respect for global ethics. Global ethics was defined as human rights and values beyond human rights. One of the African members, Angeline Kamba from Zimbabwe⁴, popularly defined it as “treating each other decently” and not just quarrelling about whose human rights to protect.

The follow up to the report quickly revealed a major problem: how to transform “soft” goals about the significance of culture in development, into decisions in the “hard” areas which are decisive for cultural development, such as international trade, economic policy and sector policies (for example, in environment, health, education and infrastructure).

This has been dealt with since through two approaches. The first approach stresses cultural diversity as a goal, and has focused on formulating “norms” for the broader economic and political environment to foster cultural diversity. The second approach focuses on the use of culture as an instrument to foster broader economic and political goals, most importantly poverty reduction.

The first and “normative” approach culminated with the adoption of the Convention in 2005. There have been many agendas on the road to the Convention

4 Speaking at the opening conference of the “Images of the World” cultural festival in 2000, Copenhagen, Denmark.

and certain governments, cultural ministers and later UNESCO have at different times been in the driver's seat. It has generated networks, such as the culture ministers' network, the International Network on Cultural Policy (INCP). UNESCO initiatives such as the UNESCO Declaration on Cultural Diversity (2001) and the creation of the Global Alliance for Cultural Diversity are the other ancillary results.

The second has been the "development" approach, which to some degree has succeeded in recommending that the cultural dimension be "mainstreamed" into development policies, in order to achieve poverty reduction and sector development goals, such as for human rights and good governance, education, health, water and sanitation, environment, and gender. Since 1998 some initiatives in developing countries have been supported by some governments. Policies and reports have been formulated by the World Bank⁵, UNDP⁶ (2004) and some bilateral donors, such as the Nordic countries. The Nordic countries have significant programmes from Sida and Norad, and a cultural strategy from Danida in 2002. Other bilateral donors, for example, France, Italy and Japan provide assistance for the cultural sector. Some private foundations have played a key role in moving the agenda, such as the Ford and Rockefeller Foundations; and, in Asia, the CAFO network created in 1998, reflects the foundation concern.

The difference today from ten years ago, is that there is a higher awareness about culture in development policy:

- South governments acknowledge that culture has an economic and social potential and were active in supporting the Convention;
- Multilateral development agencies and programs (World Bank, UNDP, WHO, EFA, WSIS, etc.) and some bilateral development agencies, have more references to culture in their strategies and a key agency such as the World Bank has decided to "mainstream culture" into its programmes.
- The Convention has, through Articles 14-18, focused on the need to combine the "normative" goal of cultural diversity with the efforts made in development cooperation in the field of culture.

When assessing whether culture systematically and consciously is taken into account in the formulation and implementation of development policies at national level, or in multilateral or bilateral cooperation programmes, the answer is a resounding "no." There are a few exceptions of good intentions and practices, but

5 I am referring to the World Bank's "Culture and Sustainable Development - A Framework for Action" (1999), "Culture Counts" conference (1999) etc. More recently, the Bank has supported the development of more research, a recent reference e.g. is the publication of "Culture and Public Action" (2004).

6 UNDP Human Development Report in 2004 had as its theme "Cultural Liberty in today's Diverse World".

culture is nowhere near the mainstream. The current agenda seems to focus on the need for studies of “what works” and development of “best practices,” which hopefully later will lead to systematic policies and programmes.

The conclusion, therefore, is that the status of culture in development policy has improved over the last ten years, but when it comes to concrete policy formulation and implementation it is still an “uphill struggle”. Major challenges lie ahead.

Increased understanding of the “dual nature” of cultural activities, goods and services (economic and cultural) after the Convention

The Convention is a normative instrument for future international and national policy making, which supports and reinforces the last decade's increased focus on culture in development policy. The Convention Articles 1-4 reaffirm the value framework established by the international community over the last 50 years, in fields such as human rights and fundamental freedoms, sustainable development, equal access and opportunities, international solidarity and cooperation. This value framework is also the basis for the existing international cooperation for development and poverty reduction.

What is new with the Convention is that it links this value framework to the cultural sector. By doing so, it provides a new framework for international development cooperation related to the cultural sector.

One of the key principles established in the Convention is the “dual” nature of cultural activities, goods and services. This refers on the one hand to the “cultural” nature, which may be an end in itself, and on the other hand to the “economic” nature of the goods and services produced.

The “dual” nature principle was part of the dispute with the United States, which was reluctant to accept that cultural activities, goods and services should be treated other than in relation to their economic value. I will not address this dispute since the U.S. and Israel were the only two countries in the world which opposed the Convention, whereas 148 countries, including the developing countries, voted for it.

The dual nature principle has wide implications for development cooperation.

The “economic” nature

Throughout the negotiations on the Convention, it was evident that the recognition of the economic nature of cultural activities, goods and services was important for developing countries, to generate employment and economic development, which in turn contributes to poverty reduction. It has been voiced that it is important for all

cultural and linguistic areas, and in particular non-dominant minorities, including indigenous peoples, who are generally restricted to a limited domestic market and thus must compete on an unequal footing. Without “active cultural policies” (see Article 6) the cultural activities, goods and services of these cultures will not be viable economically and they will eventually collapse and die. In Europe, the European Union has so far guaranteed that an active cultural policy is possible in EU countries *vis-à-vis* bilateral trade agreements such as the ones proposed by the U.S., but in developing countries, it is up to the countries themselves to establish this situation. The norms established by the Convention give legitimacy to national active cultural policies, but it will require a very strong political will in developing countries to use and implement these norms. “Active cultural policies” are needed to build capacity among cultural policy-makers, industries and infrastructure, which in turn can bring economic returns.

With respect to development cooperation, the follow-up focus must be on the relationship between cultural policy and economic development, in relation to cultural industries in which there is an obvious economic comparative advantage. This includes, for example, craft and design, sports, tourism, food, music, media and publishing. The opportunity for cultural industries in these fields requires a positive economic environment, focussed on SME’s, and with appropriate instruments and incentives.

The “cultural” nature

The Convention (Article 4) refers to cultural “expressions that result from the creativity of individuals, groups and societies, and that have cultural content.” The latter is defined as “the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.”

Seen from the point of view of international development cooperation, it means that the focus is both (1) on artistic expressions and artistic development as an end in itself, and (2) on cultural expressions in the broader sense of the term, which fosters human development. In other words: the first is the narrow focus on art, and as a goal itself, and the second is the broad focus on artistic and cultural expressions which contribute to human development, whether understood as health, education, quality of life, social justice, gender equality, sustainable development, participation, accountability and so on.

The broad focus is reinforced in Article 14, which states that a “dynamic cultural sector” is closely related to aims of the “parties to the Convention” to support cooperation for sustainable development and poverty reduction.

The narrow and the broad understanding of the “cultural” nature of cultural activities, cover two different approaches to culture and development over the last

15-20 years: (1) on the one hand, respecting and supporting the Arts as an autonomous field of activity with its own quality criteria and discourse, and (2) on the other hand, using artistic and other cultural expressions as a tool for human development with goals related to human rights, gender equality, environment, education, health, etc. The first is governed by artistic quality criteria, the second by didactic and social quality criteria.

Since governments, donors, banks and private foundations historically and also in the recent decade have split support and grant systems into either the narrow box or the broader box, the above does put into question whether this practise is still the best. This is particularly the case if one assumes that artists, civil society, governments, donors, banks and private foundations, would like the Convention to be effective, particularly in relation to Articles 14-18.

My view is that, for the Convention to work:

- 1) It is necessary to establish broader, comprehensive and ambitious cultural programmes in developing countries based on cross-sector, interdisciplinary approaches, which enable artists and cultural producers to contribute consciously and systematically to human development. Projects and programmes are often developed with no link to national cultural policies and priorities. While the reason is often fear of government inadequacies, the result in the long term is *ad hoc* solutions, and unsustainable cultural development.
- 2) Within broader programmes, the distinction between support based on artistic criteria and support based on instrumental "human development" criteria is still necessary, in order to maintain a balance between the development of a professional, qualified cultural sector, and the broader goal of human development. The cultural sector will never bloom and eventually benefit broader human and social ends unless it is allowed to build its own infrastructure (support systems of education, production, distribution, communication, etc), and there is sufficient room in which independent artists can operate.

The establishment of broader programmes at this time must be based on pilot projects which can demonstrate that artistic and cultural expressions work, in relation to human development goals in education, health, gender equality and other sectors. Some progress and experiences have been built over recent decades in a number of sectors. Some examples are:

The Education for All (EFA) framework, since its inception in 1990, has focused on the need to develop student-centred, rather than teacher-centred, education systems. In recent years, EFA has increasingly focused on Quality of Education and educators have increasingly given attention to the cultural dimension and creativity. It has been seen as crucial for building quality learning environments and critical

thinking, which are necessary to empower students to tackle the social challenges they will confront in life. Artists and the cultural sector are a major asset for achieving these goals, but opportunities are often not developed for local artists, art teachers and local producers of cultural content (such as producers of television and radio programmes and music, and publishers of books and magazines) to be partners for achieving EFA goals. And in most countries, artists and their organisations are not aware of the goals and opportunities related to the implementation of EFA.

In health, the situation is similar. Over the last 25 years, the distinction⁷ between the cultural construct of illness and working to decrease illness itself has gained momentum as crucial for dealing with health policies. To some degree this has increased the will to take culture into account in health policies. As an example, the fight against HIV/AIDS has already involved artists and indigenous cultural leaders. Throughout the world, there are many examples of best practices, such as the HIV/AIDS training programme of the Zimbabwe National Traditional Healers. Another example is water and sanitation, which are crucial for achieving universal health. In Bangladesh, the Danish-Bangladeshi Official Development Cooperation Programme in water and sanitation recently decided to include theatre as a conscious and systematic element⁸. This is done primarily by the Bangladesh Institute for Theatre Arts in Chittagong and by other institutions which have developed theatre as a general tool for human development issues. The challenge again is how to ensure that the use of artistic and cultural practices is done in a way which builds capacity among artists and cultural producers, and ensures that programmes are culturally sustainable, both by building on local cultural traditions and by surviving beyond the period in which external funding is given.

Examples could also be elaborated in many other sectors and themes for development cooperation, such as human rights and good governance, gender, environment, etc., which all relate to using cultural expressions for human development.

In conclusion, I believe artists, cultural producers and those who can speak for the cultural sector need to get better at preparing and making the case for culture to economic and development policy decision-makers.

First, they need to be better informed about the existing opportunities and policies for arts and culture, in specific sector policies which have already been agreed by

7 This distinction was originally introduced by Arthur Kleinman in "Patients and Healers in the Context of Culture" (1980). University of California Press.

8 For further information please refer to <http://www.dccd.dk/dccd/cku.nsf/doc/kulturstrategibangla?OpenDocument>

their governments, and through existing international development cooperation agreements.

Second, they need more studies, pilot projects and programmes which demonstrate to governments and donors the potential of investing in the cultural sector, whether to achieve an economic development return, or whether to foster human development in sectors and areas such as education, health, human rights, gender and the environment.

Third, I believe that achieving a higher priority from governments and donors for the funding of the cultural sector, such as capacity building of the cultural infrastructure (arts and culture education, production, distribution, marketing, communication etc), will require the sector to achieve two simultaneous goals: to increasing the income generated from the market, and thus to increase its contribution to the country's economic development; and to increase the country's ability to meet related human development goals.

The inclusion of culture as a strategic goal

Mainstreaming culture and development

An increasing number of countries over the last 50 years have recognised the importance of the cultural sector by creating ministries of culture and by formulating cultural policies. In the last ten years, a new trend has been to formulate policies for cultural industries and the relationship between culture and business. However, in most of the world, governments still tend to give low priority to culture in comparison with other sectors, and this is exacerbated in many developing countries, particularly those that are least developed. Policies which consciously and systematically take culture and the cultural sector into account in economic and human development are rare, and often randomly formulated.

In the context of international development cooperation, the World Bank's focus on culture and development from 1998 has been pivotal for international cooperation in this field. The Bank's conclusion after the initial excitement was the so called "mainstreaming approach." This approach is also used by a number of the other "like-minded" donors, such as the Nordic, Dutch and Swiss governments, although some of these have culture as a specific area of support, with separate budgets and processes.

The mainstreaming approach asserts that culture should be taken into account by the strategies, programmes and projects adopted by each country, as well as in various cross-cutting priorities and strategies. This is the long and difficult road which, due to the lack of staff and resources devoted to specific interventions in

culture itself, risks leading to a complete marginalisation of the cultural sector. On the other hand, if successful, in principle this can lead to conscious and systematic integration of culture into all policies, programmes and projects.

If it is seen as an element of existing priorities for economic and human development, mainstreaming means that the cultural sector potentially can be supported. Since international development cooperation increasingly intends to be “recipient-driven,” governments of the concerned developing countries must be explicit that culture is a priority for them and that culture is integrated into their own development plans and budgets.

Poverty Reduction Strategy Papers (PRSP)

If Articles 14-18 in the Convention are to work, it is imperative that governments in the concerned developing countries state, and reflect in their own planning, that cultural development is a political priority for them.

For most of the economically poorest countries the national development plans and budgets are formulated as part of the process of the PRSP. PRSP is ideally a process where the national priorities are determined in a comprehensive consultative process involving all different government departments and ministries, as well as the private sector and civil society.

The inclusion of culture in PRSPs and the subsequent national development plans and budgets should therefore be considered a strategic focus for the Convention to work.

This will require comprehensive work by many parties:

- a) Artists and cultural producers in every country, and their organisations, need to lobby for this outcome. PRSPs are, in principle, formulated in a consultative process with civil society, but in most countries, artists and the cultural sector have been absent from this civil society involvement. It is very important for artists and the cultural sector to raise their voices and seek to influence the PRSP. An example of how this can work came last year when the Zambia Arts Council took it up very actively, including with demonstrations directly before Parliament. This has resulted in a process where culture is considered a factor for national planning. An example of a concrete immediate step, the issue of abolishing taxes on musical instruments has now been taken up, which would be an important step in the development of the music industry of Zambia.
- b) Governments, as well as professional and academic institutions, need to gather better and stronger information, and this can help decision-making on how best to include culture in the PRSP. Some governments, such as Senegal, Mali, Ghana and Zambia, have taken the first steps to consider how best to include culture in the

PRSP. However, they need hard facts which document the positive benefits of prioritising funds for culture over the competing demands on the budget⁹. While some information exists, more is needed.

- c) Once culture has been included and strengthened in national planning and budgeting, official international development cooperation needs to be willing to support appropriate policy development, programmes and projects.

The World Bank and many of the multilateral and bilateral donors have already said, in principle, that they are willing to do this. However, most of these agencies lack concrete strategies and programmes relating culture to the specific country, sector or thematic programme. It would be beneficial if government-donor coordination for specific sectors in specific countries was used to initiate a coordinated effort on cultural impact assessment, and on cultural activities for development. The relationship with the cultural sector should be integrated in any future terms of reference, to preclude interventions in other sectors (health, education, water, environment, etc) which are unsustainable when seen from the point of view of the cultural sector.

NGOs, foundations and other donors do have, in the short, medium and long term, an important role in providing support for studies, pilot programmes and projects, which allow for gathering information and experimenting with new models. This is extremely important for future decision-making on how to include culture, systematically and consciously, in broader programmes which strengthen the cultural sector as well as the cultural dimension of other sectors.

The need to build new alliances and partnerships

Making the Convention, including Articles 14-18, work and strengthening the inclusion of culture in PRSPs and national development plans and budgets, will never happen unless new alliances and partnerships are developed among key stakeholders.

The first condition is for artists and cultural producers at local and national level to get organised and to advocate for their interests. If the primary producers are not making the case, how will others be convinced? Artists and cultural producers must create their own organisations and make them heard at the national, regional and international level.

The second condition is to discuss and build alliances and partnerships between artists and cultural producers on the one hand, and the private sector and local and

⁹ Interview with officers in charge of PRSP in the Ministry of Finance, Senegal, November 2005.

national governments on the other hand. This may not be as difficult as it seems because artists and cultural producers are a diverse group which includes people who are in civil society, private sector players, and some who are closely related to government. Private sector organisations and labour groups already include many cultural sector members. Governments also have a vested interest in culture, for political reasons that are self-evident. The obstacles to action are mainly related to the need for a better basis for decision-making in the face of competing demands on limited public resources, a key part of the political process. Also, if the artists and cultural sector lack well-supported arguments, or are not organised and well-connected with other pressure groups in the private sector and the labour movements, both the lobby and the government's ability to make good decisions in the field will be weakened.

The third condition is that new studies, pilot programmes and projects, are essential to allow for gathering information, experimenting with new models, and sharing best practices. A concrete initiative which seeks to do this is an African programme, created as a partnership between the Danish Centre for Culture and Development, the International Network for Cultural Diversity in Africa and the Global Alliance for Cultural Diversity (based in UNESCO). This programme includes artists, cultural journalists, producers and organisations in a range of African countries and involves building linkages and contacts with governments and international agencies and NGOs in development cooperation, which are all concerned with including culture in the PRSP, and national planning and budgets. The initiative of the Global Alliance for Cultural Diversity also provides a forward-looking vision. The vision needs however to be further developed by the much more active involvement of all the key stakeholders, in particular those involved in international development cooperation, whether civil society, governments, private sector, or the banks and donors.

Chapter 7

**Culture incorporated; or trade revisited?
How the position of different countries affects the outcomes of
the debate on cultural trade and diversity**

Caroline Pauwels, Jan Loisen and Karen Donders

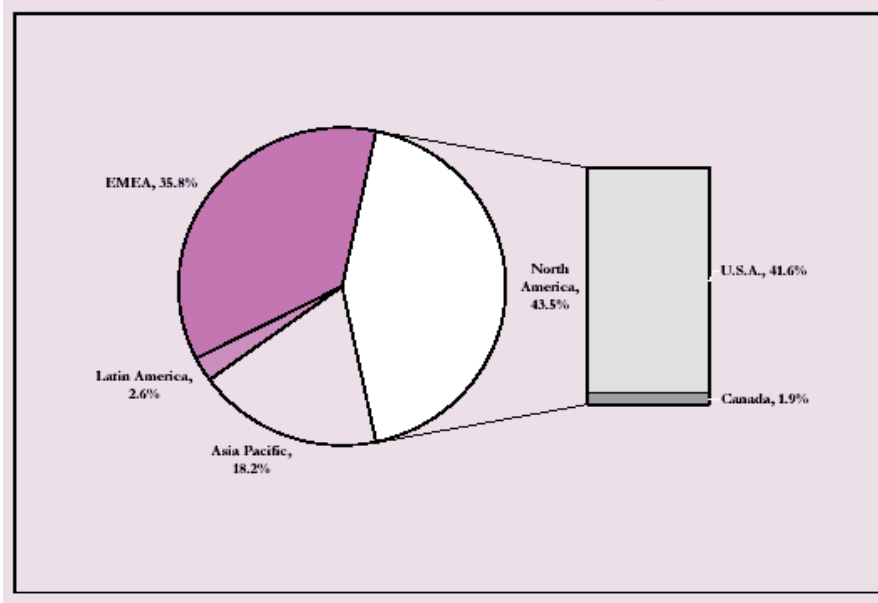
The liberalisation of the audiovisual sector has been on the GATT agenda since its creation in 1948. While the U.S. has consistently pushed for liberalisation in this sector, the EU (France particularly) has just as strongly resisted liberalisation efforts. The Uruguay Round, however, meant the start of a new era in trade negotiations, with a fundamental impact on the audiovisual sector. Apart from ongoing negotiations on the liberalisation of trade in goods, contracting parties began to negotiate the liberalisation of services. Although highly polemic and rather ambiguous in definitions and scope, the outcome of the Uruguay Round meant, amongst other things, that the audiovisual sector explicitly falls under all of the key WTO agreements (GATT, GATS and TRIPS).

From the pre-Uruguay Round to the Uruguay Shift

Opposing approaches about the relationship between economics and culture became clear right from the first GATT negotiations. The United States appeared to be aiming at a liberalisation of the audiovisual sector. The support measures of the European countries and other trading partners were a thorn in the side of the U.S. which was seeking to cash in on its dominant position in the sector and on the global prospects for profits. Whilst the U.S. was broaching the question of liberalisation, Europe, and in particular France, was refusing to play the game. Based on cultural arguments, but also with the relative economic weakness of the European audiovisual sector in the back of mind, it defended cultural policy support measures. This opposition was at that time easily acceptable as the GATT's mandate covered solely the liberalisation of industrial and agricultural goods, but not services (Pauwels and Loisen, 2003: 293). The only cultural reference was GATT article IV, concerning the legitimacy of cinema screen quotas, an article that annoyed the United States, but which, in the end,

did little to prevent U.S. market domination of the media and audiovisual sectors, a situation that still prevails globally.

Entertainment and media markets by region (in million US\$), 2003



Source: Global Entertainment and Media Outlook 2004-2008, PWC in UNESCO, 2005: 23

The eighth liberalisation round, which started in Punta del Este, Uruguay (and became known as the Uruguay Round) signalled an about-turn in audiovisual policy. Given the growing importance of the super-symbolic economy (Braman, 1990: 365) and the need for new investment markets, the major U.S. and European trade blocks were seeking – albeit from divergent sectoral interests – to start liberalising the services sector (Hoekman & Kostecki, 2001: 249). The outcome was the General Agreement on Trade in Services (GATS). Obviously, the U.S. demanded to include the audiovisual sector in the negotiations and Europe could do little to prevent this.

In 1974, the European Court of Justice stipulated in its *Sacchi judgement* that television was a service within the meaning of the Treaty of Rome, television was offered against payment and was cross-border in nature. A decade later, coinciding with the start of the Uruguay Round, Europe had internally set a more liberal course in the audiovisual sector with the negotiations on the *Television without Frontiers Directive* (Pauwels, 1995). It is interesting that even such an awkward party as interventionist-oriented France made a radical policy turn in 1986 when it privatised

the public TV station TF1, resulting in a breach in the traditionally defensive and cultural protectionist European line of argument (Pauwels and Loisen, 2003: 294).

The inclusion of audiovisual services in GATS negotiations, and their possible use as a barter currency in the give and take of the negotiating process, became unavoidable. The changing context did not, however, prevent the French from resuming their traditional protectionist discourse. Partly at their instigation, Europe, through the mouth of the overarching EU, was to advocate ardently for a separate status for audiovisual services. After exploring various avenues, from exclusion and cultural specificity to cultural exception, none of which offered any decisive legal guarantees or enjoyed political support, and with the U.S. taking a more strident position, a stalemate in the audiovisual dossier appeared unavoidable (de Witte, 2001). The eleventh hour solution pulled from the hat provided that Europe would make no liberalisation commitments and would draw up a detailed list of exceptions to the Most Favoured Nation principle (MFN) for the audiovisual sector.

The impact of the GATS in the audiovisual sector is therefore almost nil for countries which, in the Uruguay Round, obtained exceptions on the MFN principle, and refrained from making specific liberalisation commitments. The sole obligation that applies to these countries is for transparency, the commitment to ensure that all rules and regulations which might affect cultural services are publicly available. Otherwise, they are free to implement and amend audiovisual and other cultural policies as they see fit. The outcome of the Uruguay Round therefore meant that at least EU member states had their hands free to maintain support measures in the audiovisual sector (Wheeler, 2000; Pauwels and Loisen, 2003: 294-296). Most other trading partners also took no commitments. By the time the Doha Round was launched, only 24 countries had made commitments that affect audiovisual services (Graber, 2004: 23).

Nevertheless, major breaches had been made in the audiovisual dossier. The audiovisual area now indeed falls under the GATS agreement. Though Europe and others gained a standstill period and a certain room for manoeuvre, the question was no longer whether the audiovisual sector would be liberalised, but how quickly and by what paths, thus the importance of the current Doha Round. Once a member has included a particular sector in its liberalisation planning, it can no longer apply any restriction to “market access” or maintain measures that favour nationals over foreign services providers¹. Also, with the Uruguay Round, the working framework was extended with the GATS and TRIPs agreements alongside GATT, and with a WTO dispute settlement trade court. In this context, many opportunities effectively exist to break open the audiovisual sector and not just via the GATS agreement, but also via TRIPs and GATT (Footer and Graber, 2000; Graber, 2004; Pauwels and Loisen, 2003). This opportunity is even greater as WTO negotiations are undertaken in the

form of package deals. This refers to the negotiating practice of getting reluctant partners to agree to certain proposals by compensating concessions in one sector (e.g. audiovisual) with gains in another sector (e.g. maritime transport). This has the effect of maintaining the liberalisation dynamic, a dynamic which was undeniably introduced in the audiovisual sector at the end of the Uruguay Round (Hoekman and Kostecki, 2001: 115).

The introduction of audiovisual services in the GATS thus represented a fundamental shift in cultural, and especially audiovisual, policy on the international level. Before, UNESCO was the main forum to discuss underlying issues. However, the unhappiness of Western countries with the stronger voice of the developing countries in UNESCO and the polemics surrounding the New World Information and Communication Order had marked the start of its decline in the 1980s. The U.S. left UNESCO in 1984 and the U.K. followed shortly after, which led to financial constraints for the organisation.

It is against this timeframe that the Uruguay Round, the creation of the WTO and the different agreements (such as the GATS) provided an opportunity to discuss the audiovisual dossier in a policy forum that is concerned primarily with economic interests. However, the concluded Uruguay framework has many inconsistencies. Firstly, there are many ambiguities in existing rules and definitions. Secondly, some contracting parties contest the absence of a framework on subsidies, investment and competition in relation to audiovisual services. Thirdly, and more fundamentally, the trend towards convergence adds to the overall vagueness and furthermore opens up the future of the audiovisual dossier in different and quite opposite directions.

The Uruguay Round resulted in a complex tangle of trading rules in the audiovisual sector indeed. "The culture-and-trade question crops up in other fields of the WTO legal order which have their own, partly distinctive rules: trade in goods, intellectual property, investment and subsidies." (De Witte 2001, 238).

The growing convergence between traditional and new digital communication media is increasing the number of interfaces between policy and regulation in the audiovisual sector and regulation in other service sectors. This convergence is having the effect of blurring the boundaries between concepts such as "audiovisual services", "electronic commerce" or "online trading" (Wheeler, 2000: 254, 257; Deselaers and König, 1999: 148). Given the stalemate in the audiovisual area during

In the GATS the so-called positive list approach is used, which means that a party explicitly has to list the liberalisation commitment it is willing to take in a particular sector or subsector. The negative list approach, which is used in for example the bilateral trade treaties the US is negotiating with its trading partners, refers to the practice of liberalisation as a rule, unless an exception is specifically incised and motivated in the liberalisation schedule.

the Uruguay Round, one might therefore reasonably expect that proponents of far-reaching liberalisation of the audiovisual sector will seek to break open the audiovisual market via the interfaces between different types of services. This applies even more given that in the telecommunications sector, following hard sectoral negotiations, significant progress has been made in the liberalisation process (Fredebeul-Krein and Freytag, 1997: 477, 483, 486; Annex on Telecommunications in WTO, 1999: 314-319).

WTO rules, however, do not explicitly address this increasing convergence and remain largely incomplete and vague, although TV and radio services have been excluded from the telecom deal for now. But it is far from certain that this exclusion means a life-long assurance for cultural policy measures in these traditional media. Whereas in the past a position in discussions on the audiovisual sector was that regulatory interference in content distribution is defensible for cultural reasons, this is much less so for audiovisual services delivered electronically alongside a wide range of other services (Wheeler, 2000: 257; Deselaers and König, 1999: 148, 150). Moreover, the U.S. and Japan, as we will see, want certain products that are delivered by and can be downloaded from the Internet to be classified as virtual goods. In this way, they would fall not under GATS, but under GATT regulations which, for the time being, demand much stronger liberalisation (Deselaers and König, 1999: 151). The European Commission's Deputy director-general for trade, Karl Falkenberg, made a similar comment: "If the Americans consider audiovisual products, as well as telemedicine or telelearning systems, as immaterial goods, we lose the right to regulate them." (Le Monde, 23 November 1999: 8)

For the time being it is still unclear whether and how the convergence issue will be dealt with in the Doha Round, and if it could be used to accelerate liberalisation in the audiovisual domain. It is obvious that some trading partners win by remaining silent on convergence issues. In this context Larouche (2004: 410-411) argues that the system of specific commitments and the fact that the classification and definitions of converging services are not very precise, leave trade partners with room to put forward their specific needs or wants. In Cameron's view (2004: 31-32) it stresses the flexibility of evolutions in the audiovisual dossier on a WTO level:

"There will be difficult issues to resolve along the way, notably those related to intellectual property rights and the desire of some countries to protect their unique cultural heritage. Still, if the basic telecom agreement demonstrated anything, it is that the WTO is an extremely creative and flexible body when its Members have the will to achieve something. In audiovisual, as in telecom, if there is a will, there will be a way." (Cameron, 2004: 33)

But even if the audiovisual dossier is discussed during the Doha Round, as agreed upon in the built-in agenda of the concluded Uruguay Round and reiterated during the 2005 Hong Kong Ministerial, it is at the same time just as clear that the political and economic context have changed².

The Post-Uruguay period: Doha and UNESCO, a marriage of reason?

Firstly, on a WTO level, the recurrent imbalance of gains between the developing and developed world was supposed to be addressed in the Doha negotiations. Therefore, it is dubbed the Doha Development Round. In the audiovisual sector, as in others, developing countries are invited to take a position, and developed countries are expected to consider their interests seriously. It remains to be seen if this is merely a symbolic commitment. New voices, reflecting the growing stake of some of the developing countries, such as Brazil, China and India, including in the audiovisual domain, mean new bargaining power and the possibility of expected and less expected coalitions.

Secondly, UNESCO re-entered the global scene, in an attempt to readjust the debate on global trade in culture and to invite parties to consider cultural diversity issues as well, although the impact of this development is unclear:

“At UNESCO, we have ministers of culture, of education and of science. At the WTO there are rather ministers of finance and trade. It is their duty to assure more coordination concerning their engagements in the different authorities. But it is also our duty to remind them of this.” (UNESCO Director-General Matsuura in *Le Monde*, 3 October 2000, III).

Beginning in 2003, UNESCO members were invited to work on a draft Convention on cultural diversity. It needs to be highlighted that a number of players did much to encourage a renewed role for UNESCO in the global debate on cultural trade. Pressure came from Canada and “protectionist” France, reinforced by cultural lobbyists as diverse as l’Organisation internationale de la francophonie (representing 53 member countries, spread over the five continents), the International Network for Cultural Diversity (INCD), the European Broadcasting Union (EBU), authors rights institutions and the International Network on Cultural Policy (INCP). The prospect of having a Convention contrary to WTO agreements thrilled some parties while worrying others fundamentally. It comes therefore as no surprise that the U.S.

2 The Hong Kong Ministerial by the way, has altered the procedures for requesting and offering concessions. To make progress in this give and take game, groups of countries can launch requests together. This means that it is possible that a joint request will be made for liberalisation efforts by partners who wish to progress on the liberalisation of the audiovisual sector (Maenaut, 22 December 2005).

re-joined UNESCO in 2003, following the U.K. Furthermore, the EU, in a similar concern to maintain consistency of international agreements, pushed its member states to accept the EC negotiating on their behalf in UNESCO, a precedent for the EU. The Convention was quite overwhelmingly adopted in October 2005, with four abstentions and only the U.S. and Israel voting against it.

In this inter-institutional battlefield, although UNESCO insisted all along that their work should not be interpreted as a move “against WTO,” positions of negotiating parties were very revealing. In what follows, we will distinguish between:

1. Some parties, such as Canada and the EU, using UNESCO as a way to preserve and gain room for manoeuvre on cultural policies, a strategy they have been implementing consistently and in which they are followed by others,
2. Parties such as the U.S. and Japan, opposing UNESCO and striving for more liberalisation exclusively within WTO, and
3. The positions of some developing countries.

Canada

In the first group of partners wishing to maintain a certain room to manoeuvre and perhaps to regain lost ground, Canada is a prominent actor. It has a long tradition of trying to balance trade commitments with cultural policy needs because of its powerful big neighbour, the U.S. Whereas Canada’s trade deficit in cultural services towards all trade partners stood around CAD \$919 million in 2002, a 5 percent increase since 1995, the trade deficit in cultural services with the U.S. increased by a whopping 42 percent between 1996 and 2002, to a total deficit of CAD \$1.2 billion. There is a similar story in cultural goods, Canada is a net importer, with a trade deficit of CAD \$2 billion in 2004. The deficit vis-à-vis the U.S. accounts for CAD \$1.3 billion of this total. (The Daily, Statistics Canada, 9 September 2004).

In this context of unbalanced trade, it is hardly surprising that the Canadians wish to maintain the status quo in the WTO. In its horizontal proposal for the entire services sector, Canada explicitly mentions that the GATS leaves members the right to regulate the audiovisual sector as a means of achieving national cultural policy objectives. The Canadians also declare that they will not sign up to any commitment that jeopardises their ability to pursue culture policy objectives, until a new international instrument, specifically aimed at a country’s freedom to maintain and promote cultural diversity, is developed (Canada, 2001). Hence, reference is made to the elaboration of the draft Convention on Cultural Diversity within UNESCO. For Canada, the necessity for such an instrument was clearly illustrated by the Canada Periodicals Case (1997), in which Canadian cultural arguments were rejected both by the Dispute Settlement Panel and the Appellate Body of the WTO.

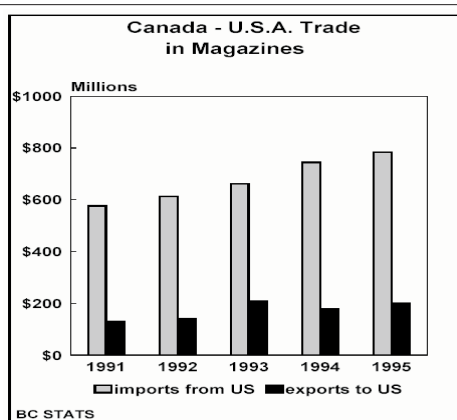
Without wanting to elaborate on this case³, we would like to stress some important issues that need to be taken into account when discussing the possibility of balancing economic and cultural objectives inside the WTO framework. Firstly, the line between the GATT and GATS could not always be clearly defined in this case. The WTO panel made clear that, when talking about international trade in (semi)cultural goods and services, we have to consider both agreements and explore precisely which component of the good or the services incorporated into the good is subject to which agreement and which commitment:

“Overlaps between the subject matter of disciplines in GATT 1994 and in GATS are inevitable, and will further increase with the progress of technology and the globalisation of economic activities. We do not consider that such overlaps will undermine the coherence of the WTO system.” (WTO, 14 March 1997: 60-61).

Secondly, even by excluding their audiovisual services from the GATS agreement, countries do not defend other parts of their cultural industries, as was demonstrated in the dispute panel's adjudication. Thirdly, the Periodicals Case illustrated quite explicitly that cultural exceptions can only be claimed and defended if they are not suspicious on economic grounds. This was obviously not the case here. Countering the Canadian argument, the U.S. successfully claimed that the protection measures were not based on content, but on the advertisements in the magazines, and by doing

so the Canadians were themselves undermining the cultural rationale of their support measures.

The unequal exchange of magazines and cultural goods and services in general across the Canadian-U.S. border, however, remained a huge stumbling block for the Canadians. The smaller size of the domestic



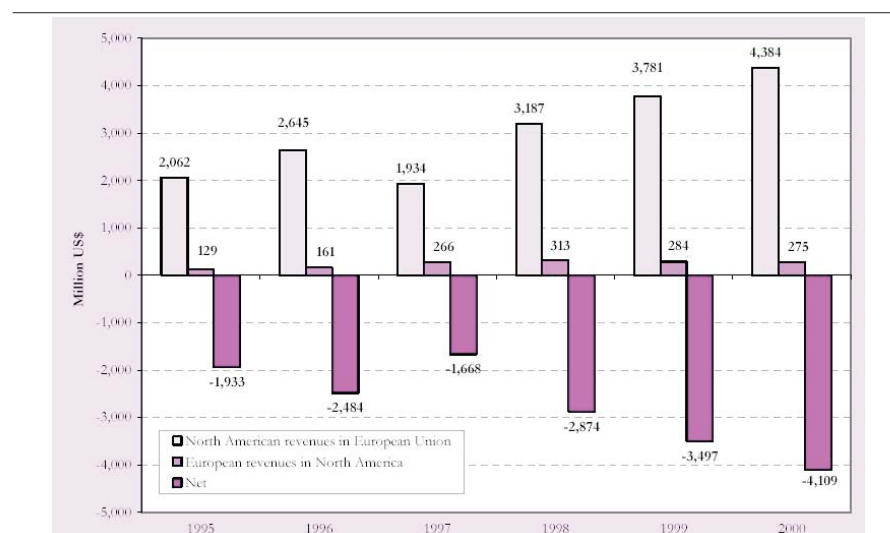
3 The Periodicals case refers to a dispute concerning several aspects of Canada's magazine policy towards split-run magazines, i.e. imported magazines that have the same content as their original counterparts, but differ in their advertisements, which target specifically the market in which it is sold. The US brought a case to the WTO Dispute Settlement system, arguing that 1 Canada's restrictive policy towards split-runs was in breach with article XI:1 GATT, 2 that a tax on advertisements in split-runs was inconsistent with the national treatment principle and 3 that a postal program beneficial to Canadian magazines was discriminatory. Ultimately, the Dispute Panel, and in appeal, the Appellate Body, ruled in favour of the US on all aspects (Krikorian, 2005: 951-960).

market has been an obvious handicap for the Canadian cultural industries. Due to its precarious position vis-à-vis the U.S. and the wake-up call of the Periodicals Case, the Canadians considered it urgent and necessary to develop an international instrument to support its goal of preserving its cultural policy. For the Canadians, the draft convention therefore appeared an absolute opportunity to entrench in international law the right of countries to have domestic cultural policies (Nuti, 2005). In their opinion, several trade agreements have been placing increasing pressure on countries to give up this right. Hence, the Canadians support for UNESCO, a position in which they were joined by the European camp.

The European Union

As does Canada, the EU has a large trade deficit vis-à-vis the U.S. in the audiovisual sector. In trade in broadcasting programmes for example, the EU countries have sustained a deficit fifteen times the total value of their exports to North America.

Estimates of the trade in audiovisual programmes (TV only) between the European Union and North America, 1995-2000



Source: ETS/European Audiovisual Observatory, 2002 (in UNESCO, 2005: 48)

The traditional European argument that the audiovisual sector requires separate treatment has nevertheless increasingly come under pressure. Its discourse has revealed a number of cracks since the end of the 1990s and escalated in the debate which the French right-wing party launched on the privatisation of the public broadcaster A2 (the second after TF 1). However, the polemic launched when

Jean-Marie Messier, (former) chief executive of the Franco-American Vivendi/Canal Plus/Universal group stated quite provocatively that the French “cultural exception” was dead, was even more important. And, although the French political class felt betrayed by the statements made by its top industrialist, it weakened its traditional protectionist attitude during the preparations for the WTO Seattle meeting, much to the dismay of some other EU countries, such as Belgium. The official French/European position was that cultural specificity bore an overly French and thus protectionist stamp. Consensus was found in defending cultural diversity (Pauwels and Loisen, 2003: 308). Moreover “cultural” support mechanisms such as quotas or subsidies, extensively used by the French, were not favoured by other, more-liberal-minded, member states.

As a consequence, dissension in the European camp was present at the beginning of negotiations when, for example, the Netherlands and the United Kingdom overtly made reservations towards the European position (Briquemont, 2005).

Nevertheless, the official EU position in the WTO remains for the time being unambiguous and *unisono*. Presently, EU policy is fully compatible with the GATS regulations. Nor is it expected that current policies will be challenged via a dispute before the WTO Dispute Settlement Body (Richardson, 2005). The EU's objective for the Doha Round is to maintain the status quo in the audiovisual area (Guerrier, 2004: 130). In this way the EU is hoping to maintain its trade policy unchanged, in conformity with article 151 of the Treaty of Amsterdam and with the inbuilt support mechanisms, as underlined by declarations of former EU Foreign Trade Commissioner Pascal Lamy (19 May 2003):

“Let us head towards cultural diversity [...]. In Europe, because of linguistic reasons, we have small and segmented audiovisual markets. Therefore it is impossible for the Union to realise economies of scale, the ultimate goal of each country engaged in the different WTO discussions. If we accept international division in this domain, we will never be competitive. In this context, it is impossible to insert any proposal to open up the audiovisual sector in current or future negotiations. The mandate given to the Commission for the negotiations on free trade of services is therefore to preserve the development of policies fostering cultural diversity. We stick to our mandate and we are not expecting to make any commitment regarding audiovisual services in the current WTO negotiations. The promotion of cultural diversity being included in the treaty (art. 151), it is part of our trade policy”

Logically, the EU has not made any offer to liberalise audiovisual services and no commitments will be made on market access and national treatment either.

The EU is furthermore confident that it will resist liberalisation calls from other partners, because requests for offers in audiovisual services have been mainly launched by countries that have an economically insignificant share of world trade in

the audiovisual sector. And the U.S. call is dismissed because the EU is of the opinion that the U.S. is “not in a position to ask us for more offers” (EU, 2005), referring to the limited offers that have been put forward by the United States. Moreover, in defence of its cultural sector, the EU is probably also at the same time defending the audiovisual industries of many of its trading partners that do not have the same negotiating strength as the EU. We have to consider that: “The promotion of cultural diversity is not an idea or an issue that concerns Europe only” (Guerrier, 2004: 132).

The European Union, and certainly opinion-leader France, was therefore very pleased with the adoption of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. Given the internal dissension, it is remarkable that all countries, including the Netherlands and the United Kingdom, supported the general European standpoint on cultural diversity. And while the U.S. was severely questioning the negotiation role of the European Commission, all EU member states defended this approach in stating that they gave their mandate to the EC for the necessary coordination of a response to this issue. “The European Community, through the European Commission and as per the mandate conferred by the Council in November 2004, negotiated alongside the member states at UNESCO,…” (EU Press Release, 21 October 2005). With the discussions on the Convention the EU apparently closed ranks again. In the words of its commissioner Viviane Reding:

“The UNESCO Convention provides a political, and to a certain extent, juridical leverage to the steady EU position on audiovisual services in the WTO. There has not been so far, and there will not be, as long as I am Commissioner in charge of Audiovisual, any European offer in this domain. In other words: no bargaining of ‘agriculture’ against ‘audiovisual’!” (Reding, 2005a)

The Convention represents a moral victory for the EU in its battle for recognition of the cultural component of cultural goods and services. Whether or not the Convention will lead to a juridical empowerment of the current status quo in the WTO, is questionable and even inside Europe opinions are divided. Some see the Convention as an important instrument to secure sovereign cultural policies and do believe the instrument can help countries to refrain from the ongoing liberalisation dynamics in the WTO. Walter Lerouge of the Flemish UNESCO Commission for example stated that the Convention is affirming the current, but temporary, exception for culture inside the WTO (De Morgen, 21 October 2005). Some even call the Convention “a manifest for another globalisation” (Le Monde, 21 October 2005).

Others doubt the impact the Convention could have. Although they evaluate the Convention as a moral victory, they deem the juridical impact to be minor. The absence of a binding dispute settlement system and the vagueness of the Convention text are the main arguments that underline this position (Maenaut, 22 December 2005, Obuljen, 25 June 2005). Still others counter-argue that the resistance of the U.S. itself illustrates that the Convention has an impact. The EU itself is stating that

the Convention makes it possible to fill a legal vacuum in world governance by establishing a series of rights and obligations, at both national and international level, aimed at protecting and promoting cultural diversity. The EU defends this statement by pointing at the equal status of the WTO agreements (and specific commitments) and the UNESCO Convention. Consequently, the overall objective to take into account cultural diversity when developing other (trade) policies, will pay off (EU, 21 October 2005).

Despite the disagreements on the future impact of the Convention, it is clear that the EU and, not surprisingly again, the French, consider it a victory of principle: "We have to contest the WTO's competence as regards culture, and need to assert that of UNESCO ... Culture is not a soul's supplement. For our country, it is a tank of activities, influences and radiations that requires resources" (Renaud Donnedieu de Vabres in *Le Monde*, 11 May 2005). The negotiation of the Convention is an *acte politique*, in which the international community (except for the U.S. and Israel) is explicitly choosing for a limited liberalisation (*Le Monde*, 19 October 2005; Neil, 31 December 2005).

The United States

The second camp, in favour of further liberalisation efforts in all economic sectors, is obviously led by the U.S. The U.S. has the most to gain from a liberalised market, which explains the position the U.S. has been taking in the audiovisual debate for many decades now.

The position of the United States in the Uruguay Round was indeed quite straightforward and in line with stances they have taken ever since the creation of the GATT in 1947. For the past few years, however, the U.S. has been diversifying its strategies in order to give a boost to the liberalisation dynamics regarding audiovisual services (Bernier, 2004). Three strategies come to the fore. To some extent and, some would say by way of window-dressing, their rhetoric through the years has changed, although their fundamental aim, trade liberalisation in the audiovisual sector, remains the same. Secondly, if this aim cannot be realised, at least for the moment, through multilateral agreements, there is always room for manoeuvring through bilateral negotiations or unilateral approaches. Thirdly, the U.S. points out the opportunities and flexibilities within GATT, GATT and TRIPS to further push liberalisation.

Inside the WTO, the U.S. indeed seems to be putting forward a more pragmatic approach. The U.S. position and rhetoric are not as rigid as was the case during the Uruguay Round. Clearly they want to overcome the *false dichotomy* that characterised the Uruguay Round – trade in audiovisual services as a choice between American hegemony on the one hand and cultural diversity on the other (Richardson, 2004: 112). Rejoining UNESCO can be interpreted as a result of this new approach or

as an illustration of their, at least symbolic, commitment. The new strategy is not straightforward however nor easy to interpret. Illustrative of this is the U.S. proposal (launched 18 December 2000) for the Doha Round that specifically targets current negotiations on audiovisual services.

On the one side, the proposal can be evaluated as more constructive by emphasising the need for debate. It talks of creating an open and predictable environment in which the concern for cultural values and cultural identity is recognised. At the same time, it stresses the need for a liberalised international market in order to absorb the high production costs associated with audiovisual content creation. This will, it is said, ensure the development and further growth of the audiovisual and ICT sectors. The proposal furthermore heavily emphasises the changing nature of audiovisual products, stating that the audiovisual sector is very different from the one discussed during the Uruguay Round. Anticipating the hesitance of other trading partners, the U.S. moreover seeks to show that sufficient guarantees exist for the preservation of the cultural component of audiovisual services. For example, GATT article IV provides an exception from the obligation to provide national treatment for cinema films, and GATS article XIV(a) and GATT article XX(a) provide possibilities for regulatory intervention “to preserve public morality”. Moreover, entering into commitments does not *per se* preclude the opportunity of regulating (U.S., 2000).

On the other hand, discourse often does not match practice. In the U.S. proposal, a systematic attempt is made to invalidate the arguments put forward by the defenders of cultural diversity. From a more critical perspective the tenor remains similar to the American standpoint during the Uruguay Round; that audiovisual services are, in the first instance, economic goods. This also comes out of the proposal to review the classification of audiovisual services and to use the already existing Agreement on Subsidies and Countervailing Measures (SCM) as a sampler for negotiations on subsidies to services. Given U.S. disappointment with the outcome of earlier GATS negotiations, an attempt is being made to apply rules already negotiated for other sectors to the audiovisual sector. These rules, compared to what has so far been agreed for the audiovisual sector, imply a far-reaching commitment to liberalisation by their signatories. Moreover, we should realise that the flexibilities the GATS offers for regulatory intervention – which is stressed extensively in the U.S. proposal – are restricted by the condition that the regulation should not be administered in a way that represents an unexpected trade barrier. Or, with regard to GATT article IV, the U.S. expressly states that the exception applies solely to cinema films and not to TV programmes (U.S., 2000).

The United States is increasingly using paths other than multilateral negotiations to achieve liberalisation dynamics and pursue its interests. The Americans, who for

decades were advocating global multilateralism, are increasingly using unilateral instruments (such as Section 301 of the *Omnibus Trade Act*), as well as bilateral and regional agreements (such as NAFTA) to foster their trade policy (Feinberg, 2004: 1019). Bilateral agreements have been concluded with countries such as Chile, Singapore, Australia, six countries in Central America and Morocco, and more bilateral deals are in sight. When the negotiations between the U.S. and Chile were successfully concluded in 2002, (former) MPAA head Jack Valenti stated that: "This agreement avoids the 'cultural exceptions' approach, while demonstrating that a trade agreement has sufficient flexibility to take into account countries' cultural promotion interests" (MPAA, 11 December 2002).

A pertinent question is whether bilateral agreements are preferable to the multilateral forum. Not only are these deals more difficult to monitor, they also rely heavily on a *divide et impera* strategy and moreover maintain the risk of sustaining and creating asymmetric power relations. The difference between American discourse and practice can be quite clearly illustrated with the recent negotiations on an investment treaty between South Korea and the U.S. South Korea has traditionally protected its film industry by making use of screen quotas under which Korean cinemas must program national films for at least 146 days per year. Its policy meets the conditions set by GATT article IV and is therefore undisputable in a WTO context. Despite the discourse on accepting cultural arguments, article IV remains a thorn in the side of the U.S. in practice:

"Since legal remedies seem to be burdened with uncertainty, the U.S. government is putting political pressure on South Korea and recently made the abolition of quotas a prerequisite for intensified trade relations. [...] the U.S. government postponed the conclusion of bilateral negotiations on a U.S.-South Korean Bilateral Investment Treaty until the screen quotas are eliminated." (Graber, 2004: 49)

The MPAA was active in trying to encourage the Koreans to eliminate its quota system. It offered the South Korean government an investment of U.S. \$500 million in its film industry if the quota were to be abolished (Graber, 2004: 49-50). The U.S. position clearly indicated that if the Koreans want a deal with one of the most powerful economies in the world, it would have been difficult to maintain its "cultural protectionist" policy. Effectively, the Korean government announced early in 2006 that it would cut its screen quota by one-half effective 1 July 2006. According to Peterson, this casts a shadow over the strength of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*:

"Remarkably, Korea's capitulation to MPAA demands comes mere months after the conclusion of an international treaty which was supposed to strengthen the hands of governments in protecting local cultural industries. The UNESCO Convention on Cultural Diversity was concluded last October to great fanfare, with only the U.S. and Israel failing to sign on to the agreement. Yet, the newly

minted Convention proved impotent in preventing Korea from abandoning its own successful cultural policies. Ultimately, a free trade pact with the United States proved too tantalizing a prospect for a Korean government, which has aspirations to be the economic hub of Asia” (Peterson, 2006).

Bilateral agreements are indeed subject to quite different negotiation dynamics than are the multilateral ones. Bernier (2004) identifies four elements in the new U.S. negotiating strategy.

First, in bilateral agreements the U.S. has negotiated with Chile, Singapore, six Central American countries (the CAFTA agreement), Australia and Morocco, a negative list approach is used in scheduling commitments. This means that parties are automatically bound in all services sectors unless reservations or exceptions are inscribed in the schedule. Whereas in the GATS’ positive list approach members need only to abstain from making commitments, in this case, parties to the FTA need to explain explicitly why a reservation or exception is necessary. This approach evidently puts more pressure on states who wish to introduce protectionist elements in the agreement (Bernier, 2004: 3-4). For partners not having equal negotiating power and resources vis-à-vis their counterpart, this practice is difficult and risky. Needless to say, asymmetrical power relations often turn out beneficial for the U.S., a global economic giant, at the cost of its trading partner (and especially the developing countries).

The second element is the increasingly detached view of subsidies. For Bernier, bilateral trade agreements are characterised by a more relaxed subsidy regime than the GATS regime. While the GATS currently lacks an effective article on subsidies and only stipulates that the necessary multilateral disciplines should be developed after the Uruguay negotiations, this does not mean that subsidies fall out of the agreement altogether. The horizontal principle of Most Favoured Nation (MFN) and the vertical principle of national treatment apply to subsidies regulations. In the bilateral agreements, this is even not necessarily the case.

Bernier explains the renewed strategy of not targeting subsidies by pointing to the fact that the U.S. itself uses subsidies for its own audiovisual sector. But even more important is the fact that a rigid position on the issue would inevitably lead to resistance of nearly all trading partners, since “the truth of the matter is that the production of audiovisual and cinematographic content in most countries is practically impossible without subsidies” (Bernier, 2004: 6). This pragmatic approach is continued, thirdly, by the fact that already existing discriminatory regulation towards the traditional audiovisual sectors is no longer a priority for the U.S. They are content to live with a *grandfathering* provision on this matter and thus to maintain the *status quo*.

But, in turn, and this is the fourth element of the renewed strategy according to Bernier (2004: 15), the U.S. insists on keeping future regulation and specifically regulation on digitally delivered content, free of cultural protectionism. Surprisingly but importantly, this position is shared by the EU Commissioner on the Information Society:

“We certainly do not need 'quotas' on Internet content. We will not achieve cultural diversity by means of regulation, it will impose itself. A company offering media services in Europe without taking account of the cultural diversity would inevitably fail. This is an economic and commercial fact, which is understood more and more by European and non-European businesses” (Reding, 2005b).

Moreover, the U.S. seeks, for digitally delivered content, the principles of MFN, national treatment and market access to apply, as they are applied to the electronic supply of other services. Bringing digitally delivered content under the umbrella of the electronic supply of services is problematic, in the sense that it is not yet clear whether e-commerce in services would better be handled by services agreements or goods agreements. In electronically delivered content, the U.S. thus clearly wants to circumvent the distinction between cultural goods and services. This approach comes down to the third strategy of the U.S. which is to use the overall flexibility of WTO agreements and their inherent vagueness, as for example the convergence concerns, to explore means to open up the audiovisual sector to enhanced liberalisation.

Summarising, the restricted pragmatic approach within the multilateral WTO negotiations is complemented by unilateral approaches, and regional and bilateral agreements outside of the WTO. The network of these bilateral free trade agreements adds to the pressure on a WTO level to achieve increased liberalisation in future negotiations. In these agreements, the unbalanced power relations helps the U.S. to attain its goals in the audiovisual sector more easily, but, more importantly, it counters the coalitions of trading partners which defend cultural policies. In this context, a forceful Convention of Cultural diversity may hamper U.S. strategies.

Although the U.S. claimed they “considered it possible and desirable for UNESCO to have taken the lead in addressing cultural issues while leaving the trade issues to the WTO” (Richardson, 5 July 2005), and called the Convention a missed opportunity to create balance between cultural issues and trade issues (Richardson, 5 July 2005), it is indeed just as clear that the overall goal of the Convention is difficult, if not impossible, to reconcile with the American standpoint on the matter. Several elements are of great concern to the U.S.

Firstly, the U.S. is questioning the content of the Convention. In line with their ideological beliefs, and not in the least inspired by their position on audiovisual world markets, the Americans strongly oppose the Convention's position towards trade in audiovisual goods and services. In the Americans' view, free trade stimulates cultural

diversity rather than prevents it. Furthermore, one should admit at least the existence of a historical process of creative destruction: culture is a dynamic process and as such outdated cultural manifestations are continuously crowded out by new cultural activities and forms (Cowen, 2002: 84). Even the concept of “protect(ion)” is therefore considered problematic. Bonnie Richardson however stated that she does not believe “that all policies based on ideas of cultural identity are necessarily protectionist – though some policies can have a protectionist effect”. She continued by claiming that a “middle ground between policies that are effective at promoting cultural diversity and policies that facilitate trade” should be found (Richardson, 5 July 2005). But for the U.S., this balance is not reflected within the Convention. Moreover the Convention is considered too vague, even ambiguous and possibly contrary to UNESCO’s Constitutional obligation to promote “the free flow of ideas by word and image” (Oliver, 20 October 2005).

A second U.S. concern is the goals of the Convention. In this view, the Convention is nothing more than a renegotiation of existing trade agreements. “The working title of this document is *Convention on the protection and promotion of the diversity of cultural contents and artistic expressions*, this is not about Cultural Diversity; although we often refer to it as such” (Miller, 17 October 2003). The Convention “has nothing to do with promoting cultural diversity. Everything is window dressing – it’s an amendment to trade agreements.” (Dana Gioia in: Miller, 17 October 2003). Further, the Convention could well turn out to be an instrument that promotes and allows protectionism without any constraints: “...disturbing statements by some government leaders who have indicated a clear intent to use this Convention to control – not facilitate – the flow of goods, services and ideas.” (Oliver, 20 October 2005). Thus, the U.S. believes that the Convention is anti-commercial and anti-American in nature. In that way, it is merely an articulation of the contemporary skepticism about the value of cultural exchange (Cowen, 2002: 78).

The American trade negotiators are particularly frustrated by the active role of the European Commission in UNESCO, while refusing any constructive debate in the WTO (Richardson, 5 July 2005). The fact that the Commission was a negotiating partner is hard to accept for the U.S. representatives, who pointed out that the European Commission has a mandate to negotiate on trade issues but no mandate to negotiate on cultural issues. In a statement on the final draft, Robert S. Martin, head of the US delegation in the final negotiations stated:

“We came here fully prepared to help craft an effective instrument to promote cultural diversity. We had hoped for genuine dialogue and true consensus. However, as this meeting progressed, we have not only observed but have been told repeatedly that this Convention is not about culture. What we have seen in various press reports and official statements is that this Convention is actually about trade. In fact, the trade agenda was so compelling that we even had to bend

UNESCO's long-established rules to accommodate the participation of the European Commission, which has competency for trade, not culture." (Martin, 3 June 2005).

That the WTO, and more specifically the GATS, would be a more appropriate forum to discuss the possibility for support measures and the right of individuals and communities to participate in their cultural industries, is a third issue. The U.S. Secretary of State, Condoleezza Rice, intervened in the discussion by sending a letter to all ministers of foreign affairs, claiming that the Convention is not only violating fundamental principles of the international trade regime, but also human rights and the right of free expression and opinion (*Le Monde*, 16 October 2005). In sum, although the U.S. is pointing at some urgent issues to be addressed, it would have been impossible to please it through a Convention that is, in fact, infringing on their political beliefs and economic interests.

Japan

In a WTO context, the U.S. is backed by Japan, another major trading power. Japanese corporations have a large vested interest in content software, such as animated movies, and especially in the media hardware industries, such as the production of CDs and consumer electronics (televisions, video and DVD recorders, cameras, etc.). The Japanese horizontal proposal for negotiations on the services sector therefore emphasises the dismantling of MFN exceptions, with explicit mention of audiovisual services. Japan also questions quantitative limitations and departures from the national treatment principle as a way of guaranteeing access to a variety of cultures and information for each member state's citizens (Japan, 2000).

In a joint statement on the negotiations of audiovisual services, Japan joined the U.S., Hong Kong China, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Mexico. It reminds members wishing to exclude the audiovisual sector from the Doha discussions that this would be inconsistent with the Negotiating Guidelines adopted for the services negotiations of the Doha Agenda. The statement emphasises the importance of the audiovisual sector as a nodal point in the converged digital networks of tomorrow with spill-over effects towards other services sectors like tourism and educational services. The joint proposal even claims that countries that do protect their audiovisual industries are harming their own domestic economies by impeding investments and preventing free cultural exchange. Moreover, members who want to schedule commitments in line with national policy objectives should take notice of the flexibility that the GATS treaty offers. In any case, the statement urges "all Members to consider carefully the broad economic benefits from including audiovisual commitments in their offers. Above all, trade in audiovisual services results in cultural exchange, the best way to promote cultural diversity." (Hong Kong China et. al., 2005).

For the Japanese, liberalisation, rather than protectionism, is a means of realising cultural diversity objectives. Japan shares this position with the U.S., and, as we will see, also with some developing countries. In this context, it came as a surprise to some that a working group called “the Friends of Cultural Diversity” within WTO, gathered similar countries to the Friends of the Audiovisual group, the U.S., Chile, Mexico, Japan, Hong Kong China and Taiwan (INCD, 2004).

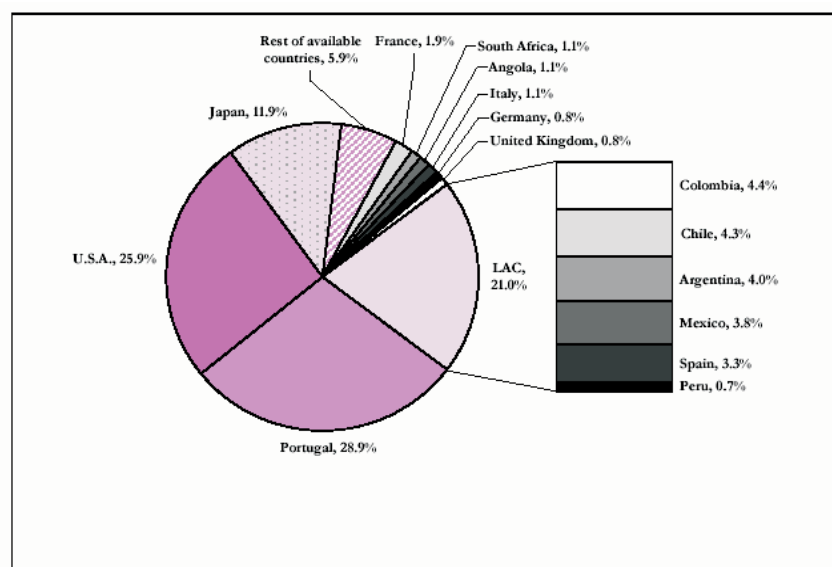
The Japanese position on the Convention was more ambivalent, however. Japan, unlike the U.S., voted in favour of its adoption. On many crucial issues in the negotiations, like the relationship between the Convention and other international instruments and the dispute settlement system, Japan sided with its traditional ally, the U.S. Japan even shared the problems the U.S. was having with the definition of the term *protection*. The U.S., Mexico and Japan were concerned about the conceptualisation of *protection* and wanted a definition of *protection* that would eliminate any possibility of using it to support trade barriers. The decision of the Japanese to vote in favour of the Convention may be explained in part by the fact that it came less than two weeks after the re-election of Japan’s Koïchiro Matsuura for a new term as UNESCO Director-General (Maenaut, 22 December 2005). On a multilateral level seemingly unrelated matters may indeed change positions quite surprisingly.

Considering the position of the U.S. and Japan on the one hand, and the EU and Canada on the other hand, it looks as if we are heading for a remake of the Uruguay Round negotiations in the audiovisual sector, with antagonistic stances and not much willingness to compromise at both ends of the policy options spectrum. Nevertheless, both sides expressed their concern that a rerun of the Uruguay Round would not be beneficial for progress in the Doha Round (Richardson, 2005; EU, 2005). It is therefore important to assess positions of other negotiating parties able to shift the balance in one or the other direction, or possibly to come up with a third way to bridge the economy-culture dichotomy. Indeed, and somewhat in contrast to the Uruguay Round, a number of “new” voices, coming from developing countries, were raised. However, this grouping is heterogeneous and positions taken often reflect very specific economic bargaining power within the audiovisual sector. Furthermore, their proposals require further clarification.

Brazil

Brazil, for one, is taking a somewhat nuanced approach when it comes to debating the liberalisation or protection of the audiovisual sector. This sector is of high importance to the Brazilian economy. Although Brazil is, like most countries, a net importer of cultural goods and services, we can see a steady decline of cultural imports.

Total trade partners of Brazilian exports of core cultural goods, 2003



Source: UIS based on data from UN Comtrade, DESA/UNSD, 2004 (In: UNESCO, 2005)

The most important “victim” of this evolution is the United States, the largest exporter of cultural goods and services to Brazil. While the cultural trade balance is negative, imports are decreasing and the value of exports has remained steady. The domestic production of recorded media and video games has increased dramatically and this makes free trade in certain products very appealing to Brazil. This is especially so when you consider that the U.S. and Japan, two proponents of further liberalisation in the audiovisual sector, are the second and third largest destinations for Brazilian audiovisual exports after Portugal (UNESCO, 2005: 33-34).

Brazil's position in the global debate on culture and audiovisual is interesting in several respects. We start by looking at Brazil's specific WTO proposal. Although developing countries are frequently assumed to be not particularly receptive towards the WTO's progressive liberalisation dynamics, Brazil's proposal points, in a rather nuanced way, to the double effects of privatisation and the dismantling of trade barriers for developing countries. On the one hand, this can have positive affects in certain sectors, on the other hand it can also negatively and structurally affect submarkets (such as the market for agricultural produce). In the audiovisual sector, Brazil's position adopts the concept of cultural diversity. Brazil wants a liberalisation of the audiovisual market, aimed at cultural diversity and cultural identity. In other

words, it joins neither the American nor the European camp. For Brazil, both visions of the audiovisual sector and liberalisation miss the essential point. According to its proposal, this consists of entering into further commitments that can bring growth to the economies of developing countries. Here again, however, it points at the importance of cultural diversity and identity.

More specifically, Brazil is pleading for a number of instruments that can secure a government's autonomy over its cultural policy. For example, Brazil is explicitly asking for negotiations on rules on subsidies within the GATS framework to be on the Doha agenda. For Brazil, it is clear that, whilst some developing countries have massive budgets for investment in culture industries, the financial clout of many developing countries is frequently much smaller, sometimes non-existent (Brazil, 2001). Hence, the importance of clear rules on subsidies, preferably within the WTO framework.

Brazil's contribution is interesting because, alongside its own interests, it is also viewed as a leader among developing countries. The proposal put forward for the audiovisual sector makes clear that certain interests and rights of the third world are to be defended in this area, even through liberalisation. But the Brazilian proposal at the same time highlights other imbalances within WTO negotiations, such as subsidies and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). An interesting issue to ponder is to what extent will the UNESCO Convention strengthen its arguments?

Whereas the Brazilian WTO proposal on audiovisual services tries to balance developments in the WTO with developments on a cultural diversity instrument, the change in government and newly-appointed Brazilian ambassador to UNESCO lead to a somewhat changed position and UNESCO is put forward as the main forum to negotiate the sector (Briquemont, 18 July 2005). The Brazilians actively pursued the development of the instrument on cultural diversity and they particularly emphasised the need to protect cultural participation of all people and all communities. In that respect, they heavily criticised the current intellectual property rights policy, pushed by the WTO Quad group of countries. This is interesting, because Brazil is introducing the issue of IPRs into the UNESCO framework. This standpoint was the cause of much debate however, certainly with the U.S. being the most important proponent of a stringent IPR regime. Eventually the solution was found in an agreement to disagree, and both the importance of IPRs and protection against *invalid* IPRs were mentioned in the text (Constanza-Shock, 2005). Furthermore, Brazilians stress the groundbreaking character of the Convention and are evaluating the Convention first and foremost as a "widely shared commitment of the international

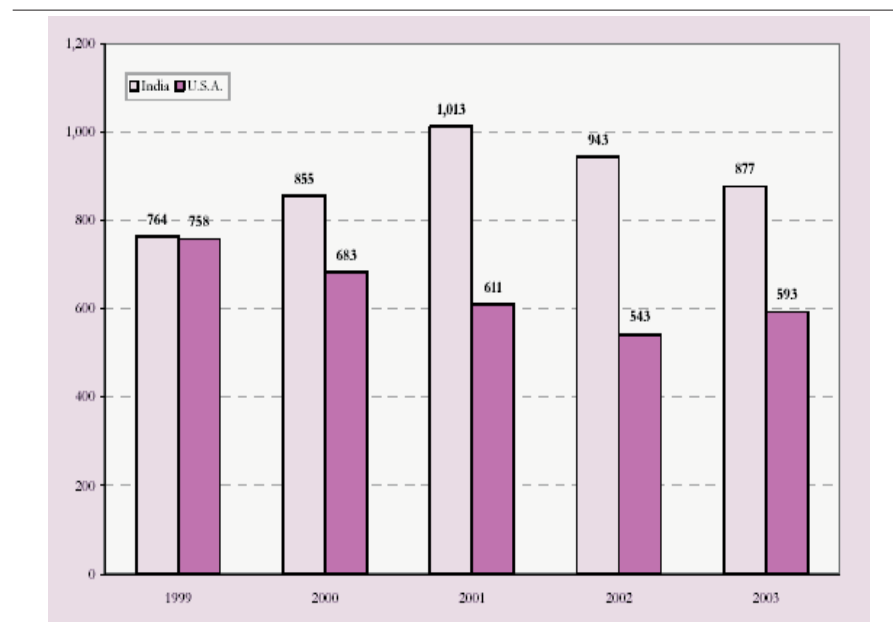
community” (Brazil, 2005). This commitment must be enforced by implementing Article 21 of the Convention stating that member parties must work together to promote the objectives and principles of the Convention within other international fora (Brazil, 2005).

India

India's position is once again somewhere in between the views of the EU and the U.S., but probably more inclined towards the U.S. perspective. Again, this position must be weighed against the growth potential of India in the creative industries. India acknowledges the need to maintain cultural diversity but disagrees with the concept that this sector should not be liberalised. Its policy goal is to strike a balance between the preservation of cultural diversity and liberalisation efforts to increase economic efficiency and global competitiveness. The Indian policy shift from the Uruguay Round, where the country remained quite hesitant to push for liberalisation and made only minor commitments, to the Doha Round, can be explained by a changing domestic situation. India evolved from a content importing country to an exporting country because of an increasingly skilled work force in the sector, growing technical know-how and low production costs (Mukherjee, 2003).

In the high-tech software sector exports grew approximately sixfold from the early 1990s and were worth almost U.S. \$30 billion in 2003. Software and ICT-enabled services export earnings increased from 20 percent of total export earnings in 1990 to over 30 percent in 2003 (UNCTAD, 2005: 69). In the more traditional “creative industries,” exports of television content were estimated in 2001 to be around U.S. \$74 million, which accounts for 20 percent of the total revenue of the content producing sector (Mukherjee, 2003: 18). India is also the global leader in the production of feature films, Bollywood studios produced more than 800 movies in 2003, significantly outnumbering the runner-up, the United States (UNESCO, 2005: 44).

Number of films produced in India and the USA, 1999-2003



Source: India Central Board of Film Certification, Federation of Indian Chambers of Commerce (FICCI), UK Film Council, Motion Picture Association of America (MPAA) (In: UNESCO, 2005: 44)

Moreover, while the Indian audience clearly prefers Indian content, providing a natural protection from external competition, Indian television programmes and films are attractive for audiences abroad, particularly in the expatriate Indian communities (such as in the U.S., Canada and Pakistan) (Mukherjee, 2003: 20). According to the latest UNESCO statistical report on trade flows in cultural goods and services, Bollywood films now collect more than a quarter of their revenues from exports, an estimated U.S. \$220 million, and a tenfold expansion in the last decade. The total value of the Indian cultural industries is estimated at \$4.3 billion and growing annually at a rate of 30 percent (UNESCO, 2005: 44). Of course, a point of saturation may be reached in the medium term but the importance of creative industries is evident and influences India's particular stance in this debate.

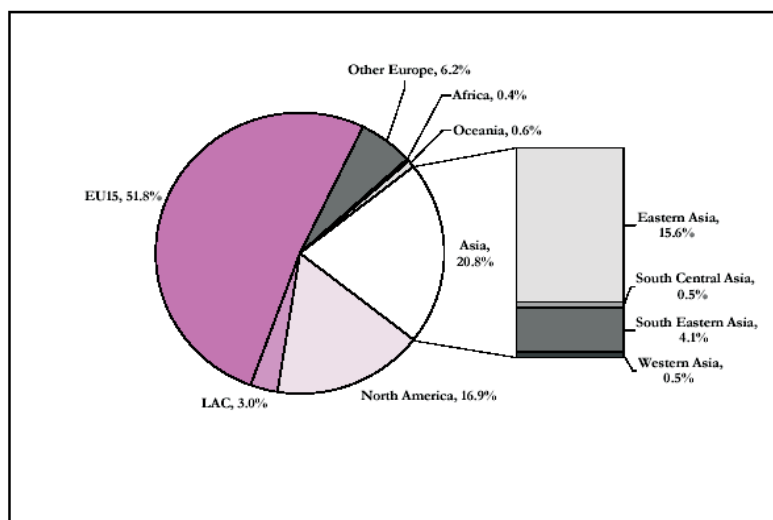
Thus, the Indian government deems it in its own interest to push for liberalisation in the sector by furthering its commitments as well as asking for reciprocal concessions from its trading partners. The multilateral option is preferred because India does not have bilateral agreements with the main actors in the audiovisual sector. Furthermore, India has liberalised domestically in this sector and wishes to obtain reciprocal treatment from WTO members. According to Mukherjee, it can be expected that the Indians will target first the liberalisation of motion picture and

videotape production and distribution services. Because of its already liberalised import policy and increasing interests in exports, commitments on Commercial Presence (Mode 3) could be taken on and reciprocal actions requested. In relation to Consumption Abroad (Mode 1) – because of the increasing use of the Internet – and the Movement of Natural Persons (Mode 4), India should offer liberal commitments in order to benefit from its unilateral liberalisation efforts. Audiovisual services could be used as barter currency to gain greater market access (Mukherjee, 13 December 2005). Nevertheless, India awaits the positions of other partners in the give and take of WTO negotiations.

It comes consequently as no surprise that India took a middle ground in the discussions of the Convention. Although India acknowledged the need for cultural diversity, it made clear its view that the new instrument should not interfere with WTO regulation in the audiovisual sector (and with its requests for liberalisation commitments of the trade partners). The Indian delegation criticised the proceedings on a number of occasions. As Japan did, a more soft-law approach was pursued respecting the relationship between the Convention and other international instruments and towards the article on dispute settlement. Reservations were also made to the fact that the European Commission negotiated instead of the European Member States separately (De Vinck, 2005). Nevertheless, India voted in favour of the Convention, at the same time indicating that in its view the Convention will not interfere with the Indian strategy in the WTO.

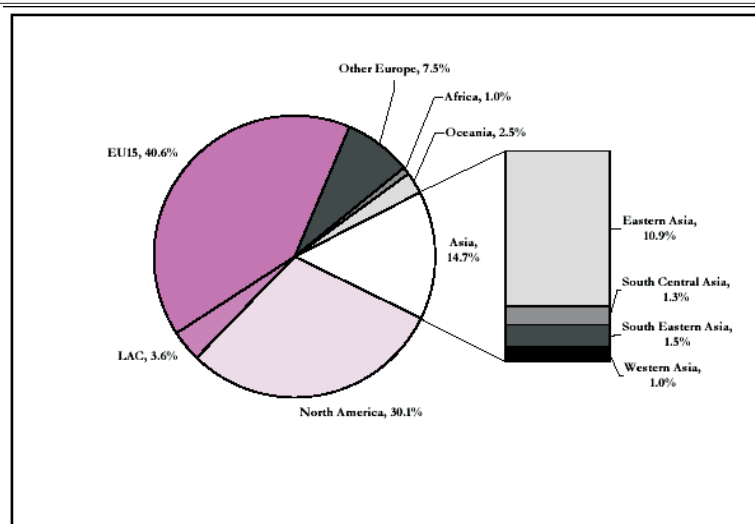
Other trading partners

Exports by region of core cultural goods, 2002



Source: UIS based on data from UN Comtrade, DESA/UNSD, 2004 (in: UNESCO, 2005: 21)

Imports by region of core cultural goods, 2002



Source: UIS based on data from UN Comtrade, DESA/UNSD, 2004 (in: UNESCO, 2005: 22)

Although global trade in cultural goods has almost doubled in the last ten years from U.S. \$39.3 billion in 1994 to \$59.2 billion in 2002, the main beneficiaries of this growth have been high income economies. The UNESCO statistical report of 2005 shows a rise of a limited number of emerging countries, albeit in a few specific markets. The main beneficiaries of this trend are South-East Asian (in recorded media) and Eastern Asian (in visual arts and video games) countries. Latin American, Caribbean and certainly countries in Oceania and Africa remain largely underrepresented in the audiovisual sector (UNESCO, 2005: 21). UNCTAD's assessment of trade and development seems to be applicable to global trade in the audiovisual sector:

“The trend towards a ‘new geography of trade’ appears to be the result, above all, of the above-average growth performance of a few Asian developing economies, and the associated shifts in the level and composition of their external trade. The fact that most developing countries outside East Asia do not appear to have participated significantly in the emerging ‘new geography of trade’ suggests that interpretations of this trend need to be treated with caution in order to avoid unrealistic expectations of its ultimate scope and impact” (UNCTAD, 2005: 153).

Speaking in general terms about trade in services, the UNCTAD report on trade and development argues that most developing countries have embarked on reform processes because they recognise the positive effects on jobs, technology and investment which the progressive liberalisation of trade in services generates. But

trade liberalisation is only a means to an end and complementary policies should be developed to generate positive results (UNCTAD, 2005).

The stance of developing countries, other than India and Brazil, on the audiovisual sector, is difficult to assess, especially in a WTO context where market power dominates and those who lack market power often remain silent. Nevertheless, one should not cease to explore the possibilities and flexibilities the WTO provides, especially for developing countries. In light of the trend towards unilateral approaches and bilateral agreements, which are inherently inequitable, a multilateral negotiation arena such as WTO might, in the end, be more profitable even to the developing countries. Or as a Ugandan observer of the WTO developments said at the launch of the Qatar Round: "Every right-minded person knows that it is worse outside the WTO than inside" (De Morgen, 26 November 2001: 9).

But as the prospects for a genuine development round and successful integration of developing economies in the world trading system remain bleak for the time being, we see that – in the audiovisual sector – most developing countries maintain the need for the protection and preservation of cultural diversity. Comments from the developing world on the approval of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* expressed relief. For them cultural diversity means: "Without cultural pluralism, we run out of breath" (Brazil's Culture Minister); "This is the guarantee for the survival of minority cultures" (Ghana's Culture Minister); "A real antidote to globalisation" (Mauritania) (Le Monde, 19 October 2005). Although developing countries acknowledge:

"that a controlled globalisation of the economy can, by multiplying exchanges and by contributing to lower production costs, have a positive effect on the vitality of and the dialogue between cultures," they deem that "in the current context, the way to preserve cultural diversity implies the refusal to commit to the liberalisation of cultural goods and services, especially in the framework of international trade agreements negotiations, such as in the WTO." (Declaration of Cotonou by l'Agence internationale de la francophonie in which most of the 53 members are developing countries).

The UNESCO forum, in which the developing countries have greater, albeit restricted, power, is therefore preferred over the WTO for discussing global cultural policy issues. Moreover, the primary responsibility in cultural policy is brought back to the national level as "every State has the right and the duty to implement the cultural policy of its choice, without external constraints and in the full respect of human rights and freedom of expression" (Burkina Faso's Minister of Culture, Mahamoudou Ouédraogo, 2003).

But fundamental questions and structural uncertainties remain. Firstly, it is clear from a cultural studies perspective and from insights gained from post-colonialism studies that the concept of cultural diversity has sometimes been considered as an

essentially “western” concept. However attractive it might seem, the call for “cultural diversity” was, for some developing countries, to be interpreted as no more than a call to defend western culture. Pascal Lamy was conscious of the ambivalence of this concept:

“To remain credible, we need to be aware that the promotion of cultural diversity is not limited to each Member state protecting its national industry. Otherwise, this would be, as some say, some sort of disguised protectionism which would not convince anybody. We can better persuade, in particular developing countries, of the legitimacy of our discourse if we can show our real opening up to diversity” (Lamy, 19 May 2003).

Secondly, it is questionable if these countries really have the means to implement a policy protecting and promoting cultural diversity and identity on a national level. In a development context, cultural diversity may just come at the end instead of the top of policy priorities. Furthermore, whereas in Europe, traditionally, subsidies and public service broadcasting services are seen as instruments for cultural diversity, this is not necessarily the case in a developing context. The above mentioned Brazilian WTO proposal pointed out that the financial means of developing countries to subsidise the culture industries are limited, resulting in more structural imbalances on a global level, instead of a contribution to cultural diversity. In that context, it may seem worrying that UNESCO members, not in the least the western members, did not agree on compulsory contributions to a development fund for cultural diversity within the framework of the Convention.

When it comes to enhancing investments and re-balancing financial inequalities, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* is narrowed down to a symbolic commitment only. As for public broadcasting, certain developing countries, and in particular civil society organizations within them, tend to associate it more with (state) repression than with the expression of genuine cultural diversity. To attain cultural diversity, the Convention is therefore only a first step. Increasing participation of developing countries in both UNESCO and WTO as well as the (re-)invention of policy instruments that work in a developing context should be developed.

Conclusion

As can be concluded from the above analysis and summarised in the above scheme, the outcome of current, to some extent competing, negotiating arenas and stances, can really go in very different directions. A multitude of scenarios and issues are highlighted. For the moment, however, the outcome of discussions on the audiovisual sector, and its many constituent issues, are unclear.

When considering the above positions and inter-institutional dialectics, what is certain is that the debate on the audiovisual sector was enriched and nuanced with new insights and it has evolved beyond the dichotomous positions taken by the Quad during the Uruguay Round. Many people, especially from the developing countries, point out inadequacies of the current WTO framework that need to be tackled, such as clarification of the subsidies issues and consciousness about imbalances resulting from the TRIPs, while at the same time supporting the idea of liberalisation as a way to consider their rights and interests in the global trade arena as well and, in the long term, to enhance cultural diversity by means of that trade. All parties, except the U.S. and Israel, seem to believe in the political importance of the Convention on Cultural Diversity, although it is clear that it lacks “obligations,” be they financial (contributions to the development fund are optional) or legal (lack of a binding dispute settlement, etc.).

But as interesting as this new playing field may at first appear, the analysis of the positions of key players and inter-institutional dialectics, also clearly shows the vagueness and ambivalences that characterise it. It is too early to assess which parties would prefer some issues to be dealt with within the WTO exclusively, which parties would lay the primary responsibility within UNESCO or which parties prefer a combined approach (and in which direction this should be developed). Moreover, in the case of a dispute between trading partners, the manner of how the relationship between the WTO and UNESCO will be handled by, for example, the WTO Dispute Settlement Body is difficult to grasp, because of the increasing complex nature of the converging audiovisual sector, the inherent imbalances of the WTO agreements, and the inherent vagueness of the Convention on Cultural Diversity.

For the moment, it remains clear that liberalisation of the audiovisual sector is a statutory obligation, due to the constraining character of WTO liberalisation dynamics, whereas the protection and promotion of cultural diversity is a moral obligation. In other words, whether we gained with the Convention more than a political manifest to acknowledge the importance of cultural diversity remains to be seen. But perhaps this may be its only purpose after all. The (continuing) vagueness that characterises the dossier, may, indeed, be a major result in itself, accommodating all parties. Ambivalences can be exploited by those parties which want to secure the

status quo, by those adopting a pull back scenario, as well as by those pushing for further liberalisation in the sector. At the same time, it became clear that parties withstand liberalisation as long as they have nothing to gain from it and that positions shift when a stronger economic bargaining power is attained. The positions of Brazil and India, though different, illustrate this. In this sense, the EU and others are right to refrain from liberalising their audiovisual sector, whereas the U.S. is just as right to insist on further liberalisation. It remains unclear, however, which of the strategies really enhances cultural diversity in the end.

Part III

Chapter 8

Implementing the Convention¹

Ivan Bernier and
Hélène Ruiz Fabri

Introduction

The adoption, on October 20, 2005, of the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* by that organisation's General Conference marked the end of the collective negotiation phase and signalled acceptance of the definitive version of the text. In follow-up, Article 29 of the Convention stipulates that "This Convention shall enter into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States or regional economic integration organisations that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date."

In order for the Convention to become part of positive law, each of the States must therefore express individually its willingness to be bound by its terms, with concomitant adherence to the following specific points:

1. In this regard, international law has traditionally referred to domestic law in determining the requisite formalities and procedures to be followed in expressing this individual consent. This explains the extremely broad phrasing of Article 29 of the Convention, which covers its ratification, acceptance, approval and even accession. Consequently, each nation's particular canon of constitutional law will serve to determine who will be responsible for the Convention's ratification, the existence or absence of control, providing information to Parliament, etc. Although the executive branch is usually responsible for proposing ratification, since it has traditionally held responsibility for international negotiations, a number of factors can present dramatic variance between countries. These include

¹ This chapter has been published earlier at <http://www.mcc.gouv.qc.ca/diversite-culturelle/eng/publications-studies/ps06-05.htm>

the State's control of the ratification procedure, the opportunity for parliamentary and democratic control that could thereby be necessary, the amount of information that could be available in this regard, as well as timelines required for completing the ratification process.

2. Following adoption of the Convention, the issue of ratification is the next imperative. This step is comprised of two legal elements: the "critical date", which is more technical in nature, and the "critical mass", which is more political.

As indicated in Article 29 of the Convention, the "critical date" threshold for its implementation is 30 ratifications. Traditionally, multilateral conventions have included a requirement for a minimum number of ratifications before they can come into effect. This pragmatic provision is intended to prevent the international justice system from being encumbered by conventions that claim to have universal acceptance but whose ratification by only a few parties in fact demonstrates the contrary. This threshold generally varies between 30 and 60 ratifications. In the case of this Convention, the number is moderate and represents a deliberate decision on the part of the negotiators to ensure that implementation is not unduly delayed. It should be noted in this regard that the implementation date (which in this case has been set at three months after the 30th instrument of ratification is filed) represents the critical date after which the text will be granted full legal effect and become both enforceable and opposable. Consequently, the effective and opposability date of a text can be important for determining in what manner it will be linked to other legal instruments (as such, the Convention's effective date will influence the enforcement of Article 20), since it has been specified that once the document takes effect, any State that subsequently ratifies it will be bound by the effective date thus defined in terms of its ratification or accession.

In addressing the issue of "critical mass", it is clear that if 30 ratifications are legally stipulated to be sufficient for the Convention's implementation – this number does not include any regional economic integration organisations' ratification, over and above those of its member States (Article 29.2) – the Convention's level of opposability, and therefore the importance it must be granted in the international arena, will be proportionate to the actual number of ratifications that it will garner. In other words, the higher the number of ratifications obtained, the more legitimate the Convention's objectives and the measures taken to achieve them. From this standpoint, although the number of voices in concurrence during the Convention's adoption is undisputedly a positive aspect, it does not determine the importance that could – or could not – be attached to the Convention in the area of international legal relations. Only two things count in this regard: the ratifications and their number. The United States, which has not concealed its hostility to the document, is not mistaken – as demonstrated by certain statements made by key figures in the State Department, to the effect that

the U.S. could try to prevent various signatory States from ratifying the Convention².

3. Subject to the restrictions imposed by each nation's constitutional law, the speed with which the signatory States will embark on ratification procedures is obviously an indication of the importance they actually attach to the Convention and of their determination to implement it quickly. The timeframe for subsequent implementation could vary, all the more so because it can and must involve several levels of participation, both nationally and internationally.

4. The three-month timeframe that must pass after the 30th instrument of ratification is filed will therefore mark the debut of the Convention implementation phase. The first step in this process will be the creation of the Convention organs – the Conference of Parties and the Intergovernmental Committee – with UNESCO assuming secretariat duties. Three issues are likely to have an impact on Convention implementation: the convocation of the first meeting of the Conference of Parties, the makeup of the Intergovernmental Committee, and the organisation of the work programme for the organs in question. We will take a closer look at these issues in the first part of this paper. Once the organs of the Convention are in place, the issue of the Parties monitoring Convention implementation will have to be addressed. A distinction will be made between political and legal monitoring. Monitoring will be dealt with in the second half of this paper. As we shall see, we must begin to take action right away if we are to achieve tangible results.

Section 1 – Establishment of Convention Organs and Development of their Work Programme

If the Parties can avail themselves of the Convention and make use of it immediately following its implementation, in particular as it relates to their own national measures and policies, the reliability and consistency of their intentions with regard to the Convention will be confirmed by the extent to which they make the necessary arrangements for complete implementation. This includes primarily the actual implementation of the institutional basis for the Convention, to the extent that it guarantees its multilateral execution.

Given that the instruments of ratification, acceptance, approval, or accession are filed with the Director-General of UNESCO and that the UNESCO Secretariat is responsible for assisting the Convention organs under Article 24 of the Convention, the Secretariat presumably will be responsible for publicising the date on which the Convention comes into force and calling the first meeting of the Conference of

2 Déclaration de Kristin Silverberg, citée in *Le Monde*, 24 octobre 2005.

Parties as well as, very shortly thereafter, a first meeting of the Intergovernmental Committee.

1. The Conference of Parties

Article 22.2 of the Convention provides that the Conference of Parties shall meet in ordinary session every two years, in conjunction with the General Conference of UNESCO to the extent possible. Unless the effective date of entry into force of the Convention closely precedes a regular session of the General Conference (the 34th General Conference is expected to be held in the autumn of 2007), a separate meeting of the Conference of Parties should be envisaged as soon as the Convention comes into effect, both to avoid undue delays in implementation and to comply with Article 23, which stipulates that the members of the Intergovernmental Committee must be elected by the Conference of Parties “upon entry into force of this Convention.” The first meeting of the Conference of Parties will inevitably raise the issue of travel expenses for members who are unable to assume the cost. Given the importance of this first meeting for Convention implementation, a special effort should be made to facilitate attendance by all members who have filed their respective instruments of ratification, acceptance, approval, and accession.

The first task of the Conference of Parties is to elect the 18 members of the Intergovernmental Committee (Article 22.4 (a) and 23.1.) The election is based on the principles of equitable geographical distribution and rotation (Article 23.5). However, the possibility of not achieving equitable distribution at the first meeting of the Conference of Parties should not be ruled out, given that the first thirty members to ratify the Convention may not be representative of all the world's regions. In such a case, should the election of the members of the Committee be delayed until a sufficiently diverse array of states has ratified the Convention? In our view, this would run counter to the requirement in Article 23 that members of the Intergovernmental Committee be elected by the Conference of Parties “upon entry into force of this Convention.” Furthermore, inasmuch as the number of Intergovernmental Committee members will be increased to 24 once 50 ratifications are obtained (Article 23.4) – assuming that this number is reached before the Committee's first four-year term has elapsed – the representation can be readjusted as necessary.

Another important task incumbent on the Conference of Parties is the approval of operational guidelines prepared at its request by the Intergovernmental Committee. Given that the Conference of Parties meets every two years, a minimum two-year period must be anticipated between the time of request and the time of approval. Should such operational guidelines be essential to Convention implementation, it would be advisable for the Conference of Parties to immediately request at the first Conference meeting that the Intergovernmental Committee prepare a draft of those

operational guidelines considered necessary, failing which adoption would be delayed until four years later. Such guidelines may be requested for instance to properly carry out such tasks as those entrusted to the Intergovernmental Committee under Article 23.6 (d), “to make appropriate recommendations to be taken in situations brought to its attention by parties of the Convention in accordance with relevant provisions of the Convention, in particular Article 8” (measures designed to protect cultural expressions); or to fulfil responsibilities conferred in paragraphs 4 and 5 of Article 18 regarding decisions on the use of International Fund for Cultural Diversity resources, “on the basis of guidelines conferred by the Conference of Parties,” as well as the acceptance of “contributions and other forms of assistance for general and specific purposes relating to specific projects, provided that these projects have been approved by the Intergovernmental Committee.” It should be recalled that the deployment of the various resources thus called on is particularly important for the developing countries and as a means of facilitating implementation of the international cooperation component of the Convention. It is therefore important that this process begins as soon as possible.

2. The Intergovernmental Committee

Immediately following the initial Conference of Parties, a first meeting of the Intergovernmental Committee will also need to be planned in order to develop a blueprint for action for the first few years. Organisation of the meeting will be facilitated by the fact that representatives of the Parties elected to the Committee will already be present. The Intergovernmental Committee will operate under the authority and guidance of, and be accountable to, the Conference of Parties (Article 23.3). Its general role is to promote the objectives of the Convention and encourage and promote its implementation. Among its more specific functions is the establishment of procedures and other mechanisms for consultation aimed at promoting Convention objectives and principles in other international fora (Article 23.6 (e)). In light of current trade negotiations, this is a matter that deserves urgent attention, if only for the purpose of identifying foreseeable prescriptive developments and initiating the distribution of information that can only serve to facilitate effective coordination, in keeping with the spirit of the Convention.

We shall come back to Convention implementation monitoring by the Conference of Parties and the Intergovernmental Committee in the next section. Before doing so, however, we want to emphasise the importance of considering well in advance the priorities these two organs should address at their first meeting. Another matter that should be considered in advance is that of the chairmanship of the Intergovernmental Committee, not so much in terms of who should be selected, but rather in terms of the requirements of the position.

Section II – Implementation Monitoring by the Parties

As indicated in the introduction, we will distinguish between political and legal monitoring.

1. Political Monitoring

Even though the State Parties to the Convention, acting individually, have primary responsibility for its implementation, the negotiators have also established Convention organs whose mission is to promote Convention objectives and encourage and monitor its implementation (Articles 22.4 (d) and 23.6 (a)). In this sense, they have equally agreed to collective supervision of Convention implementation, thus guaranteeing its status as a multilateral instrument. Furthermore, they have acknowledged, in Article 11, the fundamental role that civil society plays in protecting and promoting the diversity of cultural expressions and agreed to encourage their civil society's active participation in their efforts to achieve the objectives of the Convention. This, in turn, implies a certain degree of oversight on the part of civil society with respect to Convention implementation. Thus, one can distinguish three distinct levels of Convention monitoring: national (through governments), supranational (through collective supervision by signatory States), and, finally, domestic and international through civil society. It remains to be seen how these three levels will operate in practice with respect to Convention undertakings. To do so, we must first review the commitments assumed by the Parties under the Convention.

Commitments by the Parties

In consideration for the sovereign right granted under the Convention to Parties “to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention” (Article 5), the Parties:

- “i) shall endeavour to create in their territory an environment that encourages individuals and social groups (a) to create, produce, disseminate, distribute, and have access to their own cultural expressions and (b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world (Article 7);
- ii) provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level; designate a point of contact responsible for information sharing in relation to this Convention; and share and exchange information relating to the protection and promotion of the diversity of cultural expressions (Article 9);
- iii) encourage and promote understanding of the importance of the protection and

promotion of the diversity of cultural expressions, *inter alia*, through educational and greater public awareness programs, and cooperate with other Parties and international and regional organisations in achieving the purpose of this article (Article 10);

iv) encourage the active participation of civil society in their efforts to achieve the objectives of this Convention (Article 11);

v) shall endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions (Article 12);

vi) shall endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector by, *inter alia*, the strengthening of cultural industries in developing countries; capacity-building through the exchange of information, experience and expertise as well as the training of human resources in developing countries; transfer of technology and know-how through the introduction of appropriate incentive measures; and financial support through the establishment of an International Fund for Cultural Diversity (Article 14);

vii) encourage the development of partnerships, between and within the public and private sectors and non-profit organisations, in order to cooperate with developing countries in the enhancement of their capacities in the protection and promotion of the diversity of cultural expressions (Article 15);

viii) that are developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries (Article 16);

ix) shall cooperate in providing assistance to each other, and, in particular to developing countries, in situations referred to under Article 8 (measures to protect cultural expressions threatened with extinction, at high risk, or requiring urgent protection.) (Article 17);

x) agree to exchange information and share expertise concerning data collection and statistics on the diversity of cultural expressions as well as on best practices for its protection and promotion (Article 19.1);

xi) shall endeavour to provide contributions on a regular basis towards the implementation of this Convention and shall cooperate to develop suitable funding mechanisms. (Articles 14.4 and 18.7); and

xii) shall undertake to promote the objectives and principles of this Convention in other international forums, and for this purpose, shall consult each other, as appropriate, bearing in mind these objectives and principles (Article 21).

As we can see, most of these undertakings are good faith commitments that have no specific targets, but represent behaviour-based obligations that require that genuine effort be made to meet the objectives of the Convention. Hard to enforce from a legal perspective – proof must be made of a deliberate lack of diligence, which is not easy – they demand political follow-up, especially since the Parties themselves are responsible for setting a course of action at the domestic and international level on the basis of their own situation. A distinction can be made between commitments requiring action at the domestic level and those requiring international efforts, since the latter are more likely to be questioned by the other Parties. But, in reality, many of these commitments involve action in both the national and international spheres, as we shall see.

Convention implementation monitoring by governments

Convention implementation in each of the signatory States is the responsibility of the executive branch. To the extent that monitoring implies a critical perspective on implementation, the executive arm may, understandably, find it difficult to judge its own actions, especially if it enjoys considerable discretion in interpreting the scope of its undertakings, as is the case with so-called “best effort” commitments. Nonetheless, genuine monitoring within the structure of the state is still possible so long as there are mechanisms for political control of government action (particularly those within the purview of the legislative branch, such as questions in the legislature, parliamentary committees, etc.). This type of monitoring should not be neglected, for it can prove very useful when there is extensive support for the Convention among legislators. Such support also provides positive reinforcement for government initiatives and helps ensure a certain continuity in implementation in the event of a change of government. Conversely, the lack – or an insufficient level – of political or democratic control, leading to inadequate dissemination of information, could plant the seed of a later dispute of the policies developed, even while they are thought to be accepted. It is well known that the ratification of the Marrakech Agreements, which resulted from the WTO's Uruguay Round negotiations, was only discussed on a limited basis in the various Parliaments around the globe, to an extent that was disproportionate to the importance of the issues, and without any reference to public opinion – a situation that only served to fuel protest.

Another reason this Parliamentary support deserves attention is the existence of several international parliamentary associations and federations like the Parliamentary Assembly of the Francophonie, the Commonwealth Parliamentary Association, the Parliamentary Confederation of the Americas, and the Parliamentary Assembly of the Council of Europe, not to mention the European Parliament, whose members are directly elected to represent their European Union constituents. Through their members, these bodies can also lobby for close monitoring of

Convention implementation by the governments concerned (and by the European Community, in that particular instance). It may be useful to give some serious thought to ways in which parliamentarians could be encouraged to get involved in implementation follow-up and monitoring. For example, an international parliamentary conference could specifically look into the role of parliamentarians in implementation and examine possible courses of action, such as the formation of national or parliamentary implementation monitoring committees, or the possibility of drafting a guide explaining the scope of the Convention and the role parliamentarians can play with respect to it. This type of approach would not only promote political support for the Convention, but it would also ensure democratic control over its implementation, and as such can only strengthen its legitimacy.

However, government monitoring of Convention implementation may fluctuate over time in relation to the level of interest shown by heads of government and political parties. It is worth remembering that Brazilian and Spanish support for the draft *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* was far from assured prior to the latest changes of government in the two countries. Nothing guarantees that the opposite will not happen. In other words, we cannot solely rely on the States Parties to ensure implementation of the Convention.

Fortunately, as noted earlier, signatory States have demonstrated their openness to some form of outside oversight in the Convention by acknowledging the fundamental role of civil society in protecting and promoting the diversity of the cultural expressions, and by agreeing to encourage the active participation of civil society in their efforts to achieve the Convention objectives.

Convention implementation monitoring by civil society

The Convention does not define the concept of civil society, but it is generally agreed that it includes individuals, associations, volunteer organizations, or anything deemed an intermediary body – as in intermediary between the State and the individual – so long as it does not originate with the State³. As part of the UNESCO negotiations on the protection and promotion of the diversity of cultural expressions, various interested organisations were able to participate in meetings as observers. Unfortunately, the organisational capabilities of civil society vary significantly from country to country, and since the developed countries are much more advanced in this regard than the developing countries, they tend to be overrepresented in international fora.

In the area of protection and promotion of cultural expressions, it was not until 1997–1998 that the first NGOs dedicated to this issue appeared in France and Canada. It was not long before others sprang up in some thirty-odd nations across Europe,

3 See: http://agora.qc.ca/mot.nsf/Dossiers/Societe_civile

Africa, Latin America, and Asia, half of them in the developing world. These organisations are made up of individuals and representatives of various groups and associations of cultural professionals, including authors, producers, directors, artists, etc. from various sectors of the cultural community. The sometimes divergent interests they represent rallied around the draft Convention for the protection of the diversity of cultural expressions. But these divergent voices may seek to express themselves separately during the Convention implementation stage. Furthermore, the individuals represented or mobilized are culture professionals rather than “consumers”, which could help give their actions a corporate “look”. This requires special attention in order to avoid opening up the process to the critique of a protectionist approach. Once again, education with regard to public opinion is no doubt needed, in order to elicit support beyond the ranks of professionals, by building awareness of the issues at stake. That said, Convention monitoring by civil society, which is perceived *a priori* as essentially national in scope, can also be handed over to the transnational level, especially through the NGO networks.

1. Domestic level

The effectiveness of Convention monitoring by civil society will depend first and foremost on its ability to obtain relevant information from governments about the measures planned or already implemented to protect and promote the diversity of cultural expressions, both domestically and internationally. To secure information, civil society can refer not only to Article 11 on participation by civil society, but also to Article 9 on information sharing and transparency and Article 10 on education and public awareness. Governments are not always receptive to the idea of transmitting information that they may, for various reasons, consider confidential. In such cases, a reminder of their commitments could prove useful. But this presumes a degree of familiarity with the function of the Convention and Party commitments that civil society organizations have not necessarily acquired yet. Just as governments undertake in Article 10 to encourage and promote understanding of the importance of protecting and promoting the diversity of cultural expressions through education and public awareness programs, non-government organisations active in this area should undertake an awareness campaign as quickly as possible to familiarize their members with the Convention and how to use it. Lastly, in anticipation of the moment when the Convention organs become operational, civil society should undertake exploratory work on the priority issues with which it would like to see them deal. It should be remembered that under its rules of procedure, the Intergovernmental Committee can invite at any time public or private organisations or individuals to participate in its meetings for consultation on specific questions (Article 23.7).

2. International level

Although civil society involvement in Convention monitoring is mostly at the national level, this in no way excludes international initiatives. For a number of years now, there has been a growing need for collaboration and consultation between various national organisations involved in protecting the diversity of cultural expressions. Efforts are currently underway to establish one of more federations of such organisations. There are two key reasons for this: the first is to tackle the unequal organisational capabilities of civil society organizations worldwide and the need for assistance in many countries; the second is the need to develop common approaches in the aim of encouraging the Parties to actively promote Convention objectives and principles in other international fora. In this regard, civil society can rely on Article 12 (c), which calls upon the Parties to strengthen their bilateral, regional, and international cooperation so as to create conditions in order to “reinforce partnerships with and among civil society, non-governmental organisations, and the private sector in fostering and promoting the diversity of cultural expressions.”

Convention implementation monitoring by the Convention organs

But the type of Convention monitoring that should prove most crucial over time will be that performed by the Convention organs, for it reflects the collective will of the Parties. Article 9 of the Convention on information sharing and transparency sets out the basic mechanism: “The Parties shall provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level.” This requirement must not be perceived as a form of outside interference in the internal affairs of the Parties, but rather a way to stimulate critical reflection on their own attainment of the Convention objectives and engage in a dialogue with other Parties on the topic. It would also represent an opportunity to take the measure of what already exists and to identify a specific number of useful levers that could be used, especially for developing international cooperation. In this regard, Article 9 of the Convention must be interpreted in light of article 19.1, which further specifies that, “The Parties agree to exchange information and share expertise concerning data collection and statistics on the diversity of cultural expressions as well as on best practices for its protection and promotion.”

It is also worth noting that the international cooperation contemplated in Articles 12, 14, and 15 can only occur if information is transmitted and needs are expressed by the Parties, building upon already existing cooperation, even if this cooperation is scattered and remains inadequate. Article 14.2 specifically calls for “capacity-building through the exchange of information, experience, and expertise as well as the training of human resources in developing countries....” The availability

of information also plays a central role in the implementation of Articles 8.1 and 17, when a Party notes “special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.” In such cases, the Parties may take whatever measures are appropriate to protect and preserve the cultural expressions in question, but they must report to the Intergovernmental Committee on these measures, and the Committee may formulate appropriate recommendations, including international cooperation.

As can be seen, the collection, exchange, analysis, and dissemination of information will play a key role in Convention implementation. But for the Parties' commitments in this regard to lead to concrete results, reflection must begin now on the concrete implications of Articles 9 and 19, all the more so given that Article 19, paragraphs 2, 3, and 4 commit UNESCO to facilitating, through the use of existing mechanisms within the Secretariat, the collection, analysis, and dissemination of all relevant information, statistics, and best practices; to establishing and updating a databank on different sectors and governmental, private, and non-profit organisations involved in the area of cultural expressions; and to paying particular attention to capacity-building and the strengthening of expertise for Parties that request such assistance. An example of a useful initiative in this regard would be the creation of a database on the production, consumption, and international circulation of cultural activities, goods, and services of signatory States. Efforts to this effect were made earlier, between 1998 and 2002, in UNESCO's *World Report on Culture* for 2000 and 2002, but unfortunately had to be interrupted. They merit a second attempt, perhaps immediately on the initiative of one or several States acting in conjunction with the UNESCO Statistics Institute, organisations like the European Audiovisual Observatory and the statistics departments of interested States. The mobilisation of various means that already exist could serve to facilitate the Convention's implementation, since it would prevent significant new costs that could engender the Parties' reluctance.

But the role of information as understood in the Convention is to underpin action. And, in this respect, it is easy to conceive that the information collected and transmitted will highlight the major gap that exists between developed and developing countries in terms of ability to meet any cultural needs identified. States which have few cultural policies in place to protect and promote their cultural expressions are most often States that simply do not have the technical and financial resources to administer such policies. It is therefore important to develop as quickly as possible a strategy to help these States. Two possibilities exist in this regard.

The first is direct aid. Many developed countries already have cultural policies that address very diversified needs and that have shown their worth. This know-how and experience can benefit developing countries, provided it is adapted for their specific

needs. The partnership formula set out in Article 15 of the Convention is worth careful consideration in this regard. Such partnerships between and within the public and private sectors and non-profit organisations emphasise, “according to the practical needs of developing countries, the further development of infrastructure, human resources and policies, as well as the exchange of cultural activities, goods and services.” Nothing prevents us from considering now how to implement such partnerships. The second possibility is multilateral aid as contemplated in Article 18, which sets up the International Fund for Cultural Diversity. Multilateral aid is a vital companion to direct aid in that it offers greater leeway for determining aid conditions while also providing a guarantee that aid will be available to all Member States. To be credible, however, it requires that the Fund in question rapidly acquire the resources it needs to function. A strategy must be developed now to accelerate the inflow of funds. It would be extremely useful, for instance, if States ratifying the Convention were to use the opportunity to announce their contribution to the Fund. Civil society should also participate in this effort. Culture professionals, who have often helped out on humanitarian causes in the past, could no doubt find a way to contribute to the Fund. The same is true for big international organisations active in the field of culture and development. For developing countries, seeing that concrete action is being taken now to ensure that the Fund rapidly becomes functional would be a clear signal that the Convention will not just be collecting dust on a shelf.

2. Legal monitoring

By legal monitoring, we mean the monitoring of Parties’ commitments in the event of disputes over the interpretation or enforcement of such commitments. The Convention has no provisions on judicial or arbitral settlement of disputes, i.e., provisions that institute mechanisms that lead to binding, legal decisions. But the Convention’s silence on the matter does not preclude recourse to either of these modes of dispute settlement if the Parties so agree.

The Convention does, however, include a dispute settlement mode that is similar in some regards to judicial or arbitral settlement, but it is more political than legal, leading to a dispute settlement proposal that the Parties examine in good faith, rather than to a legally-binding decision. The mechanism consists of a conciliation procedure which is compulsory for all Parties, except those that declare at the time of ratification that they do not wish to be bound by such mechanism. The appeal of this mechanism lies in the fact that, although not binding, it will encourage States to submit their cultural disputes to a special dispute settlement body, the Conciliation Committee, composed of specialists of the cultural sector, which is the only way that non-trade solutions to the questions raised can be found, and jurisprudence founded on cultural considerations can be developed over time.

Unfortunately, although the Convention has an appendix that explains the conciliation procedure, it does not address a certain number of points that could use clarification, such as the UNESCO Secretariat's role in administering the mechanism, whether the committee's proceedings will be made public or not, and who will pay for what. It would therefore be appropriate as we wait for the Convention to come into force to reflect on what can be done to ensure that the mechanism operates properly.

This would not be sufficient, however. If the mechanism is to truly play its role, it should be used by the signatory Parties to the Convention – a requirement that assumes people know about it and understand its mission. Unfortunately, this is currently not the case. As a dispute resolution mechanism, conciliation is a relatively new approach that only appeared on the international scene in the aftermath of World War I, during negotiation of the Locarno Treaties of 1925 and in the 1928 *General Act for the Pacific Settlement of International Disputes*⁴. Despite its similarities at first glance, to good offices and to mediation (the objective of this process is to reconcile the various parties' viewpoints and to propose a non-restrictive solution), this approach can only be understood – as has been pointed out – by juxtaposing it against the two previous mechanisms: “It was in fact commonly perceived as a reaction against good offices and mediation, which were considered in the 19th century (following the European Concert's practices) as permitting easy concealment of pressure tactics applied to the small and medium-sized States by the major powers”⁵. This explains why the process is perceived as being more markedly formal and legal in nature, and more reflective of contradictory viewpoints, since the objective is to ensure that the organ is as unbiased as possible.

The 1960s saw a resurgence of interest in this form of dispute resolution mechanism. One example is the 1962 *Protocol establishing the Conciliation and Good Offices Commission responsible for seeking the settlement of any disputes which may arise between States Parties to the UNESCO Convention against Discrimination in Education*. During the UNESCO General Conference, which is held once every two years, the Executive Council submits a list of individuals who have been selected by the Parties to this Protocol as candidates for election or re-election to serve with the Commission⁶. To date, however, it appears that no disputes have been resolved under the terms of this particular Protocol. Conciliation is also referred to in Articles 12 and 13 of the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination* (which came into effect in 1969). In this case also, the procedure does not so far appear to have been used. The 1969

4 Jean-Pierre Cot, *La conciliation internationale*, Pédone, Paris, 1928.

5 <http://www2.univ-lille2.fr/droit/dipa/dipa15.html>

6 UNESCO'doc. 33/C/NOM/7

Vienna Convention on the Law of Treaties between States defines conciliation as the basic procedure for resolving disputes relating to invalidity, termination, withdrawal from or suspension of the operation of a treaty (Article 65). A more recent example would be the 1982 *United Nations Convention on the Law of the Sea*, which stipulates that the limits of territorial waters must be established by agreement and, in the absence thereof, by international conciliation or jurisdictional resolution. Given the minimal use of jurisdictional resolution, a suggestion was made by Richard Meese, in an article published in 1998, whereby States would benefit from more frequent recourse to international conciliation for some of the territorial boundaries that remained unidentified⁷. In support of his conclusion, the author cited an interesting precedent: the 1980 conciliation agreement signed by Norway and Finland in order to submit recommendations regarding the continental shelf limits in the Jan Mayen sector. The commission that was established at the time delivered a report, the recommendations of which were unanimously adopted and accepted by both signatories as a basis for their supplementary negotiations that ultimately produced an agreement in October 1981.

Starting in the 1990s, conciliation was adopted as a dispute resolution mechanism in several international instruments. Key among these were the *Convention on Conciliation and Arbitration* within the Organisation for Security and Cooperation in Europe (Stockholm 1992), the United Nations *Convention on Biological Diversity* (1992), the United Nations *Model Rule for the Conciliation of Disputes between States* (1996), the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (1998), the PCA (Permanent Court of Arbitration) *Optional Rules for Arbitration of Disputes Relating to Natural Resources and Environment* (2002) and the UNCITRAL Model Law on International Commercial Conciliation (2002). Notwithstanding this obvious interest in the conciliation procedure demonstrated by the parties to recent international agreements, specific instances of application of this procedure remain somewhat rare, subject to the understanding that some older instances of its use exist.

One could wonder why this situation exists, given that the conciliation process is not as restrictive as jurisdictional resolution and therefore poses less threat to States' sovereignty. Could it be the absence of conflicts? There is reason for doubt here. Between Canada and the United States alone, one can easily identify half a dozen conflicts of a cultural nature that could have undergone a dispute resolution mechanism. Is it because of the general reluctance of the various States to submit their conflicts with other States to this type of mechanism, whatever its nature? Although this is certainly not false, the importance of jurisdictional dispute resolution within

⁷ Richard Meese, "Délimitations maritimes: règlement juridictionnel et conciliation internationale", *Indeme - Annuaire du droit de la mer*, 1998, Vol. III

the WTO appears to show that States are not as reluctant as originally believed to submit their conflicts to a dispute resolution mechanism. What appears in reality to be a determining factor is the States' own perception of their interest in undergoing this type of procedure. In cases where the conflicts are trade-based, this interest is quite widely acknowledged. On the other hand, this is not yet readily apparent in the case of culture-based conflicts. Further reflection on the relevance of using the conciliation process to resolve cultural disputes would also appear desirable, as would be the publication of a more detailed document explaining the nature of the mechanism in question and its potential role in implementing the Convention.

It should, furthermore, be acknowledged that the fact that the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* grants Parties the right, if they so desire, to withdraw from the conciliation procedure when they ratify the Convention is not an incentive to make use of this mechanism. It would therefore appear important that the Convention be ratified by the greatest number of States without exercising this right. For this purpose, the first round of ratifications must clearly set the tone in this respect. If, for example, the first 30 States that ratify the Convention were to do so without seeking to withdraw from the prescribed dispute resolution mechanism, one would hope that the subsequent States do the same. An immediate effort – involving all players who are interested in seeing the Convention succeed – is required in order to achieve this result. The very first instrument of ratification filed with the Director-General of UNESCO – by Canada, on November 25, 2005 – opens the door to this process by accepting the Convention without making use of the opting-out clause attached to the dispute resolution mechanism.

Conclusion

This paper on the implementation of the Convention is in no way an exhaustive review of the question. It simply aims to spur reflection in areas that could speed implementation and build support for the Convention. It would be most regrettable, after the Convention's adoption by the General Conference and ratification by the required number of States, to see it fail through poor implementation. The best way to avoid this is to prepare now for the implementation phase, as if it were about to begin.

With the Convention now a reality and its importance being openly recognised – if the interest it has elicited is to be believed, including in mass communication media – the Parties must take up the challenge of actually using the instrument they sought to have. This note has deliberately avoided entering into the details of the implementation of the Convention from the standpoint of policies to be introduced, since each Party is responsible for defining its own policies and measures. It would

perhaps be appropriate, however, to recap certain points that call for particular vigilance:

1. The policies and measures must be designed and implemented with all due consideration for human rights and the basic freedoms, and the transparency that will be demonstrated by the Parties, particularly within the context of the various monitoring mechanisms we have analysed above, can only contribute to affirming the Convention's success.
2. The Convention cannot be implemented in isolation, without due consideration for the overall context. It would, to this end, no doubt be appropriate to recall that the Convention's purpose is limited to the policies and measures espoused by the Parties, which essentially are the States. Although it is an important dimension, this notion does not exhaust the question of protection and promotion of the diversity of cultural expressions. Other discussions currently underway demonstrate the issues relating to the expert handling of the means of production and, above all, of dissemination, given the progress of technological advancements, as well as the need to take into consideration the economic structuring of the cultural industry sector and to reflect on the problem of regulating behaviour among the players in the sector, both nationally and internationally.
3. Since deliberations began on the feasibility of having a legal instrument to govern cultural diversity, it has become evident that an instrument of this type, even if its use was limited to addressing a cultural problem, and due to the specific characteristics of globalisation, would of necessity interact with other areas of endeavour. This Convention represents a foundation stone, on which would be built a cultural pillar for globalisation legislation; however, this pillar must be consolidated and the Convention's implementation could also serve as an opportunity to reflect on the underlying conditions of this consolidation and to begin the associated process.

Chapter 9

Monitoring the Convention worldwide

Danielle Cliche

How can specific articles of the UNESCO Convention related to national cultural policies and measures be monitored, in the absence of a well-articulated mandate for monitoring in the text adopted October 2005? In order to deal with this challenging question, specific attention is drawn to Articles 6 (2) and 7 and 8 on measures which national governments are to report on every four years as per Article 9 (a).

The ideas laid down in this chapter are based on the experiences derived from the Council of Europe/ERICarts project, “Compendium of Cultural Policies and Trends in Europe”¹ which introduced monitoring activities in 2003 and for which plans to monitor elements of the UNESCO Convention are currently being made.

The UNESCO Convention does provide the basis for monitoring

In July 2004, UNESCO presented a draft *Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, in which Article 15 foresaw the establishment of a Cultural Diversity Observatory “to collect, analyse and disseminate all relevant information, statistics and best practices” of relevance in this domain. While there was resistance to the idea of setting up a new administrative structure, on the part of both national governments and civil society actors, the idea to

1 The Council of Europe/ERICarts, “Compendium of Cultural Policies and Trends in Europe” is a web-based and permanently updated information and monitoring system of national cultural policies in Europe. It is a long term project which aims to include all 48 member states co-operating within the context of the European Cultural Convention. It is realised in partnership with a “community of practice” comprised of independent cultural policy researchers, NGOs and national governments. For more information see <http://www.culturalpolicies.net>. Ideas for constructing similar information systems in Latin America and Asia have been presented during the UNESCO/CONACULTA *International Seminar on Cultural Indicators*, held in Mexico City (May 2003) and during the ASEF *Asia-Europe Seminar on Cultural Policy*, held in Bangkok (June 2004).

systematically collect information and data on cultural diversity was welcomed. Proposals were made to increase support for existing efforts already being carried out by public and third sector bodies to map policy actions and approaches to cultural diversity in different parts of the world.

Despite the fact that Article 15 was eventually removed from the subsequent draft of the Convention, the underlying goal of producing and sharing information on cultural diversity and policy measures in support thereof was cemented in various articles of the Convention adopted in October 2005. The main ones are Article 9 (a) which calls on parties to provide appropriate information in their reports to UNESCO every four years and Article 19 (1) which calls for the exchange, analysis and dissemination of information including best practices. Articles 6 (2), 7 and 8 indicate which types of measures may be included in cultural policy frameworks aimed at protecting and promoting the diversity of cultural expressions. See the attached Table at the end of this text for specific references.

While the adopted text is not explicit in its language about support for specific monitoring activities, the Articles mentioned do provide an opportunity for the monitoring process to be put in place. The extent to which systematic monitoring activities can and will be implemented beyond technical exercises of, for example, keeping track of the ratification process, depends upon the political will of governments. It will also highly depend upon the active participation of civil society actors (primarily researchers but also professional organisations and others) already collecting information and data on cultural diversity generally and in relation to policy measures listed specifically in the Convention.

Constructing a system of monitoring

The word “monitoring” is not neutral. It has many interpretations and connotations, many of which are contentious depending on *who* is monitoring *what*. In this article, monitoring is used to mean a process which involves the regular and full participation of both public and private actors to understand *how* the translation of theoretical (and increasingly political - ideological) concepts of cultural diversity into legislation and policies have developed over time in different countries and how they have (or have not) successfully supported the realities faced by producers and receivers of cultural expressions. With this knowledge (transparency), public and private actors can work together to, for example: evaluate goals, resolve strategic policy questions, improve upon existing instruments, devise new measures or make pertinent management decisions which successfully meet the needs of all members of society; a cyclical process otherwise known as *knowledge production, transfer and uptake*.

In a recent paper outlining a process for monitoring cultural policies and trends in Europe², several prerequisites and steps were defined including:

- Clearly defined goals and mission;
- Standardised questions and indicators;
- Availability of reliable data and information which are collected on a regular basis and over a certain time period;
- Secured verification procedures by specialists of the data and information;
- Mechanisms to process and channel the (expected) results to reach relevant policy makers interested in evaluating their goals, activities and instruments.

Below is a cursory overview of how some of these different steps could be considered for application in the context of the UNESCO Convention and its requirement for signatories to report every four years on measures to protect and promote the diversity of cultural expressions.

Goals for monitoring are established

The various actors involved in the monitoring process will have different frames of reference and expectations of what is to be monitored and how. Looking at this exercise from a more technical / institutional point of view, the goals would be to monitor, for example:

- the ratification process;
- how government obligations under this Convention comply or conflict with other international agreements and forms of cooperation;
- efforts by governments to engage in international cultural dialogue, exchange and cooperation;
- the setting up and functioning of specific bodies and instruments such as the “Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions”³ or the International Fund for Cultural Diversity⁴;

National governments which sign the Convention have committed themselves to the goal of increasing transparency by sharing information and expertise on the collection of information, statistics and best practices on cultural policy measures in their country which protect and promote the diversity of cultural expressions (as

2 Council of Europe / ERICarts: *Compendium of Cultural Policies and Trends in Europe: First Proposals for the Development of Monitoring Activities*. 2003.

3 See UNESCO Convention *Article 23* - Intergovernmental Committee.

4 For more information see UNESCO Convention *Article 18* International Fund for Cultural Diversity

spelled out in Articles 9 and 19). What remains unclear is how this goal will be made operational in concrete terms. The setting up a global monitoring system can help in this regard as it will necessitate the formulation of guidelines on the depth and breadth of the information to be exchanged as well as the design of an instrument which would facilitate a more regular collection and analysis of such information beyond the formal reporting requirements of the Convention.

Article 11 acknowledges the roles, responsibilities and participation of civil society actors in achieving the objectives of the Convention. Their active participation in any future monitoring system is crucial and can help to start a dialogue and bridge a knowledge gap in the ideals expressed in the Convention and/or in national legislation and the realities faced by producers and receivers of cultural expressions⁵. This information could facilitate the creation of new ideas and the subsequent development of new policy instruments and measures.

Defining standardised questions and indicators

Articles 6 (2), 7 and 8 of the Convention provide the starting point for defining standardised questions and indicators to be included in a future global monitoring exercise. These Articles are important as they provide policy makers and researchers with the opportunity to go beyond the traditional focus of broad cultural diversity mapping exercises and research studies which have addressed general questions of identity, equality, citizenship and (im)migration at national, regional and local levels. From the point of view of cultural policy making and research, the Convention encourages the collection of specific information and data on, for example:

- individuals and social groups with particular attention to women, minorities and indigenous peoples as creators, producers, distributors and audiences;
- diversity of artistic and other cultural content which diverse audiences can have access to through the media or other distribution channels;
- diversity of actors which are involved in decision-making, regulation, promotion and distribution of cultural expressions; as well as
- diversity of funding sources to which individuals and groups have access.

⁵ According to Arnold J. Love there are “few published evaluation studies of the effectiveness of the implementation of cultural diversity policies or their translation into policy instruments addressing specific relations of diversity”. See Love, Arnold J.: *Assessing the Implementation of Cultural Diversity Policies*. Published in: *Differing Diversities: Cultural Policy and Cultural Diversity*. Strasbourg 2001: 93 (Council of Europe).

By adopting this approach⁶, cultural diversity no longer becomes solely a question of “minorities” but extends to include “gate-keeping”⁷ dynamics (those institutions and persons with the power to make decisions) as well as tracking global information/cultural content flows⁸ which influence societal frames of reference⁹.

Article 7 (b) of the Convention remind us that national policies and measures are not only targeted at protecting or promoting “local cultural expressions” but also at opening access to, and encouraging dialogue with, cultural expressions from around the world. From the point of view of monitoring, it will also be necessary to map policies and measures which promote international cultural cooperation (beyond cultural diplomacy) such as schemes to facilitate, for example:

- the international distribution and exhibition of a diversity of cultural expressions (including activities, goods and services);
- the exchange/mobility of students, artists and other professionals working in the cultural field;
- the realisation of trans-national/international projects, co-productions, fora for intercultural dialogue, information exchange and networking activities.

Does this now mean developing an integrated framework with an endless number of questions and indicators which all countries are expected to answer? Experience shows that creating a large-scale monitoring system does not need to result in a comprehensive comparative framework in the classical sense from the outset. It does mean using a mixed methodological approach¹⁰ to begin mapping available information and data and to accept the blanks in between. Comparative observations can be drawn from the information and data collected and a new set of questions and indicators for monitoring trends over a certain period of time can be created. The development of standardised questions and indicators will therefore not necessarily

6 This approach to studying cultural diversity in cultural policy making has been adopted by the Council of Europe/ERICarts project: “Compendium of Cultural Policies and Trends in Europe”, <<http://www.culturalpolicies.net>>.

7 For example, see: ERICarts Report to the EU: *Culture-Gates: Exposing Professional Gate-keeping Processes in Music and New Media Arts*. Bonn: ARCult Media, 2003. <<http://www.culturegates.info>>

8 See: *UNESCO Institute for Statistics, International Flows of Cultural Goods and Services, 1994-2003*. Montreal: UIS, 2006.

9 This approach is advocated in Alibhai-Brown, Yasmin: *After Multiculturalism*. London: The Foreign Policy Centre, 2000.

10 This type of mixed approach is critical to go beyond e.g. statistical reports on the number of television channels available without considering the lack of new content available in this exploding broadcast environment. See also comments made by Françoise Benhamou in her comments to the Acheson/Maule article on the Convention on Cultural Diversity in *Journal of Cultural Economics*, Volume 28, No. 4, November 2004.

be a technical but a political process which requires the participation of many actors as well as a constant dialogue among them.

Data and information are available

Once the framework or broad parameters for defining the questions/indicators to monitor the Convention are agreed upon, a global network of locally based public and private actors can be established¹¹. They are to be responsible for gathering together the wealth of existing information and data and placing it into a centrally-based (electronic) repository which users from their territory can access and contribute to (as prescribed in Article 12 (d)). The information which is available can be updated on a regular basis so that changes over a period of time can eventually be monitored. Creating a solid information base which represents all views and engages many actors in the quest for transparency is the main objective.

The type of information which is already available within different world regions ranges from policy information, legislative texts, statistics, stories, critiques/debates, scientific studies, etc. The extent to which such resources are available will vary from region to region. The challenge for creating a global system of monitoring will be to use data from one country and stories from another to assess the impact of policies and measures within a common framework. What is important to establish in the initial stages of the monitoring exercise is an understanding of how the different measures spelled out in Articles 6 (2), 7 and 8 of the Convention are relevant or not for cultural policy making in the different countries and what evidence is available to evaluate their impact according to the objectives of the Convention to protect and promote the diversity of cultural expressions.

When evaluating the type of measures adopted by governments around the world, it will also be important to have an understanding of why certain information and data are available or not. For example, those countries which have adopted an "integrationist" citizenship model have laws which distinguish between nationals and non-nationals. Obtaining official data from such countries on, for example, certain social or ethnic groups is very difficult as it is forbidden by law¹². The cultural policy

11 A global network of observatories on cultural diversity has been proposed in the UNESCO contribution to the World Summit on Sustainable Development, Johannesburg, 26 August - 4 September 2002 and published in the UNESCO Cultural Diversity Series of Papers No. 1, 2002.

12 Dirk Jacobs and Andrea Rea: *Construction and Import of Ethnic Categorisations: 'Allochtones' in the Netherlands and Belgium*. Université Libre de Bruxelles and presented during the EURODIV Conference, "Understanding and Mapping Diversity", 26-27 January 2006 Milano.

consequences of this citizenship model could be that there are few, if any, targeted public policies, programmes and resources to promote, for example, the work of female artists in mainstream cultural institutions or linguistic diversity in media programming. On the other hand, those countries which have adopted a “multiculturalist” model of citizenship and are legally allowed to collect detailed statistics may do so in very different ways using race, geography, gender or religion as indicators. This may mean that these governments have created policies or programmes which match a preconceived list of measures to protect and promote a diversity of expressions. However, it does not mean that they can be considered “best practices” without understanding or evaluating their effects.

Verifying the results

Verification procedures are necessary in any kind of monitoring system to give meaning to the information and data provided. In this case, it requires the active establishment of partnerships among policy makers, artistic communities, researchers, cultural entrepreneurs, the public, etc., to engage in a dialogue on the effectiveness of approaches adopted so far. This evaluative aspect helps to answer questions on the development and impact of national frameworks, policies and measures in real life practice, for example:

- Have the processes to formulate new laws, policies and programmes included the participation of a diversity of public and private actors (individuals and groups)?
- Are the goals of these laws, policies and programmes transparent and measurable in both quantitative and qualitative terms?
- What is the level of public and private resources invested in securing the long-term success of specific initiatives?

In recent years, opportunities for meaningful monitoring exercises to succeed have been greatly improved due to the increased access which new information technologies provide to diverse sources of information and the possibilities to involve a greater number of actors in the verification process.

Channelling the results

There is a clear commitment by governments to engage actively in and to strengthen international cultural dialogue, cooperation and exchange as expressed in several Articles of the UNESCO Convention. From the point of view of monitoring, this means not only channelling the results to reach relevant national policy makers interested in evaluating their goals, activities and instruments but also to share these

results on the international level through formal and informal means. Article 9, in particular, sets out the process for this exchange through the designation of a responsible contact point, a formal reporting time frame (every four years) and informal means to exchange of information. Article 12 (d) promotes the use of new technologies to enhance information sharing.

Next steps being taken

At the beginning of 2006, the UNESCO Secretariat initiated a global exercise to collect information and data on national approaches to cultural diversity in several world regions¹³ as well as to compile a centralised list of key documents and experts from around the world. While not necessarily connected to the Convention process as such, the results of this activity could be used to develop a first set of standardised questions and indicators for a future global monitoring exercise of Articles 6 (2), 7 and 8 of the UNESCO Convention on cultural policy measures to protect and promote a diversity of cultural expressions.

In the meantime, we can take the first step by sharing experiences from existing information and monitoring systems such as the Council of Europe/ERICarts project, “Compendium of Cultural Policies and Trends in Europe”, to begin a dialogue on constructing sets of questions/indicators. The Table on the next page is an invitation for cooperation and is by no means comprehensive.

¹³ Participating organisations are: European Institute for Comparative Cultural Research (ERICarts), Georges Mason University (North America), Asian Media Information Centre, Observatory of Cultural Policies in Africa, Middle East Centre for Culture and Development, Organización de Estados Iberoamericanos para la Educación, la Ciencia y la Cultura. This work will be used as background information in the preparation of the 2007 UNESCO World Report on Cultural Diversity.

Table: Creating Sets of Questions/Indicators to Monitor National Cultural Policies and Measures to Protect and Promote the Diversity of Cultural Expressions as Expressed in the UNESCO Convention

Sample of UNESCO Convention Articles	Example of Policy Domain	Example of Information / Data to be Collected and Monitored over Time
<p><i>Art. 6.2 (a)</i> Regulatory measures aimed at protecting and promoting diversity of cultural expressions</p> <p>See also <i>Art. 7 (a)</i> ...paying due attention to the special circumstances and needs of women...to minorities and indigenous peoples</p>	Minority Groups*	<ul style="list-style-type: none"> • Data on officially recognised and not officially recognised minority groups • Main cultural policy approach toward minority groups, e.g. integration / multiculturalism / mainstreaming or community models • Specific laws, programmes and measures to support diverse forms of expression, cultural activities or artistic practices of minority groups • Public debates on minority groups and forums which stimulate dialogue
<p><i>Art. 6.2 (b)</i> Measures to provide opportunities for domestic cultural activities, goods and servicesincluding provisions relating to the language used for such activities, goods and services</p>	Language	<ul style="list-style-type: none"> • Data on official languages and minority languages in use • Main cultural policy approach to promote/protect official and minority languages • Specific laws and measures to support the dissemination of culture and media activities, goods and services in different languages • Public debates on linguistic diversity and forums which stimulate dialogue

<p>Art. 6.2 (c) Measures to provide domestic independent cultural industries and activities in the informal sector effective access to means of production</p> <p>See also Art. 10 (c) ... to encourage creativity and strengthen production capacities by setting up educational, training and exchange programmes...</p>	<p>Culture Industries</p>	<ul style="list-style-type: none"> • Data on the number of companies and their turnover, employment figures and other available statistics • Main legal framework and / or sector specific laws supporting domestic culture industries development and distribution of locally produced content • Public measures to set up training and education programmes to strengthen production capacities • Cases of public, private or third sector partnerships as "creative industry" strategies
<p>Art. 6.2 (d) Measures aimed at providing public financial assistance</p>	<p>Culture - General (Public Funding)</p>	<ul style="list-style-type: none"> • Data on the allocation of public funding for relevant institutions or projects • Government priorities for the allocation of public funds for specific initiatives to protect and promote a diversity of cultural expressions
<p>Art. 6.2 (e) Measures aimed at encouraging non-profit organisations as well as public and private institutions artists....</p>	<p>Culture - General (Encouraging Access of Diverse Actors to Participate in the Marketplace)</p>	<ul style="list-style-type: none"> • Constitutional provisions for freedom of expression, creation and communication • Strategies to encourage participation and build partnerships between non-profit organisations, public and private institutions

<p>Art. 6.2 (f) Measures aimed at establishing and supporting public institutions</p>	<p>Culture – General (Infrastructure)</p>	<ul style="list-style-type: none"> • Legislative provisions and financial resources to establish public cultural institutions • Cases of reform to the legal status of public cultural institutions into, for example, foundations, private companies • Identification of new actors taking responsibility for activities of public cultural institutions as a result of, for example, new public management strategies
<p>Art. 6.2 (g) Measures aimed at nurturing and supporting artists</p> <p>See also Art. 7.2 ...recognising the important contribution of artists...in nurturing the diversity of cultural expressions</p>	<p>Artistic Creativity</p>	<ul style="list-style-type: none"> • Special laws which support the socio-economic status of artists as both employed and self-employed persons, such as labour, tax, social security legislation and copyright compensation schemes • System of grants and awards to directly support artists including, education, training, mobility, entrepreneurship, recognition
<p>Art. 6.2 (h) Measures aimed at enhancing diversity of the media including through public service broadcasting</p>	<p>(Audiovisual) Media</p>	<ul style="list-style-type: none"> • Data on the organisation and ownership structure of the media sector (public, commercial and not for profit media channels) • Laws regulating public and private media respectively on, for example, licensing conditions, local content, cultural obligations, language use, ownership, foreign programming quotas

<p>Art. 7 (b) Measures to promote access to diverse cultural expressions from within their territory as well as from other countries of the world</p> <p>See also Art. 12 ... to strengthen bilateral, regional and international cooperation for the creation of conditions to promote the diversity of cultural expressions</p>	<p>International Cultural Cooperation</p>	<ul style="list-style-type: none"> • Data on the mobility patterns of persons working in the culture and media sectors and on the share of local and foreign cultural goods and services in domestic markets • Laws promoting/preventing the mobility of persons as well as a diversity of goods and services • Priorities and implementing tools outlined in bilateral, regional, international strategies to promote diversity of cultural expressions
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* Note: Article 2 of the Convention defines cultural expressions as „those expressions that result from the creativity of individuals, groups and societies, and that have cultural content“. Article 7 (a) further defines individuals and groups with particular attention placed on women, persons belonging to minorities and indigenous peoples. Article 7 (b) refers to artists, creators, cultural communities and their organisations. Minority groups were used only as an example in this table. In the broad sense of national cultural policy making, “groups” could refer to audiences and /or society as a whole.

Chapter 10

Unregulated markets don't exist: What kinds of regulations will promote cultural diversity?

Joost Smiers

Why we need regulations

What is the purpose of a Convention that would contribute to the protection and promotion of the diversity of cultural expressions? In the fields of film, music, theatre, dance, visual arts, design and publishing (whether presented live or by audiovisual or digital means), there are dominant market positions that harm broad access to cultural communications. From a human rights perspective this is a loss. Some of these market-dominating cultural conglomerates are foreign to a country; others are national, as in the United States and Brazil. Left exclusively to the market, mergers and take-overs will continue.

However, democracy demands the opposite. In all fields of the arts and media, there should be producers, distributors and promoters with strong local affinities, and who relate their audiences and publics as well to developments in other parts of the world. Nation states should regulate the cultural market in favour of diversity in order to reach this ideal.

Before analysing what kind of measures would be appropriate, it is urgent to consider that in the neo-liberal era some people might fear the existence of regulations. The norm looks to be that it is better to have unregulated markets. However, one must recognise that never in history, and nowhere on this planet, have unregulated markets existed. Markets are always regulated, in one way or another. The WTO is a good example of a mechanism that effectively regulates markets on a global scale; in favour of the principle that the winner-takes-all.

If we understand the reality that the WTO forged market conditions which makes it easier for big corporations to monopolise the whole world and to push aside smaller companies, then we should not be afraid to start thinking about what kinds of regulations can be introduced in favour of the production, distribution, promotion and reception of the diversity of artistic cultures. The *Convention on the Protection and*

Promotion of the Diversity of Cultural Expressions is only a tool; a tool that should give countries the right to make those regulations *they* think are appropriate for the protection and promotion of the diversity of artistic cultural expressions.

There are several categories of regulations to consider, beside the rather well-known *subsidy* systems, *tax* policies and different kinds of *preferential treatment*. We may think of *ownership* regulations (including *competition* law), *content* regulations and the regulation of the *public accountability* of cultural enterprises. We should understand that, in most cases, one form of regulation is insufficient to reach the desired purpose of cultural diversity. For instance, it does not automatically follow from diversity of ownership that diversity of content will arise (Doyle 2002: 13). This means that regulating authorities should find and prescribe the right mixture of ownership and content regulations.

Regulations of ownership

Let's start with ownership regulations. The purpose of ownership regulations is to prevent one owner having a too dominant control over the production, distribution, promotion and/or the conditions for reception of the different forms of the arts. The main objectives of regulating ownership are to maintain a balanced diversity of owners of cultural enterprises; to limit the market-driven paradigm; to protect communities that would not normally have a voice in the market place; and to ensure owners are accountable to the public sphere. Ownership matters because it is decisive for who can produce, what can be produced, and which artistic expressions will be distributed in what manner and surrounded by which ambiance. Internationally, oligopolies cause huge inequities between countries. From a human rights perspective there should be an enormous variety of enterprises that choose what will be produced, distributed, promoted and received in the different fields of the arts. The number of decision-makers determines whether or not broad access exists in the cultural field.

The consequence of ownership regulations is that companies are obliged to remain relatively small, or medium-sized. It is true that this may make them vulnerable to a take-over, and at the same time limitations on ownership may obstruct overseas expansion (Doyle 2002: 159). So, how do we approach this issue? In theory, if all companies are relatively small there is no problem because no one company has a significantly larger size or greater power than other companies. This is exactly the objective we are trying to reach: oversized cultural conglomerates should no longer be allowed to dominate the cultural field.

Let us try to imagine what the next step could or should be. Shouldn't cultural companies be made smaller before they are allowed to operate in a specific national

market? While children of the neo-liberal era may not fully appreciate this proposal, isn't it logical that the cultural playing field should not become dominated in any way by any one cultural enterprise? The side effect is that we will no longer have the fierce competition that presently exists between the few remaining cultural giants. The argument that they have the economies of scale, and therefore the ability to merge, goes to ruin. The diversity of artistic expressions requires a beneficial inefficiency.

The very idea of owning cultural expression is a strange concept in most cultures. This concerns the control of the means of production, distribution, promotion and reception of works of art, entertainment and design. But, it also matters in the field of intellectual property rights. Sure, artists must make a living from their work, but isn't it exaggerated to grant them (and their intermediaries, the cultural industries) an exclusive monopoly on their cultural expressions, which they have derived for the most part from different sources in the public domain (Smiers, 2003)?

Ownership regulations concerning the different fields of the arts (in the material, audiovisual or digital worlds) may take different forms.

- The first one is to preclude private ownership, for instance concerning the spectrum that transmits huge parts of our communications.
- The second one relates to the fact that we now see more and more forms of cross ownership in the cultural field: media conglomerates that are active in all the fields of the arts and entertainment, in all stages from production to distribution, promotion, and reception, and in all different media. In several cases, the reality now is that cultural production and distribution have become involved in situations of cross industry ownership. For instance, General Electric, a huge military firm, has extensive interests in cultural industries and news agencies. Arms producer Lagardère in France owns a substantial part of the publishing houses and distribution channels for newspapers and books in that country. Italian Prime Minister Silvio Berlusconi, who owns many different media and controls public radio and television, is also owner of the main advertising agency in Italy and one of the most important supermarket chains. Such forms of cross industry ownership are a nightmare and bring inherent conflicts, in which cultural freedom is extremely vulnerable.

The solution may be that countries say: conglomerated cultural enterprises may not be based here, or they should be split into independently-operated entities. Also, foreign ownership of the means of communication may be restricted in order to ensure that the production and distribution of locally-related artistic contents will not be neglected. Informal relations between cultural giants could be unravelled and broken down as well.

- Thirdly, it is amazing that in many states existing competition laws have seldom been used effectively in the cultural field. One could claim that a dominant

market position is an abuse, especially from the perspective of upholding democratic values. In many situations, it would be a cultural gain if existing anti-monopoly laws were applied in the cultural sectors, but this seldom happens. However, the conditions of access concerning culture should be more open than they are for other entrepreneurial activities. Nevertheless, it would be a good start for normal competition to be applied strictly in the cultural sectors. This process would also stimulate thinking about what kind of diversity of entrepreneurial activities is necessary from a cultural democratic perspective. It would be one of the opportunities for stressing the necessity to develop, for instance, cultural diversity indices

- Fourthly, we should wonder why there are blockbusters, bestsellers and stars. The main reason is that they have been launched with enormous marketing budgets of many millions of dollars, which actually distorts competition. Why? Without such fabulous amounts of money, other artists and their enterprises are, unable to compete with these mega events. In the case of film, Christophe Germann has written, “...investments in marketing are arguably the most decisive incentives for film exhibitors to programme blockbusters. Consequently, the moviegoers must consume the content that the Majors have imposed on theatre exhibitors through their powerful distribution structures and marketing investments. This situation is even worse when distributors use the so-called ‘block booking’ methods, i.e., they rent blockbusters to exhibitors on the condition that the latter also show other films of lower commercial value from the same distributor. The blockbuster is in this way licensed as part of a package deal to saturate the screens. In many jurisdictions, this practice violates competition rules. Arguably, the audience’s demand is therefore largely irrelevant since the market relationship takes place between the Majors as producers and distributors (offer) and film exhibitors (demand). The dominant market position of the Majors’ oligopoly leaves almost no screen capacity for content other than for blockbusters from one single cultural origin, unless governments intervene on a national and regional level by way of cultural laws and policies aimed at promoting diversity in the audiovisual offer.” (Germann 2003)
It would make sense to tax the excessive marketing budgets of blockbusters, bestsellers and stars, and transfer this collected money to the marketing budgets of other cultural productions. This would bring them to an equal position and remove the distortion to competition.

Regulations on diversity of content

Having a great number of decision-makers concerning artistic expressions does not automatically guarantee that audiences, buyers and listeners can benefit from the rich

diversity of artistic creations and performances that artists produce. The offer might tend towards a limited range of products. Why? For instance, because they are cheap, or are certain to attract a mass public, or are uncontroversial, or are in line with the political or aesthetic convictions of owners and programme makers. This is one reason to complement ownership regulations with a variety of regulations on the diversity of content.

Another reason for regulations on diversity of content is the reality that we might not succeed immediately in restraining the size and power of cultural conglomerates and turning them into small or medium-sized enterprises, as mentioned above. An additional reason to have content regulations is that people do not have an equal voice and possibility to be heard in public; this also applies to the cultural field. The consequence of this is that many artistic expressions do not count in public debate and experience, for instance, about taste, language, design, kinds of music, theatrical imaginations, narrative structures in film, or on television. This is a democratic loss. It will be an impoverishment if cultural products come from only one foreign country (with a limited domestic supply), and not from many other sources, countries, and cultures.

In general, content regulations are meant to provide access to a wide range of diverse content through appropriate and relevant distribution channels. Content regulations can ensure that cultural industries cannot dump their wares on markets that lack the economic clout and infrastructure to resist these cultural invasions, and that would otherwise be unable to produce the more costly artistic expressions. Many countries are small. So, it would be wise for such countries to cooperate on a regional level with neighbouring countries in the development of cultural productions and to assure a market larger than the home market.

Content regulations may serve different objectives:

- The most typical regulation tries to assure that domestic artistic products and local creative developments can be shown in sufficient quantity in their own country, and hopefully provide abundant shelf space for local works of art.
- Secondly, content regulations may be aimed at promoting the existence of a culturally-diverse offer from surrounding countries and other parts of the world. In countries like India, China and Brazil, regulations should promote the exchange of cultural creations from all the widely disbursed corners of these culturally-diverse countries. The idea of looking beyond one's own country or province is more complicated to realise than merely protecting local artistic developments from the torrent of the globally-operating cultural industries. Most existing content regulations have an eye on safeguarding domestic artistic life, which is important. However, it is also important to take care that the global

diversity of artistic expression has a place and thus the whole world, and all different artistic varieties, should be an object of regulations and policies.

- The third purpose of content regulations is to ensure that the broad diversity of categories of cultural representations is covered. It can promote diversity of genres. This may mean, for instance, the protection and promotion of cultural, linguistic, political and demographic diversity, including different minority interests. The objective of content regulations is to prevent cultural creations from having a too uniform source. To put it another way, they should promote the confrontation between public and diversified forms of cultural communications.

In general, four kinds of content regulations can be conceived:

1. The *at least* kind of regulation provides that certain kinds of works of art will be distributed, for instance what has been made in the local or national context.
2. The *must-carry* system might also be called the essential facility doctrine under U.S. law. It provides that an enterprise that controls a specific channel of communication must open it up to more suppliers than just the owner of the essential facility (Germann 2003: 121). This approach requires a monopoly or dominant player in the cultural market to give access to rivals on terms that are fair and non-discriminatory (Doyle 2002: 169). If a cultural enterprise in the field of production, distribution or promotion (or all of them) is very strongly present in the cultural market (at the moment this cannot be avoided), then it should get a public task to fulfil. The public task is to be the carrier of diversity without interfering editorially or otherwise in the artistic choice of what the selected independent producers and distributors wish to offer to the public.
3. The *no more than* alternative is perhaps the most challenging form of content regulation. It defines that cultural products from one foreign country may not have a market share larger than, for example, ten or twenty per cent. It thus limits the market share. This is an attractive form because it keeps the cultural market open for cultural creations from elsewhere in the world and prevents one foreign source from overwhelming local cultural life. The basic principle is that this regulation is not about exclusion, but about making sure that there is space for the presentation of a wide range of diverse cultural options.
4. The *reciprocity* policy. A foreign country with a strong presence in another country may be sent this message: if you wish to operate in our country, we demand, for instance, that a comparable number of films from our country be shown in your country.

Corporate cultural charter

In the general overview of regulations in favour of cultural diversity, the responsibility of cultural enterprises themselves should be considered. This is what we may call public accountability. Cultural corporations should make themselves accountable. The appropriate tool could be that they commit to a *corporate cultural charter*. What are the topics we might think of when we speak about a corporate cultural charter?

- The first category brings the ownership, the dependency, the influence and the lobbying relationships of the cultural corporation into the picture. Who are the owners? How is the ownership organised and structured, in what kinds of networks? What kinds of cross ownership exist? Which outside forces does the company require, for example, which banks and other financial sources does it use, or with which social interest groups does it relate? To which political, religious or other social interest groups does it contribute? What informal relations does it have with major decision-makers that are important for its functioning?
- The second category concerns how the cultural enterprise is governed. It must be obliged to take representatives from diverse cultural backgrounds – women and men – onto its board of directors and it should invite artists and different thinkers to participate on advisory committees. At its highest level, social and cultural contradictions must be discussed and the outcomes must inform and enrich the artistic and cultural decisions that a cultural enterprise makes.
- The third category deals with internal relations in the cultural enterprise. Ownership of the corporation must be separated, as strictly as possible, from the processes of decision-making concerning artistic and editorial affairs. In several countries, news media have editorial covenants that restrict the influence of the owners to the nomination of the chief editor and the establishment of the basic editorial principles (Doyle 2002: 152). It goes without saying that this model can be transferred easily to a cultural enterprise. A cultural covenant would seek to prevent proprietors from influencing the editorial and artistic content of the media, production facilities and the outlets which they own.
- The fourth category would intervene in the relationship between advertisers and the media which produce, present and promote products of artistic expression (including of course entertainment and design, comprised in the concept of the arts). *First*, a cultural enterprise must be obliged to make a strict division between advertising and programmes. Its policy on how it will realise this objective must be transparent and the day-to-day practice must be controllable. *Second*, the time and space allocated to advertising should not overshadow programmes and other cultural content. Cultural media should not, in a

substantial way, be driven by the aim of presenting as many advertisements as possible. The public should have the right not to be influenced by advertising at all times of the day. A cultural enterprise should commit to carry substantially less advertising than now. Advertising should have a modest place and should not push programming aside. *Third*, advertising should be held to a much higher standard for truth and accuracy than exists at present (McChesney 1997: 67,68). It is the task of a cultural corporation to present only those advertisements that comply with this norm, and to make their policies concerning this issue transparent.

- The fifth category is the difficult topic of how a cultural enterprise should engage in questions of moral responsibility. Producers, distributors and promoters of artistic expressions, by definition, make choices that have a moral component. The cultural enterprise should agree to make its policies in this field explicit and to engage in public debates about its choices.
- A corporation that uses public space – materially, spiritually or virtually – must also contribute to the development of the cultural diversity of these societies. This is the sixth and last category for a corporate cultural charter. It should respect cultural traditions and cultural heritage, and refrain from misusing or appropriating it. At the same time, it must produce, distribute and promote the whole and diverse areas of theatre, films, music, dance, visual arts, design, literature, games and diverse multimedia that are emerging in society. A cultural corporation that earns substantial amounts of money in a given country – for instance American cultural industries annually take more than CAD \$2 billion out of the Canadian market – must oblige itself to reinvest substantial parts of those sums in such a country.

Promoting choice

These are reasonable demands. We have only to get used to putting words to the responsibilities that cultural enterprises should bear, and to make them effective.

Aren't we over-regulating the cultural field if we introduce such regulations? What I have presented here is not more than an index, a tool kit from which to draw the correct and appropriate mix, which may differ from situation to situation. The basic purpose of proposing such a shopping list is to stimulate the imagination of public authorities and citizens: they may feel free to think creatively about forging the conditions to create more equal balance for the production, distribution, promotion and reception of theatre, music, film, literature, design, visual arts, and all imaginable melanges.

Another question is, of course, shouldn't we have confidence in people to make their own choices? Yes, indeed, let them make their choice ... providing they can choose from among a broad spectrum of performances, films, books, and works of visual art and design that artists here and there create and bring to the stage. If the dominant market forces do not, or do not sufficiently, provide this wide range of artistic creations and cultural expressions, then market relationships should be reshuffled to eliminate filters which prevent cultural diversity from reaching audiences. At the same time, the situation in which only a few corporations worldwide make the decisions on what will be on the cultural menu, on what will be produced, distributed and promoted, should be prevented.

Digital media

The new digital media may solve a part of the problem for which the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* has been created. For more and more artists it is within reach for them to produce and distribute their own creations and performances, and for publics to be able to discover completely unexpected cultural expressions from artists living and working nearby, and from those at the far side of the world. This requires that they have money and facilities and this is not guaranteed in all parts of the world. Would this mean that cultural conglomerates will fade away? If artists don't need their services to reach audiences and buyers, and if audiences can find their own way and make their own choices out of the abundant supply of works of art, then indeed such huge corporations will soon be out of business. In this situation, diversity of contents may flourish in an open communication between audiences and buyers and it is certain that dominant positions in the cultural market will be relegated to the past.

Is this expected to happen? I am not sure. The huge cultural industries represent considerable value on the stock markets. They belong to one of the most important sectors of the world economy. The groups with a vested interest in this economic sector will not surrender; they will try to adapt their activities to the changing conditions. Their strategy is to continue being the unique deliverers of cultural goods and experiences, by using the digital pipelines and maintaining control of content and delivery by means of systems of digital rights management, while seducing publics to stay in the role of passive consumers and buyers.

Conclusion

We live at an exciting moment of history. Can we prevent cultural conglomerates from continuing to control our cultural values and experiences and the impact they have on our lives? Can we create the conditions for many more suppliers, so that we will have the chance to make a choice out of many different artistic cultural options, according to our own sentiments and tastes? The *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* may stimulate us to reduce the size and market power of cultural enterprises and to support the growth of infrastructures appropriate for diversity in the digital age.

Part IV

Chapter 11

Strategies in favour of cultural diversity: The need for a global cultural movement

Joost Smiers

The *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* is only a tool, albeit an extremely important tool. It is a means to achieve certain ends. It confirms the right of sovereign states to take those measures and implement those regulations that they, and their citizens, deem appropriate for the protection and promotion of cultural diversity. The Convention is a tool to make it possible, hopefully, for all countries to create conditions for as many artistic expressions as possible to flourish in their communities, free from the threat of trade sanctions launched by another country.

The key preoccupations should be to ensure that diversity will not be pushed aside by market forces, will be sustained by adequate and flexible policy measures, and will be respected and supported by the majority of our populations. This will not be realised automatically, even when UNESCO has adopted the important new legally-binding instrument, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.

Civil society movements

Civil society *movements* must push governments to shape the conditions to permit cultural diversity to flourish and not be overwhelmed by the monopolistic control of a few cultural giants. Such cultural movements must be strong enough to determine the political cultural agenda and have the capacity to prevent this agenda being dominated only by economic forces. There is also need to think of the development of appropriate *strategies*. It is essential for the defence of cultural diversity that arguments be developed, and translated into strategies for action, processes for influencing, and lobbying. Coalitions should be organised and mobilized.

This does not mean that the time for the development of theories concerning cultural diversity is over. The contrary is true. However, theory should be combined with the development of strategic thinking and actions by the people in our societies who feel cultural diversity is a value worth defending. Those should not only be artists, but all people who believe that cultural democracy is crucially important. Strategic thinking should be accompanied by concrete action steps, more effective than those taken thus far by cultural movements. We should learn from the environmental movements that defend the diversity principle, as well as from human rights movements that work for the enforcement of cultural rights.

At first glance, cultural movements face a far more difficult challenge than those advocating for biodiversity. Citizens can smell polluted air and water, they know when food is tasteless, they can observe that trees are falling even in a moderate storm, and they can see the evidence of climate change. However, these same citizens welcome the flood of products they receive from the entertainment industry. Of course they like the products because they are promoted as being great fun. The challenge is to explain that the active promotion and regulation of cultural diversity does not disrespect their taste and their pleasure. How can we explain to them that they should care about cultural diversity, about the diversity of contents distributed and promoted in the media and other outlets, and care about the multiplicity of ownership relationships of the means of production, distribution and promotion of cultural expressions? How can we explain why owners should behave in a socially and culturally responsible way?

While abstract, these questions have a direct and unavoidable impact on whether or not cultural diversity can exist. How can we convince people that they gain when cultural diversity becomes a reality in their lives and societies? And what precisely do they gain? While these kinds of questions are often far away from the daily experiences of common people, all should be high on the priority list of cultural movements.

Both worlds – the ecological and the cultural – have to deal with the fact that for a couple of decades, many people have believed in the ideology that unregulated markets are better, and even natural, and that regulated markets restrict consumer choice and threaten freedom of expression. However, we should recall that unregulated markets have never existed at any time in history, in any society. All markets have been regulated, including cultural markets, to focus on the topic of this book. If we watch how the leaders of the American film and music industry negotiate alongside officials from the Office of the United States Trade Representative during WTO negotiations, in support of their economic interests, we will come to understand that unregulated markets are a fiction. This awareness provides us with the freedom to think productively about what kinds of regulations may serve the interests of cultural

diversity without hampering freedom of expression; what kinds of arguments can be put forward; what kinds of cases can be highlighted; and what kinds of coalitions can be forged?

I will try to outline different steps in considering adequate strategies to have cultural diversity policies accepted and implemented, in individual countries in all parts of the world. While these must meet the needs of each country, they must also have a certain coherence with, for instance, surrounding countries, and must be protected by global defence mechanisms.

Global and local

Where to start? Of course, the ultimate purpose is for nation states to develop regulations, for instance, concerning the diverse ownership of the tools of cultural production, distribution and promotion; or to obligate different media outlets to present diverse artistic productions from all parts of the world. But, this local interest is heavily influenced by global concerns. The companies that prevent this diversity are global operators. The WTO, which has the objective of liberalising cultural markets, is a global institution. Some countries cannot resist the pressure of some large states, international organisations like the WTO, media and entertainment corporations, and elements of their own citizenry. They should combine their forces and strategic creativity to foster intelligent measures to protect and promote the development of artistic cultural diversity.

Once we realise we are dealing with a global question that has local consequences, we should envision a global movement that can carry out several complicated tasks, which I will review below. The main promoters of such a movement could be the International Network for Cultural Diversity and the International Liaison Committee of the Coalitions for Cultural Diversity, which are both heavily involved in the global mobilisation in support of the Convention. But, hundreds of other cultural organisations or networks from all corners of the world should be involved to create an effective and transparent movement where many branches flow together and split again in separate activities. What are the strategic tasks of such a movement?

Strategies

The first task is to gather information on different subjects, such as steps taken by UNESCO and its member states concerning the implementation of the Convention, and the cultural implications of developments within the WTO and its treaties, including GATT, GATS and TRIPs. How is WTO dealing, for instance, with the obligation in Article 31 of the Doha Ministerial Meeting (14 November 2001) to harmonise the relationship between treaties in the fields of trade and environment?

For cultural diversity, this is an extremely interesting question. Mergers of media and entertainment companies should be mapped: how are different companies related to each other, what is their influence, what are their sources of funding; how are they integrated vertically, horizontally and across industries? Attention should be given not only to the United States, but also to Europe, Japan, Russia, Arab states, Brazil, Mexico, Argentina and Hong Kong.

The consequences of new technologies for the creation, production, distribution and promotion of artistic expressions should be analysed, for all different genres, from the very popular to those appreciated only by small groups, and from the traditional to the futuristic. One should not be afraid as well to consider whether the present copyright system has become a tool that defends the interests of the major cultural conglomerates and works, consequently, against the promotion of cultural diversity.

The second strategic task for all the networks and organisations in the different countries is to identify who are the potential supporters for the promotion of cultural diversity. Who are the stakeholders, globally, and locally? Where are they found? There must be millions of people concerned that our cultural life is becoming more and more determined by commercial interests and corporate culture; and that only a few people and their stockholders decide what kinds of films we will watch, what music we will hear, and what books will become bestsellers; and that existing diversity melts away like snow in the summer. How can they be mobilised? How can they come to feel that they should be *proud* of the fact they care for a rich and diverse cultural life?

These people are the leaders who can ensure that regulations in favour of cultural diversity find broad support among people in cities, regions and countries. They can convince their neighbours, friends, and colleagues that by introducing these kinds of regulations, more pleasure and satisfaction will be found in music, films, books, design and other cultural expressions. It should be in the democratic interest of all citizens to have a cultural landscape that is as open as possible to many different kinds of artistic expressions.

This brings us to the third task. What are the arguments to promote national governments to regulate cultural markets in favour of the development of cultural diversity? The main argument is respect for human rights, including that everyone should be free to participate in the cultural life of his or her community. This requires access to the means of communication for as many people as possible. We should remember also that the arts are specific forms of communication in which aesthetic aspects are essential. If we take this seriously, then we must conclude that no-one should be able to dominate cultural life in such a way as to reduce the majority of the population to passive consumers. While the human rights arguments may be abstract

for many people, we must find ways to make it more concrete, with local examples. Perhaps we can point out what will get lost and what will be damaged? How can democracy function if only a few artistic voices count?

Amnesty international for cultural rights

Concrete examples will help. For instance, creation of an Office of Independent Ombudsperson for Cultural Rights would strengthen the enforcement of cultural rights, according to Cees Hamelink. “The inspiration for such an Office comes largely from a recommendation made by the UNESCO World Commission on Culture and Development chaired by Javier Pérez de Cuellar in its 1995 report *Our Creative Diversity*. The Commission recommended the drawing up of an International Code of Conduct on Culture and, under the auspices of the UN Law Commission, the setting up of an International Office of the Ombudsperson for Cultural Rights” (Hamelink 2004: 125).

The World Commission stated:

“such an independent, free-standing entity could hear pleas from aggrieved or oppressed individuals or groups, act on their behalf and mediate with governments the peaceful settlement of disputes. It could fully investigate and document cases, encourage a dialogue between parties and suggest a process of arbitration and negotiated settlement leading to the effective redress of wrongs, including wherever appropriate, recommendations for legal or legislative remedies such as compensatory damages.” (Pérez de Cuellar 1995: 283).

Cees Hamelink goes on to state that for the Ombudsperson’s Office to be effective:

“independence from both governmental and business interests, as well as adequate financing, would have to be secured, and both are difficult to achieve. Obviously an office that operates from a nongovernmental background would have few possibilities for effective remedies in the sense of compensation or other sanctions. Yet, the question is whether this is the most interesting feature. Amnesty International cannot hand out prison sentences to those who violate human rights. However, its politics of shame is certainly effective in providing a good deal of protection for victims of human rights violations.” (Hamelink 2004: 126).

In the context of human rights we are inclined to think mostly about, for instance, the violation of the integrity of the human body. However, the violation of the right to information and communication should be considered as a serious threat to human beings and should be included in the strategies for the promotion and protection of the diversity of artistic cultural expressions.

Peter Baehr recommends that if a complaints procedure on economic, social and cultural rights were to be adopted, “this would call for an active role by NGOs, either by introducing complaints themselves or by providing relevant information. The

establishment of an Amnesty International for economic, social and cultural rights is urgently needed.” (Baehr 1999: 39). From the perspective of the protection and promotion of cultural diversity, it would be advisable to support such a cultural Amnesty International. We must remember that international human rights law “does not contain any specific and direct provision that address the issue of ownership of information and communication institutions. There are no standards that regulate the possible monopolisation of the production and/or distribution of information-communication goods and services.” (Hamelink 2004: 94). The character of these human rights should be analysed by the global cultural movements; why do they matter and how can they be discussed publicly? The commodification of cultural expressions threatens human cultural rights.

Further strategies

The fourth strategic task for all the networks and organisations in the different countries is to define what kinds of regulations may be helpful for the protection and the promotion of the development of cultural diversity. The strategic task is, of course, to formulate regulations in favour of cultural diversity in such a way that people understand why they are essential. It is important that people understand that no music or films, for example, will be taken away from them. It should become clear that regulations favouring cultural diversity will increase their choices.

There is also the question of how the capacity of many non-Western countries can be raised in order to enable them to produce cultural productions that they cannot now afford. It is clear that cultural exchanges should take place on a more reciprocal base than is now the case. Specifically, how can it be realised that rich countries will open their cultural markets for the cultural expressions coming from poorer nations on a consistent basis? These are complicated topics that demand serious strategic analysis: what are effective tools; how can they be popularised; what would it cost and what would it provide? Thus far, the strategic topics have a theoretical character: gathering information; identifying potential supporters; developing arguments; and formulating possible regulations.

The fifth task is to make strategic decisions, including who will be the main target of all the activities? The basic and permanent endeavour should be to convince national governments to adapt and implement measures that guarantee that a rich diversity of artistic cultures can develop free from restraints such as censorship. The focal point is thus national governments and regional and local public authorities, as they are the only ones, in the present world, which can decide that cultural markets should be structured in a way to open them to many artistic expressions. It is important to gather information about those strategies and arguments that have proven successful.

The sixth task is to analyse the obstacles to reaching these objectives, and to analyse the opportunities. This will differ enormously from country to country, and from sector to sector in the arts and entertainment fields. It would make sense to try to categorise these obstacles and opportunities and to analyse what can be done on the political level, what campaigns are necessary. Can we find reasons to bring cases to the courts, even if they are only symbolic with no prospects of winning? What are the arguments that may work? Which institutions and individuals, perhaps unexpected, can be convinced that it is in their interest for cultural diversity to exist; we could even appeal to guilt feelings.

The seventh task is to forge coalitions, including with environmental movements. But, we must also consider trade unions and professional organisations, and their different specific subsections. Different arguments may work for people in different positions. Why not coalesce with broader civil society groups, including women's organisations, small and medium-sized enterprises, social associations and clubs, human rights groups or religious associations? It should be possible to initiate the debate about the values of cultural diversity, about cultural expressions and human rights, about pleasures related to daily affairs, and about the relationship between local economic life and local cultural life. The challenge will be to achieve a critical mass of support.

The eighth task is to reach out, to campaign, and to seek public attention for specific topics that should be discussed, influenced or undertaken about cultural diversity. A campaign is a connected series of operations designed to bring about a particular result. What should be the result and which operations can support this objective, on a local and a global level? Who will be the target of a specific campaign? What should be done to make it measurable, achievable, realistic, and timely? The imagination of many people should be captured. The cultural sectors have the advantage, compared to ecological movements for instance, of being in the "business" of storytelling, of seducing through fantasy. The communication should take place on a more sophisticated level than merely having, for example, a rock group after a speech on the importance of cultural diversity. In the arts sector, there are many celebrities who can mobilise attention for cultural diversity. But this should be done in ways that make sense. Questions include how and around what demands can we intervene effectively on cultural diversity topics, ownership issues and content regulations in the processes of WTO trade negotiations, and at the International Monetary Fund and the World Bank?

Finally, many people must be educated in order to form global cultural movements that will defend the protection and the promotion of cultural diversity. They should be capable of thinking and acting strategically. They should raise awareness, in all corners of the world, of the fact that the dominance of a few cultural conglomerates

and the lack of diversity of contents are not inevitable. Competent organisers must combine a profound theoretical background of the arguments in favour of cultural diversity with a practical and pragmatic understanding of how to build citizens' movements.

Universities and other institutes of higher education in all parts of the world should start programmes to be the breeding ground for such competent organisers and strategic thinkers. There is no doubt that many young people can be attracted to work in defence of cultural diversity in film, music, theatre, musicals, shows, literature, visual arts, design and all forms of mixed media, in the digital fields as well in what is sometimes called the old media.

Perhaps the most important strategy is to make people understand that the existing cultural industries treat them with contempt. Try to imagine how many inspiring, fantastic and funny works artists create, and how few of them reach the viewer, listener, reader or observer? People should be angry that they are treated merely as passive consumers.

Chapter 12

Heritage conventions intertwine with the concept of cultural diversity: Asian and European perspectives¹

Lee Seunghwan

Introduction

On October 20th 2005, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* was adopted after two years of intense negotiations and hot debate. This Convention reinforces the notions enshrined in the UNESCO Universal Declaration on Cultural Diversity (2001) that cultural diversity is a “common heritage of humanity” and that its defence must be considered “an ethical imperative, inseparable from respect for human dignity”. Not since it initiated The New World Information and Communication Order (NWICO) in the late 1970s and early 1980s, has UNESCO received such international attention for its efforts to inspire and facilitate global debate. “In the 1970s, three demands emerged; greater variety in sources of information, less monopolisation of the forms of cultural expression, and preservation of some national cultural space from the pervasive commercialisation of Western cultural outpourings.” (Schiller 1989, in Smiers, 2003). The desire to change the cultural and communication relations throughout the world became a movement named NWICO. Unfortunately, the desire of the third world to make global media representation of diverse cultural expressions more equitable was frustrated by the withdrawal of United States and the United Kingdom from UNESCO in the mid eighties. (The U.K. rejoined in 1997 and the U.S. followed in 2003).

The withdrawal from UNESCO of these two founding members, the most important players in building multilateral cooperation mechanisms through the UN system, carried a very clear and strong implication that threatened multilateralism itself. Such a fatal blow greatly weakened multilateral cooperation generally and UNESCO in particular. After the departure of the U.S. and the U.K., the most important roles of UNESCO as an international intellectual forum and “conscience of

¹ This paper expresses the personal views of the author and does not necessarily reflect those of the organisations to which he belongs.

the world” were substantially reduced and UNESCO instead became a more functional organisation whose work focused on assisting developing countries. If we review the international standards-setting activities of UNESCO over the last thirty-five years, we can find a sharp decrease. From 1970 to 1985, 13 conventions and 18 recommendations were adopted, but between 1986 and 2000 only three conventions and three recommendations were approved. Intellectual debates lost their place in UNESCO and its main function became providing technical assistance programs. Furthermore, UNESCO's influence internationally remained low due to the continuing policy of freezing its budget, even beyond the 30 percent reduction resulting from the withdrawal of its major two member states, the U.S. and the U.K. Since then the most difficult dilemma of UNESCO has been how to make itself visible without dealing with those real issues entrusted to it as an international intellectual forum. In such difficult times, I think, the World Heritage Program was one of the activities which contributed to justifying the continuing existence of UNESCO.

NWICO and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions

One generation has passed since UNESCO led the debate on NWICO. It is marvellous that UNESCO has resumed its previous role and initiated and promoted international debate on the importance of cultural diversity, with the adoption of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. This Convention is a clear assertion from the international community that the protection of cultural diversity is as important as the protection of economic interests. It recognises the right of all states to enact provisions in this regard and in addition, it reaffirms the importance of the diversity of media, which enables cultural expression to flourish. Clearly, the Convention embodies the basic ideas of NWICO, which demanded more diversity and less monopolisation of the provision and distribution of information.

However, there is an important difference between the major players who initiated NWICO thirty years ago and the current proponents of the Convention. While the Third World led the debate of the NWICO, it was the Europe Union which played a key role in pushing the Convention for quick approval, despite very strong opposition from the United States. This is in sharp contrast to Europe's position on NWICO, most European countries sided with the United States in the 1970s and 1980s, even though they did not welcome its decision to withdraw from UNESCO. My first question is: what has brought about Europe's dramatic change of position in just one generation? The second question is: what is the interest and concern of the Asia-Pacific region in the Convention?

In 2005, the Convention was adopted with the approval of most UNESCO Member States (148 in favour, two opposed, four abstentions). While most European Member States demonstrated very strong support for the Convention, in the Plenary Session only six of 25 Asia-Pacific Member States expressed their firm and clear support. Three countries requested further discussion or expressed reservations on some content of the Convention and the remainder did not mention the Convention, despite most Asia-Pacific Member States expressing their general support for the protection of cultural diversity.

The purpose of this paper is to explore the reasons for such a change of position in Europe, to examine differences in the degree of interest of European and Asian regions in the Convention, and to make suggestions to proponents of the Convention on how to draw strong support and commitment for the Convention from the international community.

Cultural Diversity: Key Concept of UNESCO

Though the Cold War is over, we still suffer from conflict among and within nations.

“Examples of the subversive and destabilising effects of ‘divisive pluralism’ abound. Difference need not produce conflict, any more than sameness necessarily results in solidarity. The challenge is to devise a ‘vision’ of the way in which people can live together harmoniously in the larger society, while at the same time being able to maintain, rather than dilute or lose, a strong sense of belonging to their particular cultural, ethnic, religious or other community”. (*Toward a Constructive Pluralism*, 1999, UNESCO; Extract from opening address by Chief Emeka Anyaoku, Commonwealth Secretary-General).

In an era of globalisation, respect for cultural diversity becomes the most important value necessary for us to live together in peace and harmony. The value of diversity should be respected at all levels of the community, from international communities to relations between individuals. In this regard, such respect is an ethical imperative, inseparable from respect for human dignity. Respect for cultural diversity is a prerequisite in approaching UNESCO’s noble aims to build peace in the minds of men, and without respect for cultural diversity, we cannot promote genuine understanding among and between nations and communities. Gaining knowledge about other cultures and nations without valuing cultural diversity only supports domination and exploitation. With this perspective, respect for cultural diversity is the most important task of UNESCO and is even more pressing in a rapidly globalising world. In the past, efforts to make NWICO were threatened and discontinued. Currently, rapid and widespread globalisation further threatens the value of cultural diversity and leads to the disappearance of many cultures. If we look at language diversity alone, more than 50 per cent of the world’s 6000 languages are in danger of disappearing over the next few generations and thousands of languages

are overlooked by the world's education systems and the Internet. Globalisation of the economy is increasingly exerting pressure on the sovereignty of nations in cultural policy and a handful of cultural conglomerates are expanding their monopolisation over the provision and distribution of culture, further threatening cultural diversity.

In such a deplorable situation, many countries began to show concern for the crisis of cultural diversity, and it is no surprise that debate on the issue of cultural diversity has centred on and around UNESCO. Cultural diversity was highlighted in 1995 in the UNESCO Report of World Commission on Culture and Development, *Our Creative Diversity*. In 1998, UNESCO's Stockholm Action Plan identified cultural policy as one of the key components of endogenous and sustainable development. In 2001, the UNESCO *Universal Declaration on Cultural Diversity* was adopted unanimously by the Member States at the 31st session of the General Conference. For the first time in history, the international community was provided with a wide-ranging standard-setting instrument to underpin its convictions for the respect for cultural diversity. The Declaration recognises the importance of cultural diversity as a valuable source of creativity and recommends cultural policies be developed to protect and promote diversity in the provision and distribution of cultural goods and services.

The 2005 Convention reaffirms most of the 2001 Declaration but also emphasises the rights of all states to enact their own cultural policy to protect and promote cultural diversity, and the importance of international cooperation and solidarity in this regard. Above all, the most important feature of the Convention lies in its binding nature. The Convention could bring about conflict between the protection of cultural diversity and economic interests. As for its relationship with other instruments, the Convention states that signatories shall foster mutual support between the Convention and the other treaties to which they are parties. However, when there is difficulty in finding a legal solution, international moral and political support could play a very important role. This means that the future of the Convention depends on how successfully it can draw strong support from the international community. In other words, to make this Convention effective for the protection and promotion of cultural diversity, we need more comprehensive and active commitment and support from the whole international community and not just Europe.

Europe and Cultural Diversity

I will first analyse the European Union's commitment to the Convention. Without the thorough preparation and strong solidarity of EU Member States, such a commitment would not be possible. What factors brought EU nations to build such strong solidarity for the Convention? First, in the era of globalisation, as economic

liberalisation exerts increasing pressures on cultural policy, EU members have recognised the need to protect and promote their cultural diversity. Second, the increasingly expanding monopoly and control of cultural conglomerates accelerated by new information technology caused concerns. In terms of language diversity, the monopolisation of English, particularly in the area of information technology spaces like the Internet, threatens more marginal European languages. On the other hand, in the process of the further integration of Europe, member countries recognise the increasing importance of the value of cultural diversity and their individual and unique identities within the Union. It seems that the protection of cultural diversity was recognised as one of the most important components in the process of integration, as seen by the adoption of the Declaration on Cultural Diversity by the Council of Europe in 2000. This kind of pioneering effort to enshrine the value of cultural diversity in the process of European integration and create a barrier to external pressure on Member States' cultural policies deserves to be acknowledged, commended and extended to other regions.

Asia and Cultural Diversity

As I mentioned before, Asian nations are not as eager to support the Convention as their European counterparts. In speeches at the Plenary Session of the UNESCO General Conference 2005, six of 25 speakers from the Asia-Pacific voiced their strong support for the Convention. This does not mean that other Asia-Pacific Member States are not interested in the value of cultural diversity. Rather, their priority concern is different. In this regard, I would highlight the *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted in 2003. As of January 2006, the number of countries which ratified the Convention had already reached 32, and it shall enter into force in April 2006. Note the regional composition of these 32 countries; eight from the Asia-Pacific, seven from Africa, six from Eastern Europe, five from the Arab world, four from South and Central America, and two from Western Europe. This composition tells a different story on the spread of international support for the value of cultural diversity.

While Europe has a keen interest in the protection of cultural expression particularly relating to its audiovisual cultural industries, most developing countries pay more attention to the protection and promotion of their traditional cultures. In particular, most of the intangible cultural heritage of developing countries has been neglected or disdained as a symbol of backwardness. As a result, much heritage has already disappeared or is under threat of extermination. Against this background, the priority for developing countries in terms of cultural diversity naturally goes to traditional cultures rather than cultural expressions centred on audiovisual culture, an area in which they do not yet have any meaningful capacity.

Asia is comprised of extraordinarily diverse ethnic groups, languages, traditions and cultures. Another important feature of Asia is its experience of colonialism. Under such terrible historical experiences, there were many cases where Asian treasures of diversity were exploited or suppressed as subversive and divisive elements. We need to create opportunities for Asian nations to experience the constructive and positive impacts that flow from respect for cultural diversity and to look for increased solidarity among and within countries in the region as a result. In this regard, it is worth noting that two initial efforts to develop education for international understanding were launched in the Asian region; one is APNIEVE (Asia Pacific Network of International Education and Value Education) in 1995 and the other is APCEIU (Asia-Pacific Centre for Education for International Understanding) in 2000.

The Convention's significance for multilateral cooperation and other cultural heritage conventions

Both Asia and Europe recognise the value of cultural diversity, but they have different historical experiences and different priorities concerning cultural diversity. In Europe, the intra-regional process of integration and the international pressure on cultural policy have led it to further appreciate the value of cultural diversity. In the case of Asia, even though the region is a veritable treasure of cultural diversity, suffering under colonialism has meant that cultural diversity is seen more as potentially subversive and divisive. In addition, as the result of colonialist occupations and more than a half-century's focus on economic development, many Asian countries have lost much of their cultural diversity. Fortunately, despite such neglect and destruction, they have never lost sight of its value. Even though the historical experience and priorities of Asia and Europe are different, their mutual recognition of the value of cultural diversity is very strong.

I think the adoption of the Convention has special meaning in that it symbolises a turning point in the history of multilateral cooperation. While most international agreements aim to draw up and set international standards needed in the process of globalisation, this Convention, in contrast to other agreements, aims to protect and promote diversity. Most international agreements restrict sovereignty, but this Convention reaffirms the sovereignty of nations by freeing them to set their own cultural policies for the protection and promotion of cultural diversity. The real importance of the Convention lies in its emphasis of the respect of cultural diversity. And, of course, this emphasis should be applied not only to all countries but also to all communities and all peoples. In most cases, the demands for autonomy against globalisation of the economy have come from individuals, NGOs and civil society,

rather than from governments. In this regard, the adoption of the Convention with the approval of most Member States has a special and significant meaning in history.

However, I think the role and capacity of governments, as well as of a component community, to regain cultural rights from forces such as large cultural conglomerates, is limited. I wish to give the example of screen quota system of South Korea, which is believed to contribute to the protection of the Korean film industry from Hollywood's domination. Recently, the Korean government announced a reduction of the quota due to Korea's trade talks with the United States. History tells us that rights, particularly rights for a minority group or the powerless, are not a "free lunch," they come at a cost. To protect and promote cultural diversity, it is important for minority cultural groups themselves to recognise their rights fully and to make efforts to protect their cultures. I know that NGOs have played a key role in impressing the importance of the Convention to other cultural NGOs and in pushing the Convention's adoption by most UNESCO Member States. In order for the Convention to be effective, the strong support and active participation of NGOs and civil society are the most important factors.

My second point concerns the relationship between the Convention and two related conventions on the protection of tangible and intangible heritage. These are the convention concerning the *Protection of the World Cultural and Natural Heritage* adopted in 1972 and the *Convention for the Safeguarding of the Intangible Cultural Heritage* adopted in 2003. In regard to these conventions, if we focus too much on the registration of monuments and masterpieces of Member States, recognised by UNESCO as the common heritage of the world, there are frequent negative effects including narrow-minded nationalism and increased neglect for other minority cultural heritage within countries that have UNESCO World Heritage Sites. In any case, registration projects should be implemented without compromising cultural diversity, such as the comparative neglect of non-registered cultural heritage. In this regard, the Convention and the other two conventions complement rather than compete with each other. It is my opinion that the Convention on the diversity of cultural expressions reinforces respect for the concept of cultural diversity in the implementation of the two heritage conventions, while the two heritage conventions in turn can identify and protect important sources of cultural diversity on an international level.

Strategies

The challenge before us now is how to strengthen mutual cooperation and international solidarity to raise the Convention from a newborn baby into a strong and credible guiding universal standard that is respected by the international community.

To conclude, I wish to make a few general suggestions on how to successfully draw wider and more active international support for the Convention.

- 1) While the Convention's main focus is on the diversity of cultural expression, the Convention should be fully used to enhance public awareness of the important and diverse values of cultural diversity for peace, sustainable development, creativity, human dignity and so on. In discussions on cultural diversity, including the conventions on cultural expression and intangible heritage, there is a trend to focus on the economic value of cultural diversity. We need to keep the integrity of cultural diversity respected, and prevent it from being compromised by the seductive convenience of calculating value in monetary terms alone.
- 2) We should find effective ways for the Convention to contribute to the priority concerns of developing countries, such as the protection of tangible and intangible heritage. In this regard, we need to develop concrete and tangible support for developing countries to protect their valuable cultural diversity. We also need to devise mechanisms which facilitate the three conventions to reinforce each other rather than compete. The establishment of a joint commission of the three conventions is one recommendation in this regard.
- 3) The protection and promotion of cultural diversity is not only a matter between and among nations. Rather, it is a fundamentally important value to be encouraged at all levels of the community and on an individual level as well. Sometimes the focus tends to be more on inter-community issues rather than intra-community issues. However, support from the people is most important, and in this regard we need to induce active participation and support from NGOs, civil society and the mass media; in particular, these groups should play a role in disseminating the meaning and principles of the Convention to minority cultures at every level and in every genre. In line with this, the establishment of a **minority** cultures network is strongly recommended. The network's name could be the "Cultural Diversity Network" for example, and minority cultural organisations from all levels of society would be encouraged to have a major role in it. The network should also accommodate many NGOs and related movements. A few examples include farmers associations, the slow food movement, the copy-left movement and various groups seeking alternatives to free-market globalisation. The network could be initiated as a virtual network but could be developed into an **annual festival of cultural diversity** where the importance of cultural diversity and the meaning of Convention are reaffirmed, with the exchange of network members' challenges and success stories, and the strengthening of solidarity among them.
- 4) If the great cultural diversity of the Asia-Pacific region is given due recognition worldwide, NGOs in the cultural field and those working with minority culture groups in the Asia-Pacific should subsequently be active in developing the

above-mentioned network. In this regard, I wish to mention the Coalition for Cultural Diversity (CCD), an NGO which played an important role in the adoption of the Convention. As of 28 February 2006, the International Liaison Committee of Coalitions for Cultural Diversity (ILC-CCD), brings together 33 national coalitions. Among them only three national coalitions are from the Asia-Pacific region. The reason for such low participation by the Asia-Pacific region in the activities of this NGO needs to be investigated and strategies to draw more active participation from the region be explored.

- 5) Finally I wish to emphasise that the Convention cannot remain in isolation from the realities of daily life. In this context, recent unfortunate conflicts and events in Europe such as the Paris riots and the Danish publication of cartoons portraying the prophet Mohammad, both in 2005, were not helpful in developing international cooperation and solidarity for the protection and promotion of cultural diversity. If the importance and value of cultural diversity cannot be integrated with real life and politics, the Convention will end up as merely another item on a list of noble aims to which lip service is given in our increasingly competitive world.

Chapter 13

The Korean screen quota system undermined

Gina Yu

The Korean movie industry became involved in the global cultural diversity movement through its fight for the screen quota policy. The policy that has existed for a couple of decades was based on a regulation requiring Korean cinemas to show Korean movies at least 146 days each year. The purpose of the regulation was to reserve space for domestic production and to avoid the situation where screens would be dominated by foreign films, mostly from Hollywood. This turned out to be a huge success and became a trademark of Korean cultural policy and an inspiration for other countries and global cultural movements in their search for effective policies and strategies in favour of cultural diversity.

Meanwhile, the screen quota policy of Korea was constantly criticised by the trade sector in the Korean government and by some media which claimed it was overly protective and posed an obstacle to the neo-liberal globalisation movement, as well as to Korea's commercial relations with the United States. After the year 2000, the Korean movie industry flourished, producing many movies, amongst which three took over 50 percent of the market share, bringing an audience of 10 million people. Instead of acknowledging that this was a result of a concrete policy, the trade circles started to claim that Korean movies were now competitive with movies of Hollywood and that the screen quota system as a protective policy was no longer needed. This is why Korean civil society from the beginning supported the idea of the adoption of a Convention on cultural diversity, hoping that the screen quota policy, as a system for the preservation and promotion of local cultural expressions, would be sustained by international law.

However, the Korean Ministry of Foreign Affairs and Trade argued that the UNESCO Convention would have no effect on bilateral trade negotiations, such as those going on for some time between Korea and the United States. At the end of October 2005, when the adoption of the UNESCO Convention was being announced, the Parliament was going through a process of revising the legislation to change the

quota policy. Those in the Korean movie/cultural industries, who were anticipating new political developments inspired by the UNESCO Convention, were once again confused and forced to return to their fight to keep the screen quota.

Finally on 26 January 2006, the deputy Prime Minister simply announced, without trying to achieve a consensus, that a new policy scheduled would be put in place reducing the screen quota from 146 to 73 days, half of its original amount, in July 2006. The government's explanation for this policy change is that the reduction of the quota system is in the national interest of Korea, whose economy is roughly 70 percent dependent on foreign trade, and is essential to promote Korea's bilateral and multilateral trading relationships. It would be a luxury to act as if neo-liberal globalisation did not exist and to pretend it was possible to ignore the demand for a change in the screen quota policy coming from the United States.

The long battle to protect and maintain the screen quota policy against U.S. pressure created a movement for the protection and revitalisation of the national culture involving people not only working directly in the movie industry, but also from a broad spectrum of civil society organisations. This movement grew beyond the resistance against the threat of the abolition of screen quota and turned into a movement against the bilateral free trade agreement that was about to bring a deepening of the "rich-get-richer and the poor-get-poorer" relations in Korean society.

On 17 February 2006, many people in agriculture and the movie industry joined in the "Rice and Movie" candlelight cultural festival against the Korea-U.S. free trade agreement and the screen quota reduction. Several thousand farmers, movie people and citizens at large, who were fighting proudly against neo-liberalism, gathered in the cold weather and strongly criticized the government's disgraceful ways in giving up its own rice and movies.

On the same day, an emergency conference was held on the topic of possible effects of the Korea-U.S. free trade agreement for the Korean movie industry. The conference revealed that the whole Korean movie industry was threatened, together with the national broadcasting system in which a comparable system of quotas applies. If the demands articulated in 2005 by the United States Trade Representative to dismantle the quota system were accepted, this would represent a threat to the diversity and independence of the media, making public interest subject to the market forces.

Some analysts of the so-called Korean Wave considered that the spreading of the Korean popular culture that has started in Asia has become a threat to the American strategy of world-wide domination of the production and distribution of films. The fact that other countries are considering adopting the Korean model and

implementing a screen quota policy was another reason for a fierce attack of this policy by the United States trade negotiators.

In light of this, the Convention on cultural diversity was supposed to become the basis for guaranteeing and encouraging diverse cultural policies and practices, including the screen quota policy. Nonetheless, what we have discovered in Korea is that economic logic still lies ahead of the cultural logic even at the national level and therefore, even the most successful cultural policy is threatened with abolition. According to the guiding principles of the UNESCO Convention, cultural diversity and participation in cultural life should be promoted in democratic societies. The Korean example shows that, if cultural policies can be surrendered as a condition for concluding a free trade agreement, the situation for the protection and promotion of the diversity of cultural expressions may be precarious.

According to the UNESCO Convention it is necessary for the preservation of cultural diversity to recognize the importance of culture and to achieve more balanced cultural exchanges (including activities, goods and services), instead of promoting exclusively commercial interests. However, the position of the Korean government on the free trade agreement used “efficiency” as an excuse to make economically-driven political decisions, contrary to the logic of the promotion of cultural diversity.

Chapter 14

The Convention in Mexico: A necessary tool and a vision to be nurtured

Rafael Segovia

The Convention and the Latin American Cultural Realities

The recent approval of the UNESCO Convention will change the perception of the position of culture in the Latin American countries. Not so long ago, intellectuals and artists were the targets of political repression, as they worked to strengthen independent public opinion. In more recent years, many countries implemented programmes to support their local artists and creative industries, but generally failed consistently to include the marginalised sectors, in particular indigenous peoples, thereby creating a cultural elite more and more isolated from the popular audiences and creators.

This becomes dramatically revealed as cultural institutions fail to include in any of their programmes the “alternative” cultural expressions, such as graffiti, hip-hop, urban dances and street performance, which are the spontaneous manifestations of today’s popular culture.

On another side, today the cultural sector has become a target of neo-liberal free trade policies, and is subject to strong pressures intended to tear down the policy framework which took so long to build, and even when it is too modest to provide a real boost to cultural production. The local politicians will, of course, allege their firm intention to ensure the continuation of cultural policies, but they are in fact strongly exposed to these pressures, which come also from central governments, and are focusing their actions in a more neo-liberal direction.

To give one example of this trend, in Mexico, the National Institute of Anthropology (INAH), a stronghold for the preservation of cultural heritage since its founding in 1929, is threatened with a de facto dissolution, coincidentally after conflicts arose from a series of changes to heritage sites in the last few years, each one of which originated in a free trade-based venture. The National Council of the Arts has been undermining the INAH’s capacity by expelling from its ranks some of its

first level officials and researchers, by freezing the possibility of any new hiring, while 80 percent of the INAH's personnel will be reaching retirement age in the next five years, and by promoting new legislation which will bring the formerly independent cultural institution under the Council's rule, depriving it of its power to rule over cultural heritage. This is clearly related to the new policies regarding the tourism sector, where, for instance, the key State of Veracruz has put the Culture Institute under the roof and management of the local Tourism Department, or where the former director of the department of cultural heritage and tourism at Conaculta has been forced to resign after being subject to a telephone wiretapping for two years.

While this may seem to be a conspiracy against cultural heritage, we are witnessing a weakening of the nationalist cultural policies that prevailed during the past seven decades. In another context, this could be a natural evolutionary process, but the problem is there is nothing to replace these policies, except the neo-liberal thesis that the State's structures should leave the way for more "competitive" and productive ventures.

It is also a traditional practice of Latin American governments to sell out their natural heritage in order to fill the gaps of their budgets left by poor administration and corruption. If cultural assets are a source of wealth, then why not offer what is available, and at the same time respond to the strong pressures from the U.S. and other countries to liberalise the cultural services markets?

The Convention in perspective

As must be now apparent, in this context the Convention has much to accomplish. Some of its principles are in open contradiction with the real conception of culture that prevails in Latin American societies. Furthermore, the free trade agreements that the U.S. has been hurrying to sign with as many countries as possible¹, will probably undermine the negotiating flexibility of a number of States to maintain whatever cultural policies they have developed in the past.

On the other hand, there is a well-known tendency in Latin American countries to overlook the international agreements they sign. This has become apparent in the past in human rights and environmental issues. And it is likely to happen in this case as well. A few governments will probably even make the necessary legislative changes, but there is no guarantee they will be enforced in the short term.

1 North American Free-Trade Agreement (NAFTA), in 1994, Central American Free-Trade Agreement (CAFTA) in 2004, Andean Pact Free -Trade Agreement in 2005, and the Americas Free-Trade Area is making its way through a ferocious never-ending round of negotiations.

Finally, there is a financial question. Most of the Latin-American countries place culture at the bottom of their budgetary lists. This will prevent any framework changes from being fully implemented.

A promising horizon

After addressing some of the possible and most probable limitations the Convention will encounter, we must recognize there will be undeniable benefits, even if they are difficult to implement.

One of the most appealing promises in the Convention for the countries of the region is the possibility of a real concern about cultural diversity. Latin America is one of the richest continents of the world in terms of cultural diversity. There are more than 200 indigenous peoples, with their languages, traditions and expressions, struggling to exist. Their rich cultures might be able to flourish if there was a real space for them to express their cultural traditions on an equal ground.

Other key tools for a new cultural democracy are contained in Articles 12 to 17 on the promotion of international cooperation and the fostering of cultural development. These offer to bring forward a renewal of the production infrastructures and practices, as well as more financial resources for the creation of cultural industries, and a real chance for cultural development for the marginalised sectors of society (and particularly for the indigenous communities).

Article 7 on the promotion of cultural expressions will help ensure a new dissemination effort to create an enhanced understanding of culture as a tool for social peace and human development.

In general terms, the main principle of the Convention, the right of nations to support their artists and implement the necessary cultural policies, will be a fragile asset, and will have to be defended in the trenches, but is nevertheless a rich new tool for the actors of the cultural sector.

The potential of the Convention will nevertheless be subject to a question of political will and commitment from institutions, which is unlikely in the present course of history. The real possibility of change will come from the demands of civil society, not only from the cultural actors, but from the marginalised and indigenous populations as well as, in certain respects, from the audiences.

To understand how this could be accomplished, let us examine present-day events in the social and political spheres in Mexico so that we can appreciate why the existence of the Convention may be supportive in developing real cultural democracy.

The Mexican political horizon

The Mexican case is probably a paradigm for the region, since it was the first Latin American country to fall under the free trade policies of the U.S., in 1994, and further taking into account its long tradition of cultural policies, which supported a dynamic flourishing of cultural and artistic expressions during the 20th Century.

The recent months have seen Mexico's political temperature rising at an exponential rate. The 2006 federal elections were the main focus, since the traditional stakes are raised by the appearance on the political scene of Andrés Manuel López Obrador, the left-wing (PRD²) former mayor of Mexico City whose strong media presence has gained him support from many of the key sectors of social, political and economical power.

Mexican civil society is extremely dissatisfied with the political system and is calling for an end to corruption, violence and crime, and to the economic and political dependence on the U.S., which have been characteristics of the 70-year long rule of the PRI and the chaotic five years of the PAN government.

In the midst of this unrest, the cultural sector has seen its own interests more and more affected by activities of trans-national corporations, erosion of public policies and the growing inefficiency of public cultural agencies. While the ministries of Revenue and Economic Affairs have been inflicting budget cuts, increasing tax burdens and promoting privatisation in the cultural sector, the National Council for the Arts (Conaculta) has been ready many times to close down entire sectors of the State's cultural network, and to open areas of highly symbolic value (like archaeological sites) to private investment. As an example, in 2003 Conaculta engaged in a process to close down its cinema school (out of the two that exist in the country), the State-owned Churubusco cinema studios, the National Fund for the Promotion of Crafts (Fonart) and the Mexican Institute of Cinema (Imcine), all in one single "budgetary cut".

In response, the community demonstrated in the streets and in the media, and managed to stop the agency's plans. But others were to come surreptitiously, leading to the resignation of half a dozen key cultural officials, including the director of the National Institute of Fine Arts (INBA), Ignacio Toscano; the director of the National Institute of Anthropology and History (INAH), Sergio Raúl Arroyo; the director of Legal Affairs, Francisco Dorantes; and the director of the National Centre of the Arts (CENART), Lucina Jiménez. A few more have privately announced their intention to leave. This "official" criticism has offered moral support to civil society opponents of the Federal Government's cultural policy.

2 *Partido de la Revolución Democrática* : Democratic Revolution Party

It is worth mentioning here that another sort of conflict had existed for years between Conaculta and both the INBA and the INAH. These Institutes were, prior to the creation of Conaculta (1988), the main and only cultural agencies of the Federal Government, founded in the early 20th Century by a full legal constitution. Conaculta was created by a simple presidential decree, and acts as a decentralised agency, which means its legal status is inferior to that of the INAH and INBA. Even so, Conaculta has tried to take over the main functions of the Institutes and duplicates some of their departments. Moreover, with Conaculta's discretionary powers and financial prerogatives, there have been many controversial cases of corruption and embezzlement.

In this highly flammable context, various key civil society movements are in the process of converging and building a shared vision of a new institutional order for culture.

Civil society takes over

1. The defence of democratic media

The first case I will mention relates to the most dynamic and organized civil society cultural group, the [Group for] "Media Democracy". The participants come from a range of media and communication milieus, such as community radio broadcasters, independent video and cinema producers, Internet developers, journalists, etc.

This group has been struggling to open a space for dialogue with the governmental agencies in charge of communication issues: the Ministries of Communications and Transport (SCT), of the Interior (SEGOB), of Foreign Affairs (SRE) and the Congress. Their negotiations have been primarily about a new Federal Law of Radio and TV, which had been obstructed for almost three years – after being approved by the Senate – under pressure from lobbies of the highly-concentrated commercial media sector. The Congress finally set the legislation process in motion, only to allow the introduction of a new project of law, drafted by the lawyers of Televisa, the largest audiovisual and communications' corporation. This new document was approved during an early morning session, with a bare quorum of deputies, and was sent to the Senate for ratification. Fortunately enough, the Senators did not agree with the new text and the battle has started again at the Higher Chamber level.

Among the issues the law should settle is the legal framework needed by community radio to operate on a stable basis, under certain legal and technical guarantees. Instead, the AMARC Mexican chapter has been forced to fight a trench-by-trench battle merely to obtain a renewal of the old permits, cancelled as a result of the lobbyists' pressures. The other key issue is the redistribution of new

frequencies brought about by digital technologies. Televisa's project establishes, of course, that the licensees of the previous frequencies will be in possession of the new ones. And the struggle continues...

2. The Civil Society Agenda for the Reformation of the State

The second group, much larger and more diverse, was born when a key political group named the National Association for the Reformation of the State decided to engage in a broad civil society consultation leading to a nationwide lobby to change the structural conditions which allow corruption and violations of human rights.

Among other thematic groups, the initiative brought about the creation of a civil society task group on "Human Heritage and Development", a multi-disciplinary forum for the discussion of Culture, Education, Scientific Research, Cultural Heritage, Indigenous and Traditional Cultures, and the Media.

The First National Meeting of the *Civil Society Agenda for the Reformation of the State* took place in Pátzcuaro, a beautiful colonial town in the State of Michoacán. The conclusions of the cultural working group (composed of 38 persons from a diversity of fields and States) were rich and creative and included proposals for a constitutional reform (in particular, the recognition of individual cultural rights and liberties), a legislative reform and an institutional reform, all three based on a new vision of culture and cultural diversity as tools for development, and as the very foundation on which the foundations of a healthy, democratic State can be built.

Following this first national meeting, there will be a series of regional meetings leading to a more profound diagnosis of the problems affecting the various cultural sectors throughout the country. The final conclusions of the fora should be presented to the presidential candidates and pushed forward by a full spectrum of the civil society organisations throughout the country.

3. The Culture and Education Alternative Parliament

On another rather different scene, in August 2005 the Congress made a public call for civil society's participation in the "Culture Parliament", an initiative aimed at building support for legislative projects that are part of Conaculta's governance project. Conaculta is trying to gain legal status by promoting a new Law, which would provide it with the constitution it does not yet have.

The draft law, under the title: *Law for the patronising and the dissemination of culture* was bluntly refused by the civil society actors, under the allegations that it fosters the intrusion of private capital into key sectors of the cultural policy framework, and moreover provides for Conaculta's rule over the formerly autonomous Institutes of Fine Arts and of Anthropology and History.

Whatever the real agenda of the “official” Parliament of Culture may have been, some sectors in civil society opposed the meetings arguing that it was an irregular process: the call for presentations and delegates was made with only two weeks time before the preliminary regional meetings, which were held in only six cities, far away from the reach of the majority. Some in the cultural community believe this was intended to keep them away from the consultation process and to include in it a majority of cultural officers and government employees.

At that time, the Mexican Network for Cultural Diversity was trying to organize a forum of artists and cultural actors to follow-up the issues of the Patzcuáro meeting, and was therefore interacting with some of the protesting groups, who proposed to focus our forum instead on the issues raised by the convocation. Nevertheless, the Network was soon outnumbered by another group of scholars and technicians (restorers, archaeologists, arts teachers, historians and the like) from the INBA and the INAH, who had been working around a Seminar on Cultural Policies and were organizing another similar forum. We eventually decided to unite and host an “Alternative Parliament of Culture”, which took place in the dates between the regional fora of the “official” Parliament and its final session held in Mexico City.

The presentations during this “alternative” Parliament consisted of a highly accurate diagnosis of many of the most urgent problems in the various cultural fields. And the final conclusions were concise and radical: the Alternative Parliament was not to reach consensus on any of the issues proposed in the “official” agenda, since the participants found it inadequate if not impossible to design and approve legislation without a previous in-depth diagnosis of the cultural issues in present-day Mexico. Accordingly, we demanded an extension to the Parliament’s process, consisting in a diagnostic process, led jointly by the civil society group and the Congress.

The Congress promised to accede to these demands, but hasn’t yet taken any step in this direction. In response, the Alternative Parliament held a second national meeting in March 2006, whose primary objective is to create the necessary conditions to carry on the diagnostic process.

In conclusion: a civil society promoting the Convention

The large cultural movement generated by these initiatives will surely bring a serious debate between civil society and government, especially the Congress, and it could be an impulse for substantial changes in cultural policies. Better, as one of the speakers put it, it could actually **create the cultural policies** for which Mexico is waiting. This is a real “state policy”, meaning above all a change in the perception of cultural democracy, the inclusion of a broad range of citizens in the policy-building process,

and the opening of citizenship spaces in social life. All this could bring about, among other measures, the transversal coordination within the government agencies, a revision of previous wrongly-designed measures (like the non-inclusion of a "Cultural Exception" clause in the trade agreements) or the lack of any real tax incentive policies.

In the end, the idea behind civil society's proposals is to reach consensus for a complete **new foundation of the state** through a new constitutional design. And this is precisely the common objective to be followed following the federal elections of July 2006.

In the end, if the full reformation of the State is not attained, there will be at least a number of deep transformations in the political culture introduced by this dialogue between the political sectors and civil society.

As for the implementation of the Convention, just as it has happened before in the case of international human rights and environmental legislation, the principles are there, and it is now time to defend and promote those principles until they become a part of everyone's world. This is a task only civil society can accomplish, through activism, organising and consciousness-raising.

There is at least no doubt that the moment is a propitious one, a moment that will carve its memory deep in the history of Latin American culture. The *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* may well support this process.

Chapter 15

Negotiating diversity: The meaning of the Convention for the Arab World

Leila Rezk

No one can challenge the fact that diversity is a non-negotiable value. Yet, the negotiations and adoption of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, a Convention that can be described as unique, were carried out in a context rife with passion, with the different partners seemingly inspired by implicit rather than explicit motivations.

The Convention's scope of application is, of course, culture, an area that has been the subject of numerous other international conventions. However, the negotiations concerning the terms of this particular Convention were motivated by political concerns when the focus was, in fact, supposed to be on the economic aspects of cultural expressions. The inequality created by savage liberalisation and the predominance of foreign products has generated an increasingly violent cultural antagonism characterised by a decreasing capacity for tolerance and openness. Thus, whether local, regional or global, diversity is today one of the main factors destabilising relations between states, with the political dimension of cultural expressions prevailing over their economic value. This may be particularly true for Arab countries.

Hence, the negotiations resulted in a Convention that is primarily concerned with protecting creative diversity. We live in a century where profit and religion have both become overwhelming values. These two factors have invaded all aspects of daily life, seeping through to the imaginary realm and hindering freedom of expression. This raises the question of whether Arab negotiators, as much as anyone else for that matter, were trying, through the Convention, to ease the doubts and fears of their populations? Or did the negotiations reflect the contradictions of an Arab world ready

to accept the logics of a global economy with the discovery of petrol favouring the emergence of regional monopolies over cultural expressions? Do the contrasted effects produced by the financial and religious factors not bring Arab countries closer to the other partner countries, whilst at the same time dividing them further apart?

The international community has, by and large, acknowledged the dangers facing global cultural diversity. Indeed, the hegemony of multinationals on global cultural production has instilled real fears of seeing languages and cultural specificities disappear. At the same time, traditions and behaviours are becoming increasingly standardised. The interference of the religious factor on the political scene, conveying values and messages that encroach upon the creative field and threaten the freedom of the individual in his attempt to build a multiple identity, is an additional threat to the diversity of cultural expressions, a threat of which the Arab elite is, by and large, well aware. The Convention stems from a consensus and as such, is not perfect. However, through the mechanisms defined therein, it does attempt to find solutions to avoid the predominance of the two logics that alter cultural expressions. It also defines the actors who can play a role in minimising their negative impact. All the same, are these provisions sufficient to guarantee the full participation of Arab countries in the protection and promotion of globally cultural diversity?

From a legal standpoint, Arab countries in particular must ensure that their parliaments promptly ratify the Convention to ensure its effectiveness. Once ratified, Arab countries will have to provide an enlightened interpretation of its provisions and a guarantee of targeted state intervention in two important areas. First, states will have to ensure a complementarity between the economic and cultural aspects of development through the adoption of an integrated cultural policy. Second, they will have to guarantee the respect of human rights and fundamental freedoms to ensure the full development of the individual. These two principles presuppose the "recognition of the equal dignity and respect of all cultures, including those of minorities" and in particular concerning foreigners living and working in Arab countries. It also means that there should be an "equal access to the rich and diversified forms of cultural expressions worldwide", furthering, "in an appropriate way, a society that is open to the other cultures of the world".

From a political standpoint, the Convention's implementation is confronted by various obstacles, three of which will be discussed in the present document: the actual understanding of the notion of cultural diversity; the opacity of the contract defining relations between citizens and their state; and the way power is exercised. The real challenge for Arab countries is how they address the relationship between tradition and modernity.

The notion of diversity

Today, the notion of diversity in the Arab world seems to be caught in the middle of a spreading whirlwind that sweeps away all of the values upon which it is based, forming a non-ending spiral that transforms diversity into a threat and a source of conflict, of violence and of rejection. While the history of Arab culture is characterised by the fact that a single language is shared among various peoples, representing an exceptional means of communication and mutual understanding; while it includes a wealth of contributions from diverse national cultural expressions, Arab peoples are helpless witnesses to a distortion of the notion of cultural diversity, more than often reduced to the notion of religious diversity. Such a simplification allows for all kinds of abuses whereby diversity is exploited for different ends. Whilst Muslim religion calls for dialogue, a call echoed in the Islamic Declaration on Cultural Diversity, it is a culture of violence that pervades. It is a dangerous approach, all the more so in a region rife with conflicts that have altered the evolutionary paradigms of the societies living in them. In the words of Yassine Al-Hajj Saleh¹, this has led to a culture where politics is subjected to a military logic; where society is subjected to the logic of power; where the producer is subjected to the combatant and where individual happiness is subjected to activism. A better understanding would contribute to strengthen what is commonly called the dialogue between cultures, especially since imposturous theory of the clash of civilisations. However, the expression used by the Muslim world is that of dialogue of civilisations. The difference comes from the fact that “hadara”, civilisation in Arabic, has a wider, more comprehensive and nobler connotation than “thaqafa” (culture), a word closer to local “muthaqqafin” (intellectuals). The latter could also be understood as culture at an individual level, while the former, “hadara” refers to culture on a more global level, the level of the community of believers. Yet, as stated by Ghassan Salamé, civilisations and cultures are not actors in international relations. They are not structures capable of leading a concerted action. The only actors are the men and women belonging to these cultures and civilisations. Moreover, states are the main players in the international arena. It is up to the state, therefore, to clarify any ambiguity and implement the Convention by taking all necessary measures, and with the objective of protecting individual creation and enhancing exchanges between creators and producers.

The protection of cultural diversity presupposes that states implement cultural policies that support creativity and promote participation in cultural life, pluralism and the diversity of cultures and languages. However, are Arab states equally determined to adopt policies to promote diversity, as required by their international

¹ Yassine al-Hajj, Al Hayat, April 2005

obligations? What understanding can Arab states have of the Convention's provisions when only a few of them actually play a part in the area of culture and in view of the derisory budgets allocated to ministerial departments in charge of culture? If the Convention recognises a right for the state in this area, does the Convention not become an obligation for Arab states? States bear the responsibility for ensuring an encouraging and serene environment for creators; of raising awareness, through education, about the importance of diversity in cultural expressions; and of integrating culture in development programmes. The recurrent absence of cultural policies per se, and, in some cases, of institutions charged with their implementation, presents but limited alternatives for young people oscillating between being alienated from their societies and being indoctrinated by extremist groups who often fill and exploit the gaps left open by the state. Public spaces of expression are either restricted or controlled and are thus often replaced by professional and religious spaces that provide opportunities for exchange and guidance.

Actors at the national level

Implementing the Convention is all the more difficult in view of the confusion about the role the different actors, that is the state, civil society and the individual, as well as about the relationship between them. In Arab countries, culture is intrinsically related to identity. Thus, anything that concerns the management of culture becomes highly political, and any interpretation and relinquishing of control is extremely sensitive. The difference between Arab and other countries lies at this level: in democratic countries, accepting the right of a state to preserve its cultural industries is a concrete result of the respect for the diversity of cultural goods. The fact that citizens subscribe to the cultural policies of their states is, in these countries, an important factor that facilitates the implementation of measures seeking to protect and promote cultural expressions. We could even suggest complicity between creators and the authorities, a complicity that was particularly noticeable, for example, in the reactions of Europe when its cultural industries, in particular cinema, were threatened by global competition. While Arab governments have adopted the Convention, they have a tendency to regard it more as a means through which they can gain recognition in the global arena rather than as a guiding document for internal policy-making, particularly because they are conscious that opening the door to cultural pluralism will naturally lead to a political pluralism that they would much rather delay.

These factors hinder the full development of an open society and negate the effects of communal life. Can we rightfully consider all states equal in front of international law when fundamental rights are violated daily, above all by regimes with despotic tendencies? Undemocratic practices and the widespread use of oppression and

clientelism jeopardises the possibility of a peaceful relationship between citizens and their state and hinders expression. The lack of recognition of the individual and, particularly, of women, hinders the capacity they have to define themselves as such in a context where the yoke of collective identity prevails over individual identity. In this relationship, and with but rare exceptions, the individual's full development and, in particular the development of women and minorities, is treated, at best, with contempt by the authorities. Yet, according to the Convention, the state is supposed to guarantee the respect of its citizen's cultural rights as well as the moral and intellectual security of creators and artists irrespective of their beliefs, language, ethnic group or political affiliation. Cultural expression can only flourish if there is freedom. It does not fare well in an environment where censorship and restrictions prevail. It requires the preservation of the individual's right to expression. In spite of this, the act of creating is perceived in many Arab countries as an offence. Creators are more than often seen as opponents and their expressions condemned whenever they venture off the beaten track. Despite the ratification of the Convention and the vigilance of international cooperation, the latter is incapable of protecting creators. UNESCO member states have demonstrated a strong collective conviction. Yet, how can we hope to implement a common strategy in an international arena often perceived as apathetic and ruled at best by weak consensus?

The civil societies where creators and producers come from are not always conscious of the role they can play to help states improve their modes of intervention. There is an overall lack of trust which thwarts any possibility of dialogue between the different actors, and the works of artists are often regarded with suspicion, particularly in the more conservative societies. Civil society organisations could be particularly active in the area of culture and yet show a tendency to remain silent. It is not sufficient to "make" culture. It is also important to think it out. This is precisely where cultural actors seem to be absent. In other cases, societies have a tendency to rely solely on the state, particularly in oil economies. Arab societies lack neither creators nor cultural experts. However, these experts are either isolated from regional and international networks, confined to their immediate environments or overwhelmingly dependent on the goodwill of their governments. Some have even chosen exile as the easiest option or from sheer despair.

The exercise of power

What of the role of the state? Will state intervention in the area of culture not naturally lead to excesses in nationalistic production and result in self-isolation and the ghettoisation of cultural expressions? Indeed, the ambiguous role of the state in this area is patently illustrated by some Arab countries. The most striking example is that of the Baathist ideology that accepts expressions of artistic modernity, but only

within the framework of official culture. In taking possession of cultural life, these states control it according to their political interests. Thus, for example, in Saddam Hussein's Iraq, culture was used to serve a personality cult, and in Syria, culture is used to serve a nationalist ideology. Civil society initiatives are thereby quelled and the best intellectuals and creators forced into exile or confined to a role at the service of the state. As in Saudi Arabia, regimes may also choose not to interfere at all in this area. In this case, culture is subjected to the codes defined by religious authorities or to their wrath when it is deemed to be out of control, a wrath that political authorities neither wish nor have the courage to oppose.

In appearance more acceptable, although following the same patterns described above, are two other examples. First, there is Tunisia, where the state has been the main producer of culture. The country is making efforts to provide infrastructures and legal norms to support the development of cultural industries. However, it continues to control production through excessive and inappropriate censorship that reaches even the Ministry of Culture itself. The second example is Lebanon, where the government acknowledges the importance of creativity but considers that its role should be limited to that of supporting creators. It does not see itself guiding cultural issues as it deems that, in doing so, it would paralyse the sector. When exaggerated, such logic translates into a situation where the state plays but a marginal role, with civil society becoming the driving force of cultural life while at the same time struggling to preserve its diversity. This is without mentioning the case of Gulf countries where the government controls all of the major investments recently made to develop cultural infrastructures.

There is also a widespread social censorship, fuelled by the tyranny of ignorance. It reaches deep, surpassing state censorship. Culture is its primary target and any expressions considered western are hunted out. No Arab country is exempted from its destructive resolve. Beyond the ambiguous role of the state in the Arab world and beyond, the issue linked to an identity that appears to be, primarily, religious, it is important to take into account the fact that this region is at the very heart of a latent conflict. Its consequences impact upon all cultural areas. The events brought about by the prophet Mohammed caricatures remind us that the debate about cultural expressions is first and foremost political. More generally, the debate between the West and the Muslim world is in part linked to the way reference values have developed. Some consider religious references, derived from divine law, as the highest reference. For others, the universal values of human rights; that is, positive law, prevails. It has not been possible to find a *modus vivendi* that can, politically, be accepted by all. Cultural expression can transcend this dichotomy as long as it is not itself subjected to such a hierarchy.

Does the apparent concern of some countries to preserve global diversity not hide the lack of respect for diversity in their own countries where international instruments fail to provide protection? Within the framework of the Convention, states have accepted a collective monitoring system to ensure its application. They have thus chosen transparency and have committed themselves to collecting data and statistics and to provide, every four years, a report on all of the measures taken by them in favour of cultural diversity. They have also committed themselves to sharing information in order to establish a real regional and international cooperation system and to plant the seeds of solidarity between the parties to the Convention. In order to fulfil their commitments, Arab countries must modernise the management of culture. They must develop adequate tools and the capacities of their human resources within this framework. The development of statistics in the area of culture would be a revolution onto itself. The difficulties in obtaining data on cultural industries, for example, are well known, difficulties that lie mainly in the fact that cultural industries are not identified as such in custom or ministerial documents.

Negotiating between tradition and modernity

The terms of the Convention are in themselves a challenge to Arab countries. How they choose to manage cultural diversity and the expressions thereof, whether traditional or modern, will be a defining factor of what they stand for. The main objective of the Arab Organisation for Education, Culture and Science is, primarily, to work towards the cultural unity of the Arab world. Cultural diversity is only marginally addressed in its action plan for 2005-2010. It does, however, take into account the hostile climate surrounding the Arab world, an Arab world accused of rejecting modernity. It therefore includes an evaluation of the shortcomings in the development of culture and provides recommendations to break the downward spiral. It is critical of the lack of means allocated to culture. It highlights the precarious situation of creators and regrets that they only rarely benefit from authors' rights. It condemns the weakness of cultural industries as well as the feeble distribution of cultural goods in the Arab market. Together, all of these reasons contribute to the decline of nearly all forms of cultural expressions in the Arab world. The action plan also highlights the weak management of a very rich and diverse historical heritage and takes note of the lack of translation of Arab and foreign works, a further barrier to improving mutual understanding. In all of these areas, it recommends an enhanced regional cooperation enabling Arab countries to address the threats of globalisation, threats that particularly target Arab identity.

In December 2004 in Algiers, the culture ministers representing the member states of the Islamic Organisation for Education, Science and Culture, adopted an Islamic declaration on cultural diversity thereby asserting their concerns to protect diversity.

It is regrettable that such a commendable initiative was not taken by the Arab world. We will not provide an in-depth analysis of the declaration but only highlight two main tendencies. The first is the repeated call to Islamic countries in favour of dialogue with the other and to start actions to raise awareness, globally, about Islamic civilisation. It stresses the necessity to “review our perception of the other and cast away the stereotype of a people, their culture and civilisation” adding that “an equal dialogue among nations and peoples entails that we honestly judge ourselves without in any way cutting loose from our religious and cultural identity”. The second tendency is the tone – by and large defensive – that pervades throughout the action plan set out in the text for Muslim countries to promote cultural and civilisational diversity. Some of the terms used are even aggressive, for example when the text reads that “cultural and civilisational heritage is subjected to attempts of distortion, forgery, obliteration, destruction and confiscation” and reviles globalisation, describing it as a “unique dominating model in all areas” such that it “eliminates the cultural particularities of societies and might obliterate the basic elements of their identity and civilisation”. The declaration fully supports the UNESCO Convention “...with a view to warding off any attempt aimed at exterminating a language, culture or race...”. It recommends the implementation of a “vigilant cultural policy”. With regard to youth, the text highlights the importance of providing them with various “tools of self-immunisation”.

If cultural diversity is not understood within a humanist framework, there is a danger that a passive rather than dynamic approach to production will prevail. It may provide a pretext for freezing traditions and preserving them in a museum, and thus suspending evolution. Exchanges have characterised the evolution of societies. We are the products of these exchanges, of races mixing, of hybridisation. States must therefore avoid the trap of a blind commitment to traditions or roots and to the mirage of what certain advocates like to call “purity”. The cultural counter argument theory of the Mauritanian Abdoulaye Sow warns against the use of respecting traditional cultures as a pretext to perpetuate harmful traditional practices, for example the religious justification used to maintain the practice of FGMC (female genital mutilation/cutting) in certain Arab countries when Islam does not, in any way, call for such practices.

If globalisation can further openness and contribute to the full development of the individual, then it may be positive as long as the individual has a choice and the capacity to make a proper judgement. The role of the state is to enhance this capacity. Cultural uniformity at a global level is dangerous. At the local level it can be a factor of underdevelopment. The Convention's objective is to incite countries to work towards peace and an equal access to cultural expressions. It should also help to stimulate a balanced interaction between different cultures and to generate shared cultural expressions through dialogue and mutual respect.

Chapter 16

**After the Convention:
What's next for INCD and the cultural diversity movement?**

Garry Neil

The International Network for Cultural Diversity (INCD) is a worldwide network working to counter the adverse affects of economic globalisation on world cultures. Artists and cultural producers from every media, cultural organisations, academics, heritage institutions and others in close to 75 countries are joined together around fundamental principles which motivate and guide INCD campaigns to promote cultural diversity, cultural development and increased exchanges between cultures.

INCD works with governments, intergovernmental institutions and other civil society groups to ensure that diverse cultures and artistic expressions can thrive in a world of global marketplaces and rapidly changing media technologies. INCD believes that governments should have the ability to carve out a space for domestic artists and cultural producers and to ensure traditionally marginalised communities can maintain the living expressions of their cultural heritage. They also have an obligation to take the necessary actions to achieve these objectives, at the same time ensuring their citizens have access to a range of artistic works from other countries.

Since its formation in 1998 and its founding meeting in 2000, INCD's advocacy has been focused primarily on building support for what has now become the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. While inadequate resources have meant that other activities have not received the same attention, INCD has, from the beginning, recognised that achieving greater cultural diversity requires the development of cultural capacity and creative industries in many countries. It also requires efforts to achieve more balance in the global exchange of cultural goods and services.

The adoption of the Convention by the UNESCO General Conference in October 2005 was a watershed moment and an important victory for a global cultural diversity movement that is only a decade old. But, the Convention is only one step in the campaign to achieve greater cultural diversity.

As the Convention was being adopted, INCED called on States who voted in favour to ratify it, to make it as effective as possible, and to commit to supporting cultural diversity both within their own territories and globally. INCED urged governments to work with each other, with civil society, intergovernmental institutions and their own artists and cultural producers to achieve the real promise of the Convention. They need to resist the continuing pressure from those who want trade in cultural goods and services to be covered fully under the World Trade Organisation, and regional and bilateral trade treaties. They also need to ensure that developing countries have the resources they need to bring their stories, music and other artistic works to local and global audiences.

Ratifying and implementing the Convention

For the INCED, the immediate challenge is to encourage governments to ratify the Convention and to work with UNESCO to ensure it is implemented expeditiously. This campaign was launched immediately after the October meeting.

While the Convention is to come into force when 30 countries have ratified it, to be truly effective, the number of ratifications will have to be far greater. Particularly since the Convention's ability to counter the pressure on cultural policies arising from the trade and investment agreements depends on states working together in other fora, it must be ratified by more than double this minimum number. To have a real impact on the World Trade Organisation's negotiating and administrative processes, a large number of WTO member states will need to work together.

There must also be an appropriate balance among the Convention's member states. It will not achieve its objectives if the only signatories are European countries, a few other industrialised nations, joined by only a handful from the South. The ratifications must include important states from Central America and the Caribbean, South America, Africa, Asia, Oceania and the Middle East, as well as from Europe. It will have to include states taking a leading role in regional activities, as well as those which are important in the intergovernmental institutions. Without a geo-political balance among signatories, the Convention could be marginalised.

Supportive civil society organisations and member states will need to work with UNESCO to ensure it moves expeditiously to fulfil its responsibilities under the Convention. UNESCO must convene an early meeting of the Conference of State Parties, even if the coming into force does not coincide with a regular meeting of the

General Conference, it must coordinate the election of the Intergovernmental Committee, and facilitate the adoption of the rules of procedure for both groups. It will also need to establish the mechanisms and processes for the International Fund for Cultural Diversity and to encourage voluntary contributions from member states.

UNESCO also has a critical role to play in gathering, analysing and exchanging information on a variety of topics. This is needed not only to understand existing cultural markets and patterns of exchange, but also to understand developments in other fora that have an impact on cultural policies. It will be difficult for member states to implement the provisions of the Convention obligating them to work together in other fora to achieve the objectives of the Convention, if they do not have all the appropriate information. UNESCO will need to exercise leadership to ensure these elements of the Convention can be realised.

A related role for INCD will be to research the potential and work to encourage member states to include significant provisions of the Convention into their bilateral and regional cultural cooperation agreements. Member states can and should make appropriate and concrete commitments to each other. The Convention only establishes minimum standards that they are free to exceed. Through bilateral agreements they can develop joint programs to promote cultural policies, cultural development and public awareness. Countries with large domestic cultural markets can provide specific and increased market access for artists and cultural producers from the South, and can work together to preserve threatened languages and cultures. They can also encourage more states to join the Convention. By taking such steps bilaterally, they will add considerable value to the Convention and can help to ensure it achieves its objectives.

However, INCD has always recognised that the Convention alone cannot bring about more balanced exchanges between cultures, nor can it increase the capacity of musicians, filmmakers, craftspeople and storytellers from every country to bring their artistic works to local and global audiences. In the short term, it cannot prevent the trade agreements from eroding the sovereign right of states to determine their own cultural policies. INCD therefore is entering a second stage of its development where it will devote a greater share of its resources to campaigns on a range of issues.

Monitoring the trade agreements

As if to highlight that the Convention's adoption will not stop the pressure on cultural policies in the trade and investment agreements, there were two significant developments within months of the UNESCO General Conference decision.

In December 2005, WTO trade ministers reached agreement on a new process and timetable for negotiations of the General Agreement on Trade in Services (GATS).

Most cultural experts believe that GATS is the most problematic multilateral trade agreement for cultural policies. The new process gives added weight to the World Trade Organisation grouping of countries which share an interest in liberalising trading rules in a certain sector, including the so-called Friends of Audiovisual. This group has put forward a request for other WTO member states to make new commitments for sound recording, and motion picture production, distribution and projection services. The GATS timetable calls for members to make commitments by the end of October 2006 and there will be great pressure on some countries to open up these cultural markets despite the adoption of the UNESCO Convention. Even if the timetable for concluding the Doha negotiating process extends beyond 2007, pressure in GATS negotiations will continue.

In January 2006, the government of Korea succumbed to U.S. pressure and agreed to slash its cinema screen quota to 73 days, one-half of the original quota implemented in 1993. Enforcement of the original screen quota system resulted in a flourishing of the Korean movie industry, both creatively and economically. The market share of Korean movies increased from 16 percent to 47 percent in slightly more than a decade and the country's filmmakers came to be celebrated around the world. The existence of the screen quota system has been the most significant impediment to further trade negotiations between Korea and the United States. Thus, it was not surprising that shortly after the Korean decision the U.S. announced that free trade talks with Korea would be launched.

As a consequence of these developments INCD will continue to research and circulate information about the negative consequences of regional and multilateral trade and investment agreements on cultures, and on culture and media policies.

INCD will also continue to work to ensure that the arts and cultural concerns are put forward in the negotiations. INCD delegates have attended the last four WTO ministerial meetings and have lobbied at WTO headquarters in Geneva. At the December 2005 meeting in Hong Kong, INCD organized a successful civil society seminar entitled *Defending Cultural Diversity from the WTO*.

Promoting cultural development and cultural impact assessment

The experiences of diverse countries which have successfully nurtured and developed their domestic creative industries demonstrate that these sectors can make a positive contribution. Creative industries are one of the fastest growing sectors of the global economy, and contribute significantly to the GDP of many developed and some developing countries. Creative industries also have many positive economic attributes. They generally have low barriers to entry, are environmentally benign, and are labour intensive, high value-added activities with linkages to important ancillary

sectors, including information and communication technologies and design capacities.

Globalisation and the increasing interdependence of national economies have opened up new opportunities in the creative industries for developing countries and countries in transition; at the same time, these factors are potential threats to cultural diversity and creativity. Because creative industries draw from the creative expressions of communities based on the wealth of their historical and contemporary values and symbols, support for the industries should be an integral part of the preservation, protection and promotion of cultural diversity. Such diversity is a global public good which needs to be fully supported by the international community and this is explicitly acknowledged in the UNESCO Convention.

Creativity is an asset available in all countries and its effective nurturing and exploitation can contribute to job creation, income generation and poverty alleviation.

At its 2005 meeting in Senegal, INCD launched significant new campaigns to promote cultural development. INCD will advocate for cultural development to be integrated into the UN's Millennium Development Goals and urge countries to include cultural development as a core element of their Poverty Reduction Strategy Papers. INCD will also promote south-south and south-north cultural exchanges to counter the current domination of cultural markets by a few large players and to reverse the trend toward cultural homogenisation. INCD intends to collect and circulate information about best practices in cultural development and cultural exchange.

Finally, there is a great deal of work to do with intergovernmental agencies and with development agencies, both public and private, to promote greater awareness of the potential, both economically and culturally, of developing cultural capacity and creative industries, to encourage agencies to devote more resources to this task, and to encourage them to integrate cultural impact assessment into their development frameworks and processes.

Legislative framework for cultural rights internationally

In the longer term, INCD will work to expand international legal cultural rights. At present, while there are a range of individual rights and some collective rights, cultural rights are modest. For arts and culture, the UN *Universal Declaration of Human Rights* guarantees individuals "the right freely to participate in the cultural life of the community (and) to enjoy the arts." The Declaration also states: "Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and

ideas through any media and regardless of frontiers." While these are important, as are the cultural rights contained in other international legal instruments, they should be made more robust.

For example, existing rights do not guarantee the right to have access to cultural expressions which reflect one's own culture and are in one's own language, or to have access to local artists and cultural producers in the full range of products and services available in the marketplace. They also do not provide to artists and cultural producers any guarantee that they will have access to the means they need to create, produce and disseminate their works, and do little to guarantee freedom of artistic expression.

Building the movement

INCD continues to work to build the movement and to increase the number and range of its own membership. INCD's vision is to become a network of networks, rather than an organisation of individual groups and members.

The primary communication tool is the website at www.incd.net and the website www.mediademonitor.org, in which INCD is a collaborating partner. Plans include expanding the INCD site to include information and research on best practices in cultural development and exchange.

INCD raises awareness of the issues and the movement through participation in a wide range of local, national, regional and international activities and events. Recent highlights have included the World Culture Forum held in Jordan in December 2005 and the meeting of African Culture Ministers held that same month in Nairobi. INCD also continues to collaborate with the world's culture ministers organised in the International Network on Cultural Policy (INCP). Consequently, INCD's 2006 annual meeting will take place in November in Brazil, and the 2007 event will be in Spain, at the same time and place as the annual INCP ministerial gathering.

A key priority for the INCD in its organising activities is to continue to work to ensure that the concerns of traditionally marginalised communities are fully integrated into the global movement. The arts and culture of these communities is often the most vulnerable to the forces of economic globalisation and cultural homogenisation. While the Convention does not provide a formal role for civil society groups to raise concerns about forms of cultural expressions that are "at risk of extinction, under serious threat, or in urgent need of safeguarding," this will be on INCD's agenda in the coming years.

There are several priorities for building the movement. The first is to respond to the needs of the indigenous communities to create a forum, initially in the Americas, in

which representatives from these communities can work together to address the particular challenges which globalisation presents to their arts and culture, including their languages. Preliminary work has been undertaken with a range of representatives from Indigenous Peoples in a number of countries and it is anticipated the first formal meeting will take place in Bolivia in October 2006.

Finally, in the developed world, INCD is working as a priority to build links with movements in the United Kingdom and the United States. Organisations from both of these countries are underrepresented in the INCD membership.

In the U.K., there is strong support for the INCD and its objectives in many sectors, however, the global issues and the Convention have not been seen as priority matters for groups that are dealing with other challenges and struggling to survive. There is a need to demonstrate the direct relevance of the cultural diversity movement to U.K. artists and cultural producers.

With respect to the United States, INCD will build on its recent successes, including a seminar it held in partnership with the Smithsonian Institution in Washington in January 2005, to develop common approaches with a range of civil society groups. There is also a natural synergy between the U.S. media reform movement and the global cultural diversity movement which the INCD will rely on to strengthen the links. As a concrete example, INCD partnered with Free Press and several of its affiliate members in an April 2006 submission to the Office of the United States Trade Representative on the occasion of the launch of negotiations for a United States/Republic of Korea Free Trade Agreement. The submission raised the problem of the Screen Quota system, and called on the U.S. to negotiate a cultural exemption into the FTA and to ratify and implement the UNESCO Convention.

Part V

Chapter 17

Can the existing WTO legal framework take into account the cultural specificity of the audiovisual sector?

Jan Loisen

Introduction

With the adoption of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, it is important to assess whether the World Trade Organisation and its framework agreements offer any room for manoeuvre to attain a balanced audiovisual policy which takes into account both the economic and cultural aspects of audiovisual goods and services. As the WTO primarily focuses on increased economic efficiency through the liberalisation of trade, our attention will shift to the second aspect the dual nature of the audiovisual sector, namely its cultural component. The fundamental question therefore is whether the WTO can take into account the cultural specificity of the audiovisual sector?

Treatment of the audiovisual sector in the WTO framework

Although a complex tangle of trading rules applies to the audiovisual dossier (De Witte 2001, 238; Footer & Graber, 2000; Pauwels & Loisen, 2003, 2004), we will focus on the treatment of the audiovisual sector in the services agreement GATS (General Agreement on Trade in Services) and the goods agreement GATT (General Agreement on Tariffs and Trade). These two agreements within the WTO, alongside TRIPs (Agreement on Trade Related Aspects of Intellectual Property Rights), do not only represent the core of the multilateral trade framework, they are also directly relevant for the audiovisual dossier as both agreements explicitly refer to the audiovisual sector. The scope of these goods and services provisions, however, is not always clear and is difficult to interpret.

In the GATS agreement six subcategories are listed which should comprise the specific subsector of “Audiovisual services,” included in the general “Communication Services” sector. The subcategories are: Motion picture and video tape production and distribution services (UN Provisional Central Product Classification [CPC] code 9611); Motion picture projections services (CPC 9612);

Radio and television services (CPC 9613); Radio and television transmission services (CPC 7524); Sound recording (CPC not available); and Other (no CPC).

This somewhat rudimentary and broad classification makes it difficult to determine the boundaries between audiovisual and other communication services, especially as traditional and new media increasingly converge. Rental activities, and distribution and exhibition of cinema films are considered as services, but GATT Article IV refers explicitly to screen quotas for cinematograph films (Pauwels, De Vinck & Van Rompuy, 2006). And why not classify radio and television transmission services for example under telecommunication services? To deal with this, "as a general rule of thumb, however, it has become accepted that commitments involving programming content are classified under audiovisual services, while those purely involving the transmission of information are classified under telecommunications." (Zampetti, 2003: 4). But, as boundaries between different media increasingly blur, this rule of thumb increasingly comes under pressure. Moreover, overlap does exist between GATS and GATT as regards the audiovisual sector; it is the only services sector which was covered in the original GATT (cf. discussion on Article IV GATT below). That cultural issues are in the twilight zone in the WTO became clear in the so-called Canadian Periodical Case. In any event, the Appellate Body expressly made clear in this case that GATT and GATS rules are not mutually exclusive (WTO, 30 June 1997).

For the time being, however, only a few minor cases dealt with by the WTO's Dispute Settlement Body have addressed which rules apply for the audiovisual sector. The primary agreement for this dossier until now is clearly GATS. We will begin our analysis of how the WTO takes into account the specificity of the audiovisual sector with this agreement.

GATS

After the conclusion of the Uruguay Round many European media, principally French, reported that the sector had been excluded from GATS, however, the ultimate outcome of the audiovisual services negotiations was different than described. In fact, no success was achieved in incorporating the concept of cultural exception in GATS. What does exist is a services framework that is only starting to take shape and which, for the time being, leaves a wide margin to retain a national cultural policy.

Article XVI GATS

Market Access

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member

treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

Article XVII GATS

National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

Extracts of GATS Articles XVI & XVII

The proponents of further liberalisation in the audiovisual sector like to refer to these flexibilities in GATS. They point primarily to the use of the positive list approach¹ in GATS which means that a party explicitly has to list the liberalisation commitment it is willing to take in a particular sector or subsector. According to Richardson, (2004: 118) this procedure creates “enormous flexibility in crafting GATS commitments²”: Members can indeed negotiate very specific commitments regarding the principles of market access (Article XVI GATS) and national treatment (Article XVII GATS) in a sector, subsector or as regards a mode of supply, but are only bound when the commitment is explicitly taken up in its liberalisation schedule. Thus members also have the right not to engage in liberalisation commitments as, for example, the EU

- 1 This approach is opposite to the negative list approach, which is used in e.g. the bilateral trade treaties the U.S. is negotiating with its trading partners. A negative list approach refers to the practice of liberalisation as a rule, unless an exception is specifically inscribed and motivated in the liberalisation schedule.
- 2 To remove discriminatory barriers to trade in services, the GATS agreement provides for successive rounds of negotiation (Article XIX). During these rounds, the members make very precise liberalisation commitments relating to two principles which apply vertically, i.e. sector per sector. These rules are market access (Article XVI) and national treatment (Article XVII). They stipulate that a member is to abandon limits for foreign service providers gradually within a given sector. These limits are either quantitative (e.g. a film or television quota) or qualitative (e.g. reserving charges on sound and recording equipment for national residents only, linking the allocation of television licences to a nationality requirement, etc.). The following steps are taken to achieve this progressive liberalisation: after the negotiations with the other members, each GATS contracting party submits a list (or offer) of commitments. The Uruguay round was the first round during which a list of liberalisation commitments in the services sector could be submitted ("initial commitments"). These lists of planning schedules are added to the GATS agreement and are legally binding. A contracting party does not have any "market access" or "national treatment" obligation as long as it does not incorporate the sector or activity into its list of commitments.

has done for the audiovisual services subsector. Furthermore, Members had the opportunity in the Uruguay Round to exempt (parts of) sensitive (sub)sectors from the MFN (most favoured nation) principle, as again the EU and several other Members have done extensively with regard to co-production treaties in the audiovisual sector.

This, however, does not mean that the sector can be exempted *de facto* from further liberalisation, as all trade partners have committed themselves by means of GATS Article XIX to attain a progressively higher level of liberalisation commitments for the whole services sector in subsequent multilateral trade negotiating rounds. The MFN exemptions are also, in principle, of a temporary nature and in any event shall be subject to (re)negotiation in the Doha Development Round and beyond (GATS Annex on MFN exemptions, § 6).

“To summarise, GATS is characterised by some flexibility concerning the scope and speed of trade liberalisation, but also establishes a dynamic in favour of liberalization.” (Krajewski, 2003: 49)

GATT

Somewhat paradoxically - as the cultural and audiovisual sectors are mainly addressed in the services negotiations – the specificity of audiovisuals has been stressed explicitly in the GATT, which targets trade in goods. Notably, GATT Articles IV and XX point directly to the different nature of audiovisual products. However, the question arises as to whether these Articles entail, in effect, an exceptional status for the sector. Article IV provides for a departure from Article III (National Treatment) by allowing special treatment of cinematographic films through the use of screen quotas.

These quotas should in principle discriminate only between foreign and national films (§a). Moreover, they are subject to negotiations on their limitation, liberalisation or elimination (§d). Bernier (1998: 114) interprets Article IV as a compromise between two different goals: the elimination of discrimination between foreign and national products on the one hand, and the preservation of the possibility to guarantee a minimum of national production in the film sector on the other. Notwithstanding U.S. efforts from 1947 onwards to eliminate Article IV, it was continued without change in the GATT 1994 agreement within the WTO.

Although Article IV refers specifically to screen quotas for cinematographic films, a practice which has diminished in importance since the 1950s, it can be seen as an important precedent. It recalls the valid initial reasoning of leaving regulatory space to attain non-economic (in this case cultural-political) objectives in certain sectors

(Neuwirth, 2002)³. It is, however, doubtful that it can be used as a concrete policy instrument to preserve cultural diversity in the audiovisual sector. Article IV only refers to cultural goods (and more specifically cinema films); the U.S. is tenacious in applying a strict interpretation to the Article (de Witte, 2001: 242; US, 2001); and the Doha Ministerial Declaration – in spite of the emphasis on uniting free trade and public policy objectives (Herold, 2002: 2) – does not explicitly mention the reconsideration of general (e.g. cultural diversity) or specific (e.g. the audiovisual sector) cultural issues. Therefore Neuwirth (2002: 13) concludes that the Article IV heritage mainly provides a political mandate to negotiate culture in the spirit of its conception. This means that the juridical leverage of Article IV seems to be small and is only specifically applicable to the use of screen quotas. It cannot be used directly to protect other aspects of a national audiovisual sector. But the arguments for drafting Article IV in 1947 could be taken up again as the audiovisual sectors of most countries still remain in a difficult position vis-à-vis U.S. movies. Therefore, Article IV provides some sort of precedent which is juridically weak, if not non-existent, but can be exploited politically in upcoming negotiations within the WTO.

Article III GATT

National Treatment on Internal Taxation and Regulation

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

Article IV GATT

Special Provisions relating to Cinematograph Films

If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:

- (a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;

³ One however needs to remember the exceptional situation, the post World War II period, in which Article IV was drafted. Besides a cultural-political reasoning, economic motives were important as well in response to the devastation World War II had meant for the European film industry.

- (b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;
- (c) Notwithstanding the provisions of sub-paragraph (b) of this Article, any contracting party may maintain screen quotas conforming to the requirements of sub-paragraph (a) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; Provided that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947;
- (d) Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.

Also negotiated in 1947, GATT Article XX provides for a few general exceptions from the non-discrimination obligation. According to the chapeau of the Article, discriminatory measures can be allowed, if they are not applied arbitrarily or imply a disguised restriction on international trade. After the formulation of the chapeau, the conditions for the use of such discriminatory measures are set out. With regard to the audiovisual sector, Richardson (2004: 117) identifies paragraphs (a), (b) and (f) as relevant. Paragraph (a) could make censorship or measures relating to ratings systems possible and (b) could be used to discuss, for example, people smoking in audiovisual products. But the most important paragraph, which refers specifically to cultural products, is without a doubt (f), which authorizes measures "imposed for the protection of national treasures of artistic, historic or archaeological value".

Article XX GATT

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;

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

The scope of Article XX(f) is unclear, however, as no jurisprudence exists so far on its interpretation. Furthermore, the initial motivations for drafting the exception in 1947 remain obscure (Richardson, 2004: 117). The interpretation of the exception is therefore a difficult exercise: firstly with regard to the evaluation of the artistic, historic or archaeological value of a product, and secondly with regard to the underlying motivation of a policy that creates protectionist measures. The Article can be situated at the border between rules and standards: “A law is more standard-like to the extent that it established less specific guidance in advance of the conduct regulated by the law.” (Sauvé, 2003: 213). From a juridical perspective, standards are not *per se* better or worse than a rules-based approach. In a WTO context we indeed often see Articles such as Article XX vaguely formulated, as otherwise the negotiating costs would be too high. In other words, should very specific rules concerning culture be negotiated, an agreement would be practically impossible. The downside of the standards approach is that it generates uncertainty in international law, which is, of course, contrary to its aim of promoting legal security and stability (Sauvé, 2003: 212-213). A similar problem occurs for example for the environmental movement. Article XX(b) offers some margin to exempt a regulation that raises trade barriers in order to protect the environment, but it is uncertain if the paragraph offers a clear juridical instrument to protect the environment.

Nevertheless there exists some jurisprudence concerning Article XX in general. It indicates that discriminatory measures should meet the conditions set out in, for example, (f) or (g), as well as in the chapeau. According to the WTO Appellate Body, in its ruling in the U.S. Shrimp Case, this is a difficult act of balance, which moreover needs to be contextualised: “a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members. [...] The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.” (Appellate Body Report on U.S. Shrimp, paragraphs 156 and 159.)

In this report, an evolutionary approach⁴ was used for the interpretation of the term “exhaustible natural resources”, which we find in Article XX (g). Concretely, this meant that, on the basis of other conventions such as the *UN Convention on the law of the sea* or the *Convention on trade in endangered species of wild fauna and flora*, the

⁴ The evolutionary principle means that rules are interpreted in their current context. It is mainly used when the rules terminology is evolutionary instead of static. This approach deviates from the general principle of contemporaneity, where interpretation is based on the meaning of the rule at the time it is drafted.

concept was broadened from fuels and minerals to living resources, such as species threatened with extinction (Krajewski, 2003: 54). If we transpose this approach to the audiovisual case, one could argue that this offers an entry point in WTO negotiations for the concept of cultural diversity, as discussed within UNESCO. However, one needs to recall that the WTO has one inalienable and fundamental objective, to implement further liberalisation, and it is also expected that anything which looks and feels like a trade barrier will have to disappear over time - a compulsion which the audiovisual sector is not likely to escape either given U.S. sensitivities in this area.

Conclusion

The relationship between Article XX or other exceptions and audiovisual policy remains, for the time being, ambiguous. On the one hand, flexibilities do exist but their robustness is questionable. No clear and straightforward reference to the specificity of the audiovisual sector can be found in WTO agreements. Moreover, the implicit exceptions towards the audiovisual sector are always subject to further (re)negotiation. On the other hand, although in the WTO exceptions are, as a rule, interpreted restrictively (Herold, 2003: 3), these flexibilities do indicate recognition of the relationship between cultural objects and national identity (Bernier, 1998: 114). As such, they mainly provide a political mandate to negotiate on the specificity of the audiovisual sector. In this context, the *Convention on the protection and promotion of the diversity of cultural expressions* would be essential in strengthening this political mandate.

Chapter 18

Towards a *Global Cultural Contract* to counter trade related cultural discrimination

Christophe Germann

*“On agit sur la réalité en agissant sur sa représentation.”¹
“The power to narrate, or to block other narratives from forming
and emerging, is very important to culture and imperialism,
and constitutes one of the main connections between them.”²*

Introduction

In this contribution, I shall argue that the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* approved by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) on 20 October 2005, is, in fact, no real convention at all. In my opinion, this instrument is rather a mere declaration that has almost no legal effect beyond what UNESCO’s Universal Declaration on Cultural Diversity already achieved in 2001³. This leads me to advocate that cultural diversity requires fair international trade and competition that would restrain unjustifiable protectionism from both

- 1 Michel Foucault, *Les mots et les choses, Une archéologie des sciences humaines*, Paris 1966, p. 93: “You act on reality by acting on its representation.”
- 2 Edward W. Said, *Culture and Imperialism*, London 1994, p. xiii.
- 3 The preparatory documents and the various drafts of the UNESCO Convention on cultural diversity are available on the UNESCO website under the heading “Towards a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions” at http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_SECTION=201.html (status April 2005). The Swiss government engaged into a detailed consultation of the civil society to refine its position in the negotiations of this convention; the documents in French are on the Swiss UNESCO website at: <http://www.unesco.ch/work-f/diversite.htm>. Universal Declaration on Cultural Diversity, adopted by the General Conference of the UNESCO on 2 November 2001: <http://www.ohchr.org/english/law/diversity.htm>. For a brief discussion on the initial experts’ draft Convention on cultural diversity of July 2004, see Christophe Germann, *Culture in times of cholera. A vision for a new legal framework promoting cultural diversity*, in: *ERA Rechtszeitschrift der Europäischen Rechtsakademie Trier*, ERA-Forum 1/2005, pp. 109-130.

public and private sources. In this context, I shall explain why the World Trade Organisation (WTO) needs today a real competitor in the field of trade related culture (films, music, books, etc.) that would promote cultural diversity by levelling the playing field.

For this purpose, I envisage the creation of a World Cultural Diversity Organisation (wCDo) equipped with efficient legal tools that would be within reach for all countries and cultures without discrimination, be they economically rich or poor. I shall outline the rules of law that such an institution could use to achieve its objectives eventually: based on the new principles of Cultural Treatment (CT) and Most Favoured Culture (MFC) mirroring the WTO principles of National Treatment (NT) and Most Favoured Nation (MFN). I shall introduce CT and MFC as the core principles of an innovative *sui generis* normative framework relying on the international intellectual property system, and on certain national and regional competition laws and policies. In order to implement and enforce these principles, I shall propose to take inspiration from the WTO Dispute Settlement Understanding (DSU) as it was applied in the banana arbitration between Ecuador and the European Community⁴. Now more than ever, I believe that there is a great urgency to develop a truly effective system promoting cultural diversity in order to resist the ongoing "iconocide" perpetrated by private and public players who abuse their dominant positions in the local and global markets of cultural industries.

This chapter is divided into three parts: The first will critically assess the results of the UNESCO Convention on cultural diversity; the second will briefly outline the theoretical and practical bases of the cultural non-discrimination principles CT and MFC that I propose to introduce into the debate; the third will sketch out a *sui generis* legal mechanism based on intellectual property and competition rules for implementing and enforcing these principles.

This brief exploration of the legal issues at stake and their possible solutions should prepare the ground for further research on a world culture system that could interact on a level with the world trading system. At least, such further research could contribute to develop new rules providing a special and differential treatment of trade-related culture within the world trading system. In any case, the contemplated solutions should eventually enable the stakeholders to take advantage of positive spill-over effects from trade-related culture (in, for example, films, music and books) to non-commodified ones (for example, certain forms of folklore), and vice versa.

I will discuss these new approaches looking at the film industry, but they are similarly applicable to other branches of cultural industries such as music and books, and all can contribute to make the cultural policies at stake affordable for all

4 EC - Regime for the Importation, Sale and Distribution of Bananas - Recourse to arbitration under Article 22.6 of the DSU, Decision by the Arbitrators, 24 March 2000, WT/DS27/ARB/ECU; see also Fritz Breuss / Stefan Griller / Eric Vranes (eds.), *The Banana Dispute - An Economic and Legal Analysis*, Vienna / New York 2003.

countries, including those currently deprived of economic wealth. To my knowledge there has so far been little research on legal avenues in this respect⁵.

Is the UNESCO Convention on cultural diversity a “dead letter”?

Culture law and policy makers need to react to trade regulations and policies that may have a negative impact on the promotion of cultural identities and cultural diversity. From the legal perspective, there are two main approaches: nationalistic top down wishful thinking; and bottom up action, driven by stakeholders, which reaches the global level. UNESCO seems to favour the first approach when it comes to promoting cultural diversity. In the Convention on cultural diversity that an overwhelming majority of UNESCO Members recently approved, states shall remain sovereign in dealing with cultural matters. In other words, this Convention provides to its parties under Article 5 a right to pursue cultural policies that may conflict with obligations of the same parties under international trade regulations, such as the agreements of the WTO or other undertakings.

One can argue that the UNESCO Convention on cultural diversity cannot cause a genuine conflict of laws since a legal right can only conflict with a legal obligation if the right that contradicts the obligation is actually exercised⁶. The recent reduction of

5 For a more detailed analysis, see Christophe Germann *Diversité culturelle et libre-échange à la lumière du cinéma - Réflexions critiques sur le droit naissant de la diversité culturelle sous les angles du droit du commerce international, de la concurrence et de la propriété intellectuelle*. This doctoral thesis on cultural diversity and free trade in the light of cinema from the perspective of culture, international trade, competition and intellectual property laws and policies was published in summer 2006.

6 Legal scholars adopting a strict definition of “conflict” covering only mutually exclusive obligations and excluding contradictions between an obligation and a right include Wilfred Jenk, *Conflict of Law-Making Treaties* (1953) 30 BYIL 401 at 426 and 451; Wolfram Karl, *Conflicts between Treaties*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam 1984, VII, p. 468; Hans Kelsen, *Théorie générale des norms*, Paris 1996, p. 166; Friedrich Klein, *Vertragskonkurrenz*, in: Karl Strupp / H.-J. Schlochauer (eds.), *Wörterbuch des Völkerrechts*, Berlin 1962, p. 555; Wilhelm Wilting, *Vertragskonkurrenz im Völkerrecht*, Cologne 1996, p. 2. Joost Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law relates to Other Rules of International Law*, Cambridge 2003, p. 175 ff., defends a broader definition by equating “conflict” to “breach”: “Essentially, two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other.” According to this author, one norm of international law may breach another norm either (i) in and of itself, by its mere conclusion or emergence, e.g. a breach of *jus cogens* (“inherent conflict”), or by granting certain rights or imposing certain obligations which, once exercised or complied with, will constitute a breach of the other norm (“necessary conflict” if such breach will occur necessarily, whenever either of the two norms is complied with as required; “potential conflict” if there is a margin of discretion and only if a State actually decides to exercise a right will the breach materialize). This author distinguishes between the definition of conflict and how to solve an alleged conflict. As opposed to Jenk, Pauwelyn opts for a broad definition of conflict in order not to prejudice the question of how to resolve the conflict that includes the “potential conflict” between an obligation and a right.

screen quota requirements in South Korea illustrates this point: the South Korean government decided that it would reduce by one-half the quotas which favour the national film industry, in order to open negotiations for a free trade agreement with the United States⁷. South Korea therefore chose not to exercise its right to preserve the full effect of its culture policy tool. South Korea made this concession in exchange for advantages from the United States in other trade areas. In view of the contemplated free trade agreement, South Korea therefore locked itself in with respect to trade liberalisation in the film sector: it entered into an obligation to partially remove its screen time quota regulation, a state intervention that is considered by the United States as an obstacle to international trade. No actual conflict of law occurred in this example, since South Korea did not exercise its right to maintain the cultural measure at stake, although it could have so done⁸.

The real problem with the UNESCO Convention is precisely the lack of lock-in mechanisms to promote cultural diversity. As a guiding principle, Article 2.2 states that the "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory." Furthermore, in Article 5.1, the Parties "reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention." The only full obligations (phrased with "shall") set forth in this instrument are ancillary and concern reporting (Article 8.3), sharing of information and transparency (Article 9), promoting public awareness for cultural diversity (Articles 1.1 and 1.2), and complying with a general good faith principle (Article 20.1). In other words, the UNESCO Convention does not require any real discipline from the States to protect and promote cultural diversity beyond some vague "shall endeavour" obligations that the States can construe and implement to a large extent as mere discretionary rights to act.

It must be stressed that nobody can realistically oblige a state to exercise its rights and comply with its "shall endeavour" obligations to protect and promote cultural

7 International Network for Cultural Diversity, Newsletter, January 2006, Vol. 7 No 1, www.incd.net: South Korea announced in January 2006 that the government has responded to U.S. pressure and agreed, effective July 2006, to slash the screen quota to 73 days, only one-half of the original quota implemented in 1993. Enforcement of the original screen quota system resulted in a flourishing of the Korean movie industry, both creatively and economically. The market share of Korean movies increased from 16% to 47% in slightly more than a decade. The existence of the screen quota system has been the most significant impediment to further trade negotiations between Korea and the United States. Thus, it was not surprising that on February 1, 2006 the United States announced that it is launching free trade talks with Korea.

8 This example is subject to the entry into force of the UNESCO Convention on cultural diversity for South Korea that was one of the parties to approve it.

diversity under the UNESCO Convention if such State is not willing to do so for one reason or the other. Therefore, the UNESCO Convention is arguably not justiciable in practice. Eventually, most of the substantive terms and concepts of this instrument are subject to interpretation, first of all the definition of “cultural diversity” pursuant to Article 4.1. Since this treaty lacks of an effective dispute settlement mechanism that could generate case law interpreting and defining these terms and concepts, its content is likely to remain general and abstract. This instrument, even if it were justiciable, is therefore not sufficiently operational from the legal perspective, at least in a way that would be comparable to the effect of most trade treaties, in particular the WTO agreements.

The “traffic light” metaphor

Let us briefly go back to the time when the first cars appeared on the roads to summarise the key legal issues of the UNESCO Convention on cultural diversity. Let us imagine that a legislator of that time issued a new rule drafted as follows: “At road crossings, car drivers shall endeavour to comply with traffic lights.” Let us further imagine that this legislator did not define the meaning of the colours of such traffic lights, for example, that red requires the car drivers to stop and that green allows them to move ahead. By doing so, the legislator left the car drivers without guidance. Let us also imagine that private road owners have developed their own rules clearly defining the meaning of the colours and strictly binding the car drivers. By doing so, the private road owners gave guidance to the car drivers. Eventually, let us imagine that the private road owners would have the means to enforce their rules whereas the legislator did not provide anything similar. Obviously, the private road owners’ rules would be more effective than the legislator’s: The car drivers have a right (“endeavour”) to comply with the legislator’s rule that is incomplete, whereas they have an obligation to comply with the private road owners’ operational rules. Nobody will be surprised that the legislator’s rule in this story becomes a “dead letter” as opposed to the private road owners’ rules that enjoys compliance.

I would be surprised if the UNESCO Convention on cultural diversity will make a difference in the face of those trade rules contradicting cultural concerns that are applied and enforced.

Hard trade rules versus very soft culture law

The UNESCO Convention contains many rights and almost no significant obligations. One must be aware that the Parties are free not to exercise these rights. A Party can either violate an obligation contained in a trade agreement by exercising a given right granted by the UNESCO Convention, or comply with a trade treaty by not

exercising its right under the UNESCO Convention. Obviously, if there are effective sanctions provided by the trade agreement in case of a violation of its obligations, then the state that is party to both treaties will likely choose not to exercise its rights under the UNESCO Convention. There is not even an incentive to try negotiating a trade-off between culture and trade concerns when severe trade sanctions such as those provided under the WTO dispute settlement mechanism face vague state liability under the UNESCO Convention⁹.

A violation of an obligation under a trade agreement by the exercise of a right under the UNESCO Convention cannot be justified if the plaintiff state is not bound by the UNESCO Convention. According to Article 34 of the Vienna Convention on the Law of Treaties, a treaty does not create either obligations or rights for a third state without its consent. Thus, if a state is party to both the UNESCO Convention and a trade agreement, for example, a WTO agreement such as the GATT or GATS, and violates the latter by exercising a right under the former treaty, it cannot invoke any justification vis-à-vis a state that is a WTO Member and not a party to the UNESCO Convention. For example, New Zealand could not reintroduce its former broadcasting quota regulations to protect its audiovisual sector without fearing an action by the United States under GATS and the WTO Dispute Settlement Understanding¹⁰. New Zealand will most probably comply with its obligations under a WTO agreement without becoming effectively liable vis-à-vis other states that are parties to the UNESCO Convention for not exercising its cultural diversity rights.

Furthermore, the United States could invoke the Most Favoured Nation clause under GATT and GATS against a WTO Member that is bound by such clause and that grants advantages to another country pursuant to Article 12(e) of the UNESCO Convention. This provision states that parties shall endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions notably in order to encourage the conclusion of co-production and co-distribution agreements. In this context, one must remember Article 20.2 provides that nothing in the UNESCO Convention shall be interpreted as modifying rights and obligations of the parties under any other treaties to which they are parties. Accordingly, Article 12(e) would

9 According to a more optimistic scenario, the soft law approach adopted by the UNESCO Convention may have some effect based on "name and shame" pressure as described in the context of implementing and enforcing WTO rules on special and differential treatment by the Organisation for Economic Co-operation and Development (OECD), Special and differential treatment in the global trading system: Status and prospects of Doha Round proposals, TD/TC(2005)8/FINAL, 30 March 2006, p. 50-52.

10 On the removal of quota regulations in New Zealand, read Ivan Bernier, *Chronique, Les exigences de contenu local au cinéma, à la radio et à la télévision en tant qu'outils de défense de la diversité culturelle : justifications et avenir*, part II, January-March 2004, p. 17: www.mcc.gouv.qc.ca/diversite-culturelle/pdf/chronique04-01-04.pdf

limit co-production agreements between parties of the UNESCO Convention to those states that are not bound by the Most Favoured Nation clause of a relevant WTO agreement. In other words, this provision does not improve the pre-existing situation, except as a weak incentive not to get rid of existing exemptions to the Most Favoured Nation clause under GATS in the audiovisual sector in accordance with Article 20.1 of the UNESCO Convention. This interpretation of Article 12(e) also means that the guiding principles of equitable access, openness and balance (Articles 3.7 and 3.8 of the UNESCO Convention) may function as a Trojan horse whenever Most Favoured Nation clauses are applicable under WTO law. This is very bad news since cultural diversity essentially relies on equitable access, openness and balance. Let me quote in this context André Lange of the European Audiovisual Observatory who observed in 2002 that access to the markets of the United States and the European Union was (and actually still is) very restricted for films from third cultural origins:

“European film professionals are never slow to regret the North American market’s closure to foreign films. Admittedly the market share for European films in the United States remains weak (5.02% in 2001, against 4.51% in 2000) and the deficit in audiovisual trade between the European Union and the United States grows constantly: according to our estimations, it reached 8.2 billion dollars in 2000, as opposed to 7.2 billion in 1999. However, in any reflection on the imbalance of such exchanges, it is also pertinent to mention one of the lesser-known characteristics of the global market: the relative closure of the two principal Western markets (the North American and the European Union market) to films from other parts of the world. In the United States, the market share for films other than American or European varies according to the year between 1.5% and 3.0%. In the European Union, the market share of non-European, non-American films varies between 1.0% and 3.6%. In both cases, these market shares are composed chiefly by admissions to films from other developed countries (Japan, Australia, Canada, etc.) and by films from South-East Asia (Hong Kong, Taiwan, etc.). That is to say that the place accorded to films from other parts of the world is almost inexistent. (...) This illustrates clearly that for third countries other than the United States, Canada, Australia and Japan, the European market remains extremely closed, more impenetrable even than the North American market is itself for European films.”¹¹

A similar situation applies to the book and music sectors¹². If a developing country claims a right of access to the European market based on the many provisions of the UNESCO Convention that may be invoked for this purpose (Articles 1, 2.8, 5, 7, 12, 14, 15, etc.), a European country that is both a party to this Convention and a WTO

11 André Lange, Harry, Billy, Amélie...and the others?, in: European Audiovisual Observatory (ed.), *Focus 2002 World Film Market Trends*, p. 5-6: www.obs.coe.int/online_publication/reports/focus2002.pdf.en

12 Report by Almeida/Alleman for Agence Intergouvernementale de la Francophonie et du Haut Conseil de la Francophonie, p. 23, with further references, see: www.agence.francophonie.org

member will think twice before removing obstacles to trade of cultural goods and services.

Reinforcing creative autonomy against cultural imperialism

In order to avoid triggering the Most Favoured Nation clause under an applicable WTO agreement such as GATT or GATS to the benefit of, say, the United States, a developed country that is a party to the UNESCO Convention could induce the developing country not to exercise its rights under the Convention and instead to take advantage of the international fund for cultural diversity (Article 18). However, it is likely that this fund will be a weak means to compensate for the denial of access to the attractive markets of European countries where right holders enjoy enhanced and enforceable intellectual property protection, and consumers have greater purchasing power. In the worst case, this aid fund will be abused by the developed countries to keep the developing countries silent and out of sight without substantially improving the situation of cultural diversity. In this context, one must recall that protectionism, such as excessive denial of market access, may be beneficial to foster cultural identities, but is definitely detrimental to cultural diversity.

The provision on the international fund inviting rich countries to help poor ones therefore bears the risk of remaining without effect or, even worse, of becoming a kind of neo-colonialist tool that would allow the economically rich countries to dictate their cultural preferences to the poorer ones and thus practice cultural imperialism¹³. One way to address these threats is to design a system based on the valuation of catalogues of intellectual property rights that have been generated by public aid in the North, in particular within the European Union. Under the current practice, the ownership of these exclusive rights is usually fragmented among a multitude of small and medium-sized private production, publishing and distribution companies that are the beneficiaries of subsidies from wealthy states. It is common practice with publicly funded research and development ("R&D") in the field of technology that patents on inventions belong to the academic institutions that financed this R&D¹⁴. This approach should also apply to copyright and other

13 Who pays for culture shapes it: In the early eighties, the authorities of Zurich decided to heavily fund the local opera house, and to shut down a place for alternative culture in the city. Many young people did not accept this cultural bias induced by the taste and influence of the wealthier tax payers that eventually caused several weeks of heavy riots in one of the richest cities of the world. In my opinion, the principle of international solidarity and cooperation (art. 2.4), the rules on international cooperation and development (art. 12 to 15), on preferential treatment for developing countries (art. 16) on the international fund for cultural diversity (art. 18) should be read in the light of this threat.

14 As an alternative to patent protection, public universities may also chose to bring certain results of their R&D to the public domain by disclosing them.

intellectual property right titles that are generated in the course of the publicly funded creation and production of cultural goods and services. A bundling of these rights and their collective management could contribute to fund new projects by attracting private money, catalogues of intellectual property rights serving as guarantees for financiers¹⁵.

I propose that Article 18 of the UNESCO Convention should be implemented by way of creating one or more global intellectual property rights catalogues of state-aided cultural contents that should be managed in a way that they can serve as a guarantee to finance the independent production and distribution of artistic works from all over the world. In other words, Article 18 should be implemented by way of bundling and collectively valorising intellectual property rights that were generated by state aid in order to increase the competitiveness of films, books and music from a great variety of cultural origins, and to provide an incentive for subsidised producers and publishers to find private financing in the market¹⁶.

A commitment not to commit oneself

In my “traffic light” metaphor above, there is an understanding between the legislator and the private road owners about the need to provide signals, but not on what the different signs mean: the various parties’ views may differ on the colours and their meaning. Furthermore, would it be beneficial for the traffic over the roads of different owners if each road owner could develop and implement unique rules? Long distant car drivers would certainly object to this normative fragmentation. In other words, there is a threat to cultural diversity not only from rules-induced globalisation, but also from “nationalisation”. The latter situation is often synonymous with protectionism when countries discriminate in favour of local content and content providers, whereas the former usually conditions countries to become more open by removing obstacles to trade.

Promoting cultural identities and cultural diversity needs both protection and openness. The challenge consists in finding the right balance. Article 7 of the UNESCO Convention provides that the Parties shall endeavour to create in their

15 The Hollywood major film studios rely on their intellectual property assets to gather the huge amount of production and marketing money they invest each year for the worldwide promotion of their films. More generally on the role of intellectual property to attract borrowers and investors, see Roya Ghafele, *Financing Technology on the Basis of Intellectual Property: The preliminary role of Intellectual Property in developing technology markets in countries in transition* (no dated): www.oecd.org/dataoecd/60/41/34616910.pdf; see also *The Economist*, *Securitising intellectual property. Intangible opportunities*, 17 June 2006, p. 77.

16 See also Christophe Germann, *Qualité et popularité en cinéma: “Soyons réalistes, demandons l’impossible!”*, in: *Le Courrier* of 30 June 2006, Geneva, p. 4.

territory an environment which encourages individuals and social groups to have access to diverse cultural expressions from within their territory as well as from other countries of the world. In other words, cultural diversity also needs international trade in order to exist¹⁷. This requirement is in line with the basic principles of the WTO agreements requiring that members not discriminate between local and foreign goods and services.

In this context, one must quote Articles 2.2 and 5.2 of the UNESCO Convention that set forth the principle of sovereignty. States have the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory. This may open the door to a form of anarchy in favour of the economically and politically stronger countries which would be accountable only under international trade regulations and not under international law that specifically aims at promoting cultural diversity. This scenario is a long distance from what was contemplated when the parties started to elaborate and negotiate the UNESCO Convention on cultural diversity.

I therefore conclude that the UNESCO Convention implicitly is an ambiguous commitment not to commit oneself either to free trade or to cultural diversity. Since there are other enforceable treaties such as the WTO agreements under which the parties strongly commit themselves to progressively liberalise trade, cultural diversity remains outside the real agenda. Therefore, the UNESCO Convention does not fulfil its purpose, at least from the legal perspective, and since it was intended to be a legally binding instrument, there is no other perspective that should be considered relevant. Of course, the negotiating process had the positive side effect of increasing awareness about cultural diversity among a great number of states and in civil society. But mere conscience should not be the end of the story. For those who are not satisfied with the pyrrhic victory of the UNESCO Convention on cultural diversity, it is now time to take a great step forward¹⁸.

17 For instance, the Japanese audience became more familiar with the situation in ex-Yugoslavia by watching Danis Tanovic's "No Man's Land" and, thus, enjoyed one of the advantages of cultural diversity. The Nippon public could see this film only because it was distributed in Japan. Vice-versa, the Bosnian moviegoer obtained a better insight into the dark sides of the contemporary Japanese society by watching Hirokazu Kore-Eda's "Nobody Knows", provided that this movie was released or broadcasted in their country. These examples illustrate the truism that cultural diversity relies on international distribution, which, in turn, requires cross-border trade without undue obstacles.

18 In 281 B.C., King Pyrrhus of Epirus landed on the southern Italian shore with 20 elephants and 25,000-30,000 men to defend his fellow Greek speakers against Roman domination. While Pyrrhus won the first battle, he lost half his men and ultimately, the war. The term Pyrrhic victory comes from this devastating battle.

Weak faith in good faith

According to Article 26 of the Vienna Convention, every treaty in force is binding upon the parties to it (*pacta sunt servanda*) and must be performed by them in good faith. Article 20.1 of the UNESCO Convention repeats and clarifies this good faith obligation. It requires its parties to foster mutual supportiveness between this Convention and the other treaties to which they are parties, and to take into account the relevant provisions of this Convention, when interpreting and applying the other treaties to which they are parties or when entering into other international obligations. This provision further expressly states that the parties shall not subordinate the UNESCO Convention to any other treaty. This sounds *prima facie* very much in favour of cultural concerns.

There is room for scepticism, however, if one critically explores the meaning of this Article by taking the current realities of the relevant trade regulations into consideration. Even where a margin of manoeuvre exists in the context of interpreting existing undertakings or of negotiating new ones, the advocates of cultural concerns will face the fact that they have only very soft law to oppose hard trade rules. The UNESCO Convention is full of provisions containing vague terms and concepts that can be interpreted in many ways. This Convention furthermore has no dispute settlement system with an efficient sanction mechanism that will produce concrete interpretations of its terms and concepts in order to make its rules more predictable and transparent. The parties therefore have almost no incentive to clarify and develop law by litigation. One can quote the example of treaties dealing with intellectual property protection to illustrate this point: there was almost no international case law pertaining to the treaties administered by the World Intellectual Property Organisation (WIPO), such as the Berne Convention and the Paris Convention. This situation changed dramatically when these treaties were partially incorporated into the WTO agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Since TRIPS is enforceable through the WTO dispute settlement system it has generated a number of cases during the last ten years which have provided a better understanding and, consequently, a more binding interpretation of the rules at stake.

The UNESCO Convention therefore will face trade regulations that are most often clearer and more effective. It is very likely that WTO law will prevail over the rules of the UNESCO Convention, and the “good faith” requirement will probably be of little help for cultural concerns. Eventually, this Convention risks becoming irrelevant except to permit rich countries to preserve cultural policies based on subsidies, and maybe existing quota regulations like those contained in the Television Without Frontiers directive (however, the recent reduction of the South Korean screen quotas does not even support this optimistic forecast).

One may argue that keeping subsidies for culture is better than nothing. I question the good faith (in the sense of Article 20 of the UNESCO Convention) of predominantly rich governments arguing in this way: subsidies are needed to protect and promote the cultural identities of countries that can afford them. However, subsidies help to close these same countries from the cultures of weaker economies that usually cannot afford sufficient state aid for cultural industries, and this is detrimental to cultural diversity.

Cultural diversity versus cultural nationalism

Article 20.2 of the UNESCO Convention deals with conflicts of treaties by stating that nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties¹⁹. During the negotiation process there was much discussion about an alternative phrasing of this provision on the relationship to other instruments, proposed in the initial experts' draft of July 2004 as follows:

“The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.”²⁰

This stronger formulation, however, would not have changed anything. Obviously, it would have had no effect on the United States and like-minded countries that refuse to adhere to the UNESCO Convention, and it would arguably not have overcome the substantial shortcoming of the UNESCO Convention which is merely a “commitment not to commit oneself”.

In many cases, state sovereignty in cultural matters is clearly inconsistent with the single undertaking approach adopted in the WTO agreements. Beyond trade concerns, however, unrestricted state sovereignty may be detrimental to the very cause of cultural diversity as well. When it comes to determining the right balance between protecting local cultures and welcoming foreign ones, that constitutes the essence of cultural diversity, who is more competent to assess whether the Leviathan does the right thing and whether it does the thing right than a fellow Leviathan? In other words, if France, for example, believes that its film policy is satisfactory from the perspective of promoting local content, Senegal, or any other country that would

19 The principle that an earlier treaty prevails over a later one does (“lex posterior derogat anterior”) as set forth in art. 30 para. 3 of the Vienna Convention does not apply pursuant to art. 20 para. 2 of the UNESCO Convention. The Parties to the UNESCO Convention that are WTO Members therefore remain fully bound by WTO law. The same applies with respect to bilateral trade agreements.

20 Art. 19 Option A, para. 2 of the Preliminary draft of a convention on the protection of the diversity of cultural contents and artistic expressions, CLT/CPD/2004/CONF-201/2.

like to export its motion pictures to France, could challenge this view from the perspective of promoting cultural diversity²¹. I thus argue that a carefully designed limitation of state sovereignty in cultural matters could contribute to a better check and balance between the promotion of the cultural identity and the cultural diversity in any given state that would accept such restriction. In this context, the basic rules of the multilateral trade game could inspire the elaboration of a new world culture system in order to overcome an introverted and discriminatory attitude that today characterises many national cultural laws and policies. This innovative approach may contribute to realising the guiding principles of equitable access, and openness and balance as outlined in Articles 2.7 and 2.8 of the UNESCO Convention. It could provide clear, predictable and binding “traffic lights” for the dynamic interplay between private and public stakeholders from a great diversity of cultural origins.

For the time being, from the legal perspective, the UNESCO Convention is to a large extent a mere repetition of the UNESCO 2001 Declaration on Cultural Diversity, a simple programme without effective constraints. I expect that the UNESCO Convention will not generate any substantial results since this instrument has no real mechanism to develop case law; that is to confront law with reality, and to defend its objectives on a level playing field vis-à-vis the conflicting objectives of effectively enforceable trade agreements. As a matter of fact, there is nothing that should concern those who favour promoting trade liberalisation without taking account of cultural concerns. In this sense, the UNESCO Convention on cultural diversity does not reflect certain parties’ initial intention and understanding that this instrument should actually go beyond the 2001 Declaration:

“The appropriate terminology to be used to express the rights and obligations of States Parties under the Convention was the subject of an important debate. Out of respect for the principle of State sovereignty, the use of verbs such as “must”, “shall” and “undertake” with States as subjects, and of expressions implying the obligation to perform specified actions (such as “States Parties are under the obligation [or have a duty] to...”) was questioned. In response to this concern, the experts were reminded that the mandate given to the expert group was to produce a draft Convention and that, as a result, it was necessary to use terms expressing with some force the commitments of the States under the Convention. In the absence of the terminology appropriate to such an instrument, the document would become a series of statements of principles that would have the impact of a simple declaration. In view of the existence of the UNESCO Universal Declaration on Cultural Diversity, some members insisted on the need to go beyond the document adopted in 2001 by giving to the future Convention a binding character particularly expressed in the chapter on

21 See in this context the above quoted statement by André Lange that is referred to in footnote 12, where the cited statistics indicate the existence of a “cultural fortress Europe”.

rights and obligations, which should be regarded as the core of the legal document under discussion.”²²

The negotiation process revealed the fact that many defenders of the cultural cause are not familiar enough with the contemporary logics of multilateral trade regulations that have been developed over the last fifty years. I perceive these trade logics as a challenge and, at the same time, as an opportunity for culture.

As a cultural diversity advocate (and not just an international trade lawyer) I dare to state the heretic opinion that the refusal of the United States and their fellow countries to adhere to the UNESCO Convention should actually be considered as an opportunity for the cause of cultural diversity. Universal approval of this instrument would have re-introduced the concept of “cultural exception” in its nationalistic understanding that was expressly rejected when the WTO members concluded the Marrakech agreements some twelve years ago. In my opinion, the concept of “cultural exception”; that is, that international trade regulations shall not apply to culture at all and, consequently, “cultural nationalism” shall prevail, will always fail to integrate the poor countries into a desirable world culture system where private and public players would be banned from practising cultural discrimination. In addition, one should not forget that true culture has essentially a universal vocation that stands in contradiction with an introverted attitude of nations. This perception of culture legitimates *inter alia* UNESCO's global engagement for culture as an international organisation.

Distortion of trade and competition by private and public players

In 1994, the Uruguay round ended with the creation of the WTO as an international organisation and the conclusion of its agreements. This bundle of multilateral and plurilateral agreements covers trade in goods (GATT), trade in services (GATS), and trade related aspects of intellectual property rights (TRIPS)²³. The progressive

22 Report of the second meeting of experts (category VI) on the preliminary draft of the Convention on the protection of the diversity of cultural contents and artistic expressions of 30 March-3 April 2004, p. 8.

23 Most of the WTO agreements are the result of the 1986-1994 Uruguay Round negotiations, signed at the Marrakesh ministerial meeting in April 1994. There are about 60 agreements and decisions. Negotiations since then have produced additional legal texts such as the Information Technology Agreement, services and accession protocols. New negotiations were launched at the Doha Ministerial Conference in November 2001; see the WTO legal texts on: www.wto.org/english/docs_e/legal_e/legal_e.htm#finalact. For an introduction to WTO law and on its basic principles, read for example World Trade Organization (ed.), *Understanding the WTO*, Genève 2005: www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf. For a deeper insight, read Thomas Cottier / Matthias Oesch, *International Trade Regulations, Law and Policy in the WTO, the European Union and Switzerland, Cases, Materials and Comments*, Berne / Londres 2005.

liberalisation of international trade by legal means, which is at the heart of the normative globalisation as opposed to factual globalisation, is induced primarily by the WTO agreements, as well as by other multilateral, plurilateral and bilateral trade agreements²⁴. These international treaties seek to remove barriers to cross-border trade that are erected by the States.

It is now well-known that international trade regulations represent a challenge and threat to regional and national laws and policies aimed at promoting local cultural identities and cultural diversity. Public aid for local contents is commonly considered as a distortion of international competition and trade. By economically favouring local content and local content providers via tariffs, quotas and subsidies, state intervention grants them a competitive advantage vis-à-vis foreign content and content providers in the national market and, in the case of export relevant subsidies, international markets. However, the rules of the WTO and of many regional trade agreements and bilateral free trade agreements do not cover distortion of international trade and competition caused by private corporations dominating the market. This limited coverage of trade regulations is very relevant for cultural industries because, while these rules challenge trade distorting state intervention, they leave unsanctioned the often more harmful abuses of a dominant private position. The issue is here not so much the insufficiencies of the world trading system, but rather the lack of awareness of states to address distortion of competition and trade via national anti-trust legislation.

The rationale underlying the promotion of international trade by rules of law as a way to enhance welfare resides in the economic theory of “comparative advantage.” This theory can conflict with the rationale of public policies aimed at promoting the creation and production of local artistic expressions. Such expressions contribute to building up cultural identities. Eventually, cross border exchanges of local artistic expressions reflecting various cultural identities is supposed to generate cultural diversity. In other words, without trade of cultural goods and services reflecting a variety of cultural identities cultural diversity is impossible to achieve²⁵. When dealing with the question of the cross-border distribution of cultural goods and services, it therefore makes sense to take inspiration from trade-liberalising legal tools such as those developed under bilateral and regional free trade agreements, and under multilateral undertakings, foremost among which are WTO rules.

The removal of state erected obstacles to trade promotes cultural diversity if these obstacles hinder the free exchange of cultural goods and services. The issue with the current generation of WTO rules consists in considering cultural policies as a mere distortion of trade and competition if such policies favour local cultural content and

24 Normative globalisation is primarily induced by rules of law, firstly the principles of National Treatment and Most Favoured Nation, whereas “factual” globalisation results mainly from technological developments in the areas of transportation and information technologies.

25 See footnote 18.

content providers over foreign ones. The intervention by the state, however, is usually a response to market failure, the incapacity of the market forces to achieve a given policy goal, such as to promote local cultural identities and cultural diversity; for example, because local creators and producers of artistic expressions cannot take advantage of economies of scale enjoyed by their foreign competitors, or because they suffer from abuses of dominant market positions. In this case, many cultural creations and productions need the protection of the state in order to come into existence. Classical tools of state intervention in the sphere of culture are subsidies and quotas, in particular for films and music. It should be understood that quotas also translate into revenues for the producers and other right holders and thus essentially qualify as subsidies as well. This means that the local content providers are favoured vis-à-vis their foreign competitors who do not enjoy similar assistance from the state. This type of discrimination between local and foreign creators and producers of cultural goods and services may violate the national treatment principle. This discrimination may amount to a barrier to trade, provided the cultural goods and services that enjoy state protection are trade relevant²⁶. In any case, the point is that cultural policy tools based on subsidies are in most cases out of reach for developing and least developed countries for obvious economic and political reasons, at least insofar as such aid is required to achieve a critical mass sufficient to influence market shares.

The WTO rules only address trade distortion by state intervention. As mentioned, they do not cover distortion of trade and competition caused by private entities since competition law is not part of these rules. From the cultural perspective, the systemic shortcoming of this legal situation is obvious if one considers that private entities dominating a given market may strangle the creation, production and distribution of local trade-related culture. In particular, the state may need to intervene against abuses of dominant positions held by private players. The typical instrument for this purpose is competition law that, at the moment, largely remains under the regulatory competence of states²⁷.

26 A heavily subsidized opera house whose repertoire is mainly in the public domain typically is less trade relevant than a public broadcasting company that disseminates contemporary music from various origins, but this trade relevancy can vary in time. Furthermore, an opera house may promote local cultural identity to a lower degree than a radio station, e.g. the opera house of the Brazilian city of Manaus in the heart of Amazonas.

27 This current state of trade law constitutes part of the so-called "Singapore Issues" with which the WTO has to deal. Paragraph 23 of the Doha Declaration recognizes that a multilateral framework could enhance the contribution of competition policy to international trade and development. Para. 25 provides for the Working Group on the Interaction between Trade and Competition Policy to focus on the clarification of (a) core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; (b) modalities for voluntary co-operation, and (c) support for progressive reinforcement of competition institutions in developing countries through capacity building. However, no substantial progress has so far been made in integrating competition law into the WTO system.

A high degree of corporate concentration characterises the global cultural industries. Concentration leading to dominant market positions often translates into creative control over artistic expressions dedicated to mass audiences lying in the hands of a few culturally like-minded decision-makers. In this case, market forces commonly fail to achieve the public policy goals of cultural diversity. As a matter of fact, concentration can contribute substantially to harming the economic viability of a variety of cultural identities and their cross-border dissemination that would eventually generate cultural diversity. There is arguably neither a convincing economic nor a political or “cultural” justification for tolerating a situation where concentration of private players hurts cultural diversity. Classical state interventions based on quota regulations and subsidies usually fail to reach the critical mass needed to be really effective in correcting this market failure, notable exceptions being South Korea’s screen time quotas and France’s highly efficient tax system for the film industry. Furthermore, as mentioned, state aid based on subsidies remains out of range for most economies in transition, and developing and least-developed countries.

In summary, I consider the fact that competition laws and policies are, to a very large extent, outside of the scope of current WTO agreements, and therefore subject to national sovereignty, rather as an opportunity than as a threat for cultural diversity policies. To stress it again: so far, this opportunity has enjoyed little awareness among the states eager to promote this policy goal.

The case for multilateralism against “the law of the jungle”

From the legal perspective, liberalism as articulated by the principle of autonomy of private parties, risks becoming a form of totalitarianism when the rule of the strongest, “the law of the jungle”, prevails in trade areas that are sensitive for generating and disseminating opinions and expressions among the people. Obviously, contractual freedom without safeguards, cannot guarantee freedom of speech. Unbalanced bargaining replaces deliberation on a level playing field, when one contract partner dominates the other in a way that allows the former to reduce or even break the autonomy of the latter. On the international level, bilateralism between a rich and a poor country in trade areas that are relevant for cultural diversity may demonstrate the rule of the strongest where it is aimed at replacing the public domain by the private one without efficient safeguards on the national level based on competition law. This can open the door to “cultural imperialism”²⁸. Indeed,

²⁸ For definitions of “cultural imperialism”, see for example Russell Smandych, *Cultural Imperialism and Its Critics: Rethinking Cultural Domination and Resistance*, p. 3 ff.; Bernd Hamm, *Cultural Imperialism: The Political Economy of Cultural Domination*, p. 18 ff.; Katharine Sarikakis, *Legitimizing Domination: Notes on the Changing Faces of Cultural Imperialism*, p. 80 ff.; Biyot K. Tripart, *Redefining Cultural Imperialism and the Dynamics of Culture Contacts*, p 301 ff., all in: Bernd Hamm / Russell Smandych (eds.), op. cit.

obstacles to international trade caused by private interests are at least as detrimental to the cause of cultural diversity, and to the materialisation of the theory of “comparative advantage” underlying international trade regulations, as are state-erected barriers to the free movement of cultural goods and services²⁹.

Drahos examined the way in which bilateral trade negotiations aimed at concluding bilateral investment treaties and bilateral intellectual property agreements are being used by the U.S. and the EU to build more extensive protection for intellectual property than that set out in TRIPS to the disadvantage of developing countries (the so-called TRIPS Plus standard). He used examples of U.S. and EU negotiations with countries such as Nicaragua, Jordan, and Mexico to illustrate how developing countries are being drawn into a highly complex multilateral and bilateral web of intellectual property standards over which they have little control. The author describes *inter alia* how these bilateral agreements are being used to intervene in the detailed regulation of a developing country's economy. Furthermore, he shows how the Most Favoured Nation principle within TRIPS combines with these bilateral agreements to set and spread new minimum standards of intellectual property faster than would have happened otherwise. Eventually, he concludes with a reminder of the benefits of multilateralism in trade and the dangers of bilateralism:

“One of the important features of the WTO regime, including TRIPS, is that it commits states to a process of constant review and negotiation. Aside from these negotiations within the WTO, developing countries have been facing, beginning in the 1980s, increasing waves of bilateral negotiations from both the U.S. and EU on intellectual property. The nature of the standards to be found in BIPs suggest that developing countries are having very little success, if any, in halting the spread and strengthening of intellectual property norms. Even if developing countries possess the relevant IP expertise they have little real bargaining power in a negotiation in which they are seeking access to the U.S. or European market (especially if they wish to become members of the European Community or NAFTA). Almost certainly, developing country negotiators are acquiescing to the IP norms in BIPs as part of the

29 Neither cultural diversity nor the theory of comparative advantage can effectively materialize where abuses of dominant position or other anti-competitive practices by private players hinder market access. This is the reason why the EC Treaty aims at removing state and private obstacles to trade between the Members of the European Union via the rules implementing the freedom of movement of goods (art. 23-38 of persons), and the freedom of movement of persons, services and capital and payments (art. 39-60 of the EC Treaty), and via rules on competition (art. 81 to 86 of the EC Treaty) and state aid (art. 87-89 of the EC Treaty). On the global level, the relationship between trade and competition was addressed in the case Japan - Measures Affecting Consumer Photographic Film and Paper, where the United States unsuccessfully argued that Japanese government's tolerance of an allegedly anti-competitive behavior by private actors was not consistent with WTO law, see Panel report WT/DS44/R

‘standard deal’ they have to accept as the price for gaining entry to the lucrative markets of Europe and the U.S.”³⁰

The findings of this analysis of trade-related intellectual property protection and development concerns arguably can be applied *mutatis mutandis* to the area of trade and culture in order to reveal an additional substantial weakness of the UNESCO Convention. Under this Convention, the parties remain sovereign in cultural matters and are not committed to any enforceable discipline to promote cultural diversity. This causes greater vulnerability for the parties individually to be pressured via bilateral trade agreements with the United States and other countries (possibly even other parties to the UNESCO Convention) to accept trade-offs that can be highly detrimental to their cultural interests in exchange of trade benefits in non-culture related sectors, for example, better market access for bananas or textiles.

The contemplated free trade agreement between South Korea and the United States illustrates this issue. The former country gave up 50 percent of the screen quotas that have contributed greatly to promoting its cultural identity domestically and abroad, in order to be in the position to negotiate advantages in other trade areas. In this light, multilateralism as applied by the WTO appears as a safeguard against the “law of the jungle”, i.e. the law of the stronger party, whether this party is the more powerful economic lobby on the domestic level, or the economically wealthier country on the international level, or, as is most often the case, a combination of both. In comparison, within a multilateral system, the weaker parties can engage into alliances that allow them collectively to better defend their interests. The UNESCO Convention does not promote multilateralism since, in fact, it “nationalises” cultural diversity by allocating full sovereignty for cultural diversity questions to its Parties.

Classical state intervention to promote cultural identities and diversity

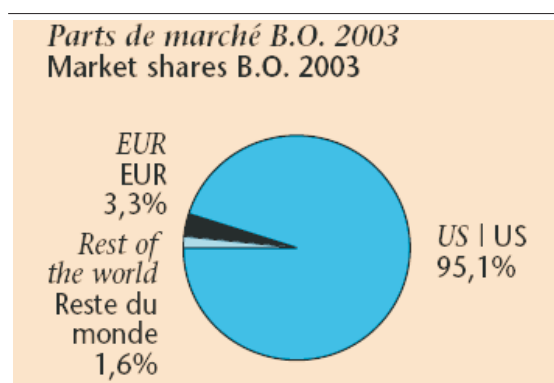
Market shares can serve as an indicator of the strength of domestic culture and cultural diversity. If we take the film industry as an example, we find four main types of market shares:

- 1) market shares resulting from an absence of state intervention because the local film industry dominates the domestic market (United States);
- 2) market shares resulting from an absence of state intervention because the state cannot afford consequential cultural policies (most developing and least developed countries);

30 Peter Drahos, *Bilateralism in Intellectual Property*, 2001, p. 2 and 15:
www.maketradeair.com/assets/english/bilateralism.pdf

- 3) market shares resulting from a state intervention mainly based on quotas (South Korea);
- 4) market shares resulting from a state intervention mainly based on subsidies (France and the European Union)³¹.

In 2003, domestic films in the United States reached 95.1 percent market share, whereas films from Europe and the rest of the world attracted only 3.3 percent and 1.6 percent, respectively, of all American moviegoers³². In light of these figures, one can argue that the European taxpayers finance the tiny remnant of cultural diversity in the film sector of the United States. This latter country does not overtly subsidise local film production³³. There, the game is left to a very large extent to private players, acting as an oligopoly in an allegedly free market, and arguably the situation in terms of diversity of the supply of cultural goods and services looks accordingly poor. I label this situation as “cultural uniformity”:



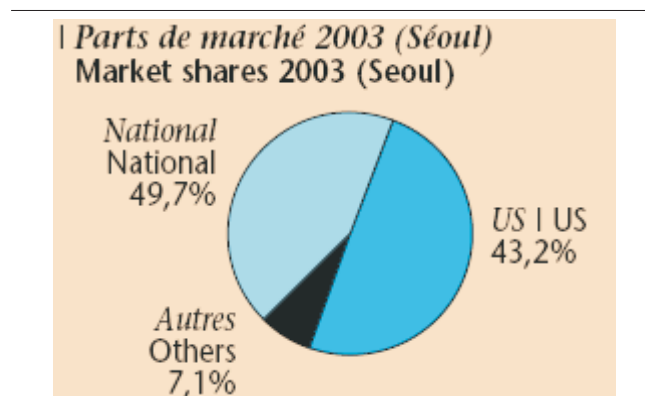
31 The market shares in India and, more recently, Nigeria do not fit into any of these four categories whose domestic film industries are very successful without subsidies or quotas.

32 The statistics are quoted from the European Audiovisual Observatory, Focus 2004, World Film Market Trends, on: www.obs.coe.int/online_publication/reports/focus2004.pdf.en For more recent figures, see Focus 2005: http://www.obs.coe.int/online_publication/reports/focus2005.pdf.en

33 It is likely, however, that the United States substantially subsidized their domestic film industry's export activities through the “Foreign Sales Corporations” tax scheme. This public aid was considered as inconsistent with WTO rules, see the Panel report United States - Tax Treatment for "Foreign Sales Corporations" Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/RW; and the Appellate Body report United States - Tax Treatment for "Foreign Sales Corporations" Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/AB/RW.

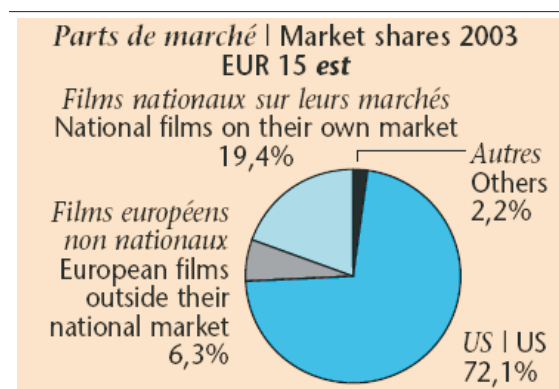
Similar figures apply for countries that cannot afford cultural policies in the film sector, including most developing and least developed countries (most notable exceptions are India and nowadays Brazil where domestic films have a substantial market share).

If the state protects local content by quantitative restrictions to trade; that is, quotas or equivalent measures, it reduces the supply of cultural goods and services from foreign origins and, as a consequence, the overall diversity of cultural offerings. The screen time quota in South Korea for theatrical release has led, in 2003, to a market share of 49.7 percent (45.2 percent in 2002) for local content; 43.2 percent (48.9 percent in 2002) for content from the oligopoly of the Hollywood majors;³⁴ and 7.1 percent (0.8 percent in 2002) for content from third cultural origins. I label this situation as “cultural duality”.



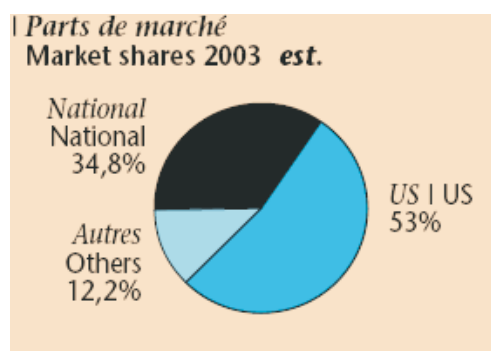
The fourth model may be found in the European Union where, again in the same period of time, U.S. films achieved approximately 72.1 percent, whereas national films obtained 19.4 percent, European films outside their national market obtained 6.3 percent, and films from the rest of the world obtained 2.2 percent. Many of the EU members substantially subsidise their own local film industry. I label this situation as “quasi cultural diversity”:

³⁴ The majors’oligopoly (“Hollywood studios”) includes Walt Disney Company, Sony Pictures Entertainment, Inc., Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corp., Universal Studios, Inc. and Warner Bros.; for updates of this list, see the website of the Motion Picture Association, the Majors’ trade organization at www.mpaa.org; for the most recent data, see The US Entertainment Industry Market Statistics 2005: www.mpaa.org/researchStatistics.asp



On the national level, France is at the top of public aid through an efficient, sector specific tax system (so-called *taxe parafiscale*) that accumulates an annual aid of more than Euros 0.3 billion. This country levies a percentage from the revenues generated by the whole audiovisual sector, and distributes it mostly to local film producers (a small part of this aid is granted to film projects from transitional and developing countries via the *Fonds Sud* development programme, and other parts are spent on foreign films made according to international co-production agreements with France)³⁵. As a matter of fact, in France, public regulations cause Hollywood to co-finance local content and, thus, to contribute to more cultural diversity in the national film market. In 2003, the French taxes levied from 53 percent of the market share obtained by U.S. films in the Hexagon to be redistributed among French producers in subsequent years to preserve local film production. In turn, this production achieved approximately 34.8 percent of the share in their own national market (during that year, 12.2 percent of the market share was obtained by films from third countries, mainly European ones).

³⁵ Since its creation, the French “Fonds Sud Cinéma” set up by the Ministry of Foreign Affairs and the Ministry of Culture and Communication (Centre National de la Cinématographie - CNC) aided more than 300 film projects, see: www.diplomatie.gouv.fr/fr/



Let me critically analyse these various types of market shares from the point of view of public choice and healthy competition that would promote freedom of expression of creators and producers of cultural goods and services, and freedom of opinion for the audience.

Market shares and public choice

One can deduce from market share measurable elements to identify the state of cultural identity and cultural diversity in a given market. For example, based on the figures above, one can assess that South Korea, which relies mainly on quotas, has a stronger film cultural identity than does France, which relies mainly on subsidies. On the other hand, France seems to enjoy a greater circulation of films from the EU and from third countries and therefore has more cultural diversity than does South Korea, in terms of market share obtained by films of various cultural origins.

One may argue that the South Korean quotas restrict freedom of choice in the sense that it conditions the audience to watch local content at given times, or to abstain from going to the theatres³⁶. It is interesting to stress that this argument would also apply in the context of the film market within the United States, where most of the audience has no choice other than to go to theatres that almost exclusively show motion

³⁶ A similar argumentation could apply to local content quotas imposed upon broadcasters according to the Television without Frontiers Directive and similar instruments. The main purpose of these types of State intervention is to provide exposure to the public for local content and to generate revenues in favor of local content providers at a lower cost for the State than via direct public payments in order to secure the economic viability of these actors. If local content providers want to take advantage of the quotas they need to meet the demand in this protected environment at least to the extent that the targeted audience does not completely desert the supply, and at most to make profits.

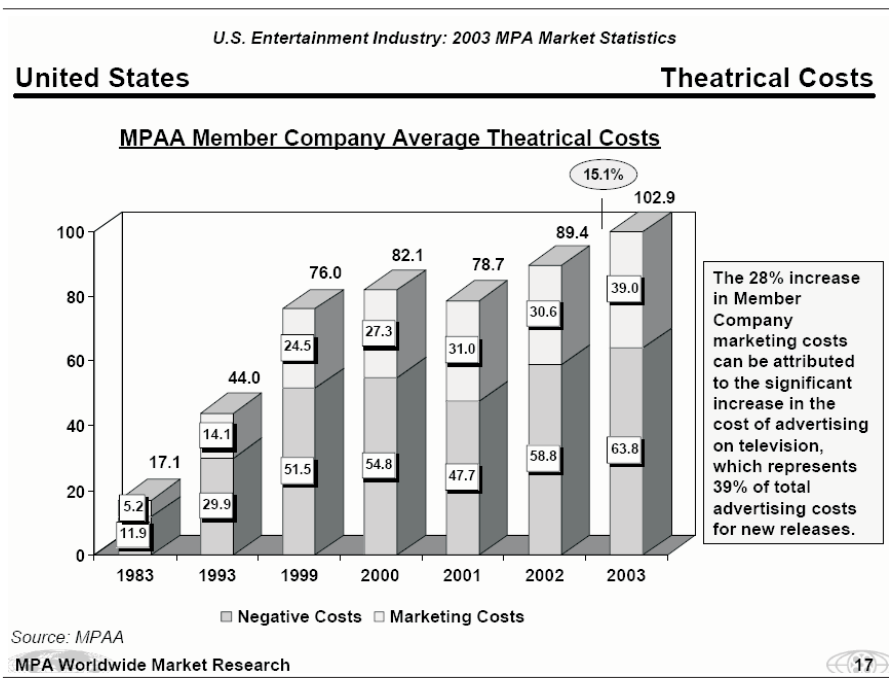
pictures originating from the oligopoly of Hollywood majors. In this case, two main opinions prevail. According to the first, it is the demand that wants cinematographic works from one single, largely culturally uniform origin, and according to the second, the demand is predominantly supply-driven. In contrast, in France, the audience is not obliged to see subsidised domestic or foreign films since it can choose between them and those supplied by the Hollywood oligopoly. This greater choice is also available in most other European countries.

Of course, it is empirically difficult, if not impossible, to assess which opinion better reflects reality. If no other choice is provided to the audience in the market place, the audience is obliged to consume the cultural goods and services supplied by the Hollywood oligopoly. One ignores, however, whether this supply would also meet the demand in a context where unbiased cultural diversity would prevail; that is, where films from a variety of cultural origins would enjoy equivalent marketing investments and a distribution on a level playing field. If so, the supply-driven demand and the demand-driven supply would meet on more balanced terms; if not, the situation in terms of public freedom of choice would be worse than the one in South Korea³⁷. As a matter of fact, from the perspective of the consumers, if you can only buy and read *Pravda*, it makes no difference whether the limited supply is imposed by the state or by a private publisher dominating the market to an extent that leads to the exclusion of all competitors. Any state facing the question of whether or not to intervene in the market in order to realise cultural diversity as a legitimate policy goal, should understand this truism.

The market share figures above confirm my interpretation that the UNESCO Convention on cultural diversity is essentially a tool for rich countries that can economically and politically afford expensive cultural policies to preserve some relatively modest market share of local content produced and distributed by cultural industries qualifying for state aid. The vast majority of countries remain out of the game. The guiding principles of solidarity and cooperation in Article 2.4 of the

³⁷ One must stress, however, that the South Korean quota system may be assessed as restraining to a much lower degree the freedom of expression of local filmmakers than a state intervention based on subsidies where the public aid is granted through an evaluation of the quality of film projects by a peer-review mechanism. Such a peer-review mechanism is in essence arbitrary and arguably often the cause of clientelism and corruption that eventually causes a low quality and popularity of the films subsidized in this way, and that could be considered as a form of hidden censorship. One can quote the example of Switzerland during the last 10 years to illustrate the devastating effects of this mechanism: Most Swiss films had hardly any box office visibility and artistic recognition in the home market and none outside of the country. In contrast, the South Korean approach generated motion pictures that became very successful during the same period of time not only domestically, but also in foreign markets where no quota restrictions apply. In this context, one should recall that export results are one of the most objective indicators for the quality of a public funding scheme.

UNESCO Convention will arguably not be sufficient to address this situation in a satisfactory manner. Once the priority needs such as security and public health are satisfied, generally no or only very scarce state resources are left to implement cultural policies in these countries, unless culture serves the purposes of the rulers, for example, as a means of propaganda, in which case it may enjoy a higher priority for obvious reasons.



Questionable cost efficiency of subsidies

The huge investment which Hollywood studios make in marketing (stars, prints and advertising) the films they produce and distribute creates market dominance for these films and largely prevents films from other cultural origins from having access to audiences. Given this reality, one may question the efficacy of many schemes in which rich states intervene in the market through subsidies.

If the average salary for stars of around US \$20 million is accounted for under marketing expenses, each of the approximately 200 films produced and distributed yearly by the Hollywood studios costs approximately US \$40 million to make (production or negative costs) and US \$60 million to sell (distribution or marketing costs). Advertising is the main tool to lure the audience into theatres³⁸. One can invest US \$40 million to make a motion picture with little chance to access the public if no monies are left to promote it in a competitive manner. The same logic applies to the music and book industry.

In most countries, film distribution is today largely dominated by the oligopoly of Hollywood majors. Film distribution means the facility to invest in competitive marketing (stars and advertising), and to bring motion pictures to theatres with the appropriate number of copies (prints) to ensure maximum simultaneous exposure to the audience³⁹.

The Hollywood studios spend their marketing money as follows:

38 Arthur De Vany Arthur. 2004, *Hollywood Economics*. How extreme uncertainty shapes the film industry, London / New York 2004, p. 122, describes the "blockbuster strategy" as follows: "The blockbuster strategy is based on the theory that motion picture audiences choose movies according to how heavily they are advertised, what stars are in them, and their revenues at the box office tournament. The blockbuster strategy is primarily a marketing strategy that suggests the movie-going audience can be 'herded' the cinema. Where this theory is true, then the choices of just a few movie-goers early in a film's run would determine the choices of those to follow. This suggests that the early choosers are leaders or people on whom later choosers base their choices. They choose to follow these 'leaders' because they believe they are more informed than they are or because they neglect their own preferences in order to mimic the leaders. Audiences who behave this way are said to be engaged in a non-informative information cascade. It is non-informative because their choices are not based on the opinions of the leaders, only their revealed actions, and the followers do not reveal their true preferences when they choose only what the leaders chose."

39 See footnote 5.

U.S. Entertainment Industry: 2003 MPA Market Statistics

Theatrical**MPAA Member Company Distribution of Advertising Costs by Media**

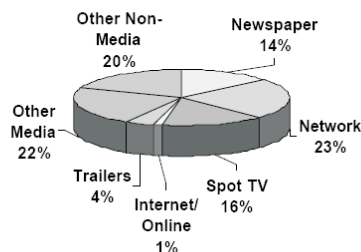
Year	Total \$	% of Total						
		Newspaper	Network	Spot TV	Internet/ Online	Trailers	Other Media	Other Non-Media
2003	\$34.84	13.9%	23.2%	15.7%	1.3%	4.4%	21.9%	19.5%
2002	27.31	13.5	23.0	17.6	0.9	4.5	21.4	19.1
2001	27.28	13.1	25.4	16.9	1.3	5.1	20.2	17.9
2000	24.00	15.6	23.8	18.3	0.7	6.4	18.8	16.3
1999	21.40	17.6	23.5	19.8	0.5	7.8	15.4	15.5

Other Media includes:

- Cable TV/Network TV
- Network Radio
- Spot Radio
- Magazines
- Billboards

Other Non-Media includes:

- Production/Creative Services
- Exhibitor Services
- Promotion & Publicity
- Market Research



Source: MPAA

MPA Worldwide Market Research



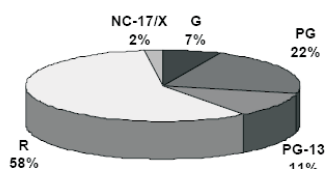
This figure illustrates the spill-over effects of a motion picture on other media. Marketing expenditures bring visibility for a particular film in other media, and those media not only gain revenues, they can use the exposure to increase their own visibility. This dynamic can impose largely uniform aesthetics and messages on the general population, and can destroy alternative forms and contents. Motion pictures that do not enjoy competitive marketing investments remain out of the sight of the public; when this situation is systematic, they become victims of an “iconicide”. When films from one single, largely homogeneous, cultural origin have competitive advertising budgets, one must expect the box office results for all age categories of the audience as follows:⁴⁰

40 For the meaning of the MPAA age related rating, see: www.mpa.org/FilmRat_Ratings.asp

U.S. Entertainment Industry: 2003 MPA Market Statistics

Ratings

Percent of films by Rating
1968 to 2003



Source: MPAA

Top Grossing Films by Rating 1968 to 2003

Rank	Title	Distributor	Box Office (USD MM)	Rating	Release Date
1	Finding Nemo	Buena Vista	339.7	G	May-03
2	The Lion King	Buena Vista	312.9	G	Jun-94
3	Monsters, Inc.	Buena Vista	255.9	G	Dec-04
4	Toy Story 2	Buena Vista	245.9	G	Nov-99
5	Aladdin	Buena Vista	217.4	G	Nov-92
1	Star Wars	Fox	461.0	PG	May-77
2	E.T.	Universal	435.0	PG	Jun-82
3	Star Wars: Phantom Menace	Fox	431.1	PG	May-99
4	Harry Potter: Sorcerer's Stone	Warner Bros.	317.6	PG	Nov-01
5	Star Wars: Attack of the Clones	Fox	310.7	PG	May-02
1	Titanic	Paramount	600.8	PG-13	Dec-97
2	Spider-Man	Sony	403.7	PG-13	May-02
3	Jurassic Park	Universal	357.1	PG-13	Jun-93
4	Lord of the Rings: Two Towers	New Line	341.7	PG-13	Dec-02
5	Forrest Gump	Paramount	329.7	PG-13	Jun-94
1	The Matrix Reloaded	Warner Bros.	281.5	R	May-03
2	Beverly Hills Cop	Paramount	234.8	R	Dec-84
3	The Exorcist	Warner Bros.	232.7	R	Dec-73
4	Saving Private Ryan	Dreamworks	216.2	R	Jul-98
5	Terminator 2	TriStar	204.8	R	Jul-91

One may find cultural uniformity in the United States acceptable by arguing it reflects a strong cultural identity. However, one should arguably be concerned about similar figures in countries such as Senegal, Argentina, Thailand or Switzerland. In this context, one may better understand the relationship between “cultural identity” and “cultural diversity”: One could interpret a very strong or a very weak cultural identity in a given place as expressing a lower degree of cultural diversity, and vice-versa.

The motion picture *11/09/01 September 11* is a good illustration of the substantial value of cultural diversity in cinema and its possible indicators. Eleven filmmakers, each from a different country (Samira Makhmalbaf, Claude Lelouch, Youssef Chahine, Danis Tanovic, Idrissa Ouedraogo, Ken Loach, Alejandro Gonzales, Innaritu, Amos Gitai, Mira Nair, Sean Penn, Shohei Imamura), were asked by the French producer Alain Brigand to create a short film relating to the terrorist attacks on New York and Washington on 11 September 2001⁴¹. The only artistic restriction was

41 See the Internet Movie Data Base: www.imdb.com/title/tt0328802/

that each individual film must last precisely 11 minutes, 9 seconds and 1 frame. The resulting collaboration offers diverse cultural, artistic and ideological perspectives on those tragic events. A tentative list of the cultural diversity indicators to be deduced from this example would include the various languages of the dialogue, the acting, the cinematographic languages, the narrative structures, the contents of the stories and their ideological references, the music, the locations, and last but not least the overall mood of the films. By analogy, one may apply this tentative list of indicators in the context of other cultural goods and services such as books and music.

New fields of research and action

As an alternative to costly subsidies and quotas, one may envisage a set of rules prohibiting cultural discrimination to protect and to promote cultural diversity. This idea is inspired by the prohibition of trade-related discrimination based on national origin that underlies WTO law and that is articulated in the basic principles of National Treatment (NT) and Most Favoured Nation (MFN). The proposed new concept should contribute to establishing an institutional dialogue, to be developed via country reviews and case law, between the WTO and an international organisation that would take care of cultural diversity on a level playing field with the WTO, for example a World Cultural Diversity Organisation (wCDo).

In this context, I will further explore the potential of using competition and intellectual property laws and policies to protect and promote cultural diversity. Competition laws that take into account the economic specificity of cultural industries may contribute to the creation of a level playing field and grant equal distribution opportunities to content creators and producers from different cultural origins. As mentioned, competition laws and policies are at the moment outside of the scope of application of the rules of the WTO.⁴² Therefore, for the time being, member states of the WTO remain fully competent to legislate in this area of law in order to provide safeguards against abuses of dominant market positions that may damage freedom of speech and, ultimately, the functioning of democracy.

A new step towards furthering cultural diversity requires a legal instrument that does not discriminate between economically rich and poor countries. This instrument should prohibit unjustified discrimination that arises from private or public players dominating a given market. More specifically, it should promote the dissemination of cultural identities on the domestic and international levels by focussing on trade-related artistic expressions (films, books, music, etc.), while improving positive spill-over effects from these expressions on non-commodified culture (for example, folklore), and vice versa.

⁴² See footnote 29.

The objective would be to elaborate a new instrument based on rules of law to implement the cultural policies at stake. In this context, I will explore legal means that are particularly suitable for countries with economies in transition, and for developing and least-developed countries that have insufficient financial resources for effective cultural policies. Intellectual property and competition laws and policies may be particularly appropriate for achieving this goal. This approach aims at putting law in context in order to broaden the discussion of legal theory and its implementation in the cultural, economic, social and political environments at stake.

Cultural diversity, competition law and intellectual property rights

There is little research available on the interactions between international trade rules and state intervention aimed at protecting and promoting cultural identities and cultural diversity on one side, and intellectual property and competition laws on the other⁴³. These latter rules, if appropriately designed and implemented, can serve as good governance tools. One can argue that existing instruments, such as the WTO's TRIPS agreement, provide the necessary flexibility to protect and promote cultural identities, and as a desirable consequence thereof, cultural diversity. An appropriate level of intellectual property protection and adequate competition legislation can contribute to a balance between the complex interests at stake. Based on the principle of territoriality, states remain instrumental to protect and enforce intellectual property rights. Furthermore, one must also remember that WTO members remain sovereign in making, implementing and enforcing competition law. As a consequence, the existing legal framework grants to states that are eager to pursue cultural diversity policies considerable room for manoeuvre if they use their national intellectual property and competition laws and policies for these purposes. The debate on access to essential drugs for poorer populations in developing countries in connection and the role of intellectual property and competition laws and policies could be stimulating inspiration for exploring new legal means to promote cultural diversity⁴⁴.

By granting subsidies, public financial aid dedicated to the achievement of certain tasks performed by private parties, states can specifically encourage the creation,

43 Alan Story calls copyright as the "sleeping giant" on the international intellectual property agenda, see Alan Story, Study Paper 5: Copyright, Software and the Internet, attached to the Report of the Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London 2002, p. 4:
www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf

44 See e.g. Jonathan Berger, Advancing public health by other means: Using competition policy to increase access to essential medicines, 2004, UNCTAD-ICTSD, at: http://www.iprsonline.org/unctadictsd/bellagio/docs/Berger_Bellagio3.pdf See also Thomas Cottier / Christophe Germann, Intellectual Property and Competition Law, in: WIPO Academy Teaching Materials, forthcoming 2006.

production and distribution of local cultural goods and services. One main rationale underlying competition laws, in contrast, is to foster economic efficiency within the market among producers, to the benefit of consumers in particular and society in general (better quality and lower price). In many jurisdictions, including the European Community, regulations on subsidies are closely linked to competition law. It is indeed in the nature of subsidies to distort competition. On the other hand, subsidies are often the costly remedy to counter anti-competitive behaviour of private parties abusing their dominant market position. The history of the U.S. film industry in its domestic market is a sequel of anti-competitive practices that started with Edison's patent-based monopoly on early cinematographic instruments (cameras and projectors) at the beginning of film history and continuing with the high vertical integration of the majors that eventually led to the so-called "Paramount decrees"⁴⁵. In this landmark case, *United States v. Paramount Pictures, et al.*, the U.S. Supreme Court found the five majors (Paramount, Warner Brothers, 20th Century Fox, Loew's, and Radio Keith Orpheum) guilty of restraint of trade, including vertical and horizontal price fixing⁴⁶. The courts ordered both the vertical disintegration of the industry and, moreover, the divestiture of approximately one half of the more than 3,000 theatres owned at the time by the large circuits (which owned or controlled all but a handful of the first run theatres in the largest twenty five U.S. cities). Some provisions of the consent decrees have more recently been relaxed.

Governments that want seriously to take care of cultural diversity in cinema are well advised to closely scrutinize the behaviour of the players dominating the market within their national jurisdictions, and, if necessary, adapt competition laws accordingly. Any move in this direction should take into account the fact that genuine competition may itself be an efficient instrument to promote real cultural diversity. True competition, in this context, would require implementing rules that provide a level playing field among competitors from different cultural origins at the marketing stage. This level playing field does not exist at the moment⁴⁷.

Applying the "essential facilities" doctrine to marketing power

If cultural policy makers decide to activate competition law resources, they should explore the so-called "essential facilities doctrine" under U.S. and EU law. In a nutshell, this doctrine "imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first." The Supreme Court first

45 Compare David Puttnam, *The Undeclared War, The Struggle for Control of the World's Film Industry*, London 1997.

46 U.S. 334 US 1. (1948).

47 One can even draw parallels between the former Soviet Union distribution system based on command economy and the Hollywood majors' centrally planned and globally effective motion picture economy of today to illustrate the lack of competition in the film industry.

articulated this doctrine in *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912). In this case, a group of railroads controlling all railway bridges and switching yards into and out of St. Louis prevented competing railroad services from offering transportation to and through that destination. The court held that this constituted both an illegal restraint of trade and an attempt to monopolise. Because it represents a divergence from the general rule that even a monopolist may choose with whom to deal, courts have established widely-adopted tests that parties must meet before a court will require a monopolist to grant access to an essential asset to its competitors. Specifically, to establish antitrust liability under the essential facilities doctrine, a party must prove four factors: (1) control of the essential facility by a monopolist; (2) the inability of the competitor practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors.

This test for antitrust liability has been adopted by virtually every United States court which has considered an “essential facilities” claim⁴⁸. Opinions of these courts also suggest that antitrust liability under the essential facilities doctrine is particularly appropriate when denial of access is motivated by an anticompetitive animus – usually demonstrated by a change in existing business practices with the apparent intent of harming rivals. Given the varied contexts in which the essential facilities doctrine has been applied, courts have declined to impose any artificial limit on the kinds of products, services, or other assets to which the doctrine may appropriately be applied. The essential facilities doctrine does not unequivocally require that a facility be of a grand nature, nor is the doctrine specifically inapplicable to tangibles such as a manufacturer’s spare parts. The term “facility” can apply to tangibles such as sports or entertainment venues, means of transportation, the transmission of energy or the transmission of information, and to intangibles such as information itself⁴⁹. The European Court of justice adopted a similar approach that is summarised in the Advocate General’s opinion of 28 May 1998 in the *Oscar Bronner* case⁵⁰.

48 The European Court of Justice added a fifth criterion requiring the absence of legitimate business reasons to refuse the access to the facility, see below footnote 52.

49 Germann Christophe, *Content Industries and Cultural Diversity. The Case of Motion Pictures*, in: Hamm, Bernd / Smandych, Russell (eds.), *Cultural Imperialism, Essays on the Political Economy of Cultural Domination*, Ontario 2005, p. 104 ff. with further references.

50 For an overview on the “essential facilities” doctrine with further references, see the opinion of the Advocate General Jacobs of 28 May 1998 in the case *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, Case C-7/97, ECR 1998 I-07791. The Court came to the conclusion that there was no essential facility in the case at stake. For an introduction to the similarities and differences between U.S. and EU competition law, see Elenaor M. Fox, *US and EU Competition Law: A Comparison*, in: Edward M. Graham / J. David Richardson (eds.), *Global Competition Policy*, Washington 1997, p. 339-354.

It would be interesting to test before courts whether the current market situation that enables the majors to invest over U.S. \$10 billion annually in marketing (stars, print and advertising) would qualify as an essential facility. Hollywood studios own substantial intangible assets in the form of catalogues of intellectual property rights that serve to guarantee the financing of this marketing. This huge intangible asset is one of the majors' main tools to dominate the markets on a sustainable basis. One must recall that in Europe, the ownership of such rights is fragmented among small and medium-sized producers, which are financed substantially by the state. Furthermore, the majors' corporate and contract-based control of domestic and international film distribution and exhibition should also qualify as an essential facility. One can therefore consider the majors' marketing power and distribution control as an essential facility that content providers from other cultural origins cannot duplicate without tremendous state aid. In light of the market structure and mechanisms currently prevailing in the film, music and book sectors, most of the providers of cultural goods and services which are denied access to this essential facility cannot reach the audience independently of the public appeal of their content. Either these creators and producers receive support from the state or they cannot continue in business.

This situation may inspire legislators and judges to elaborate and use competition rules based on the essential facilities doctrine that are specifically aimed at enhancing a level playing field among cultural content providers from a variety of cultural origins. Furthermore, by forcing market dominating private players to contribute to the policy goals at stake, such a solution may substantially contribute to implementing cultural diversity without unduly relying on taxpayers' money. It would therefore also constitute an affordable way for economically weaker countries to promote cultural diversity.

Arbitrary and misleading market definition for cultural industries

In my assessment, local agencies and courts have failed so far to use competition law to promote cultural diversity because they were unable to define adequately the relevant product and service market; that is, the goods and services and their suppliers competing with each other. Furthermore, competition authorities have so far faced the difficulty of defining and implementing cultural diversity in assessing merger and acquisitions. In my opinion, the main problem resides in the lack of clear criteria for cultural diversity as well as in the traditional definition of relevant markets.

I recommend using marketing investments made by competitors within cultural industries as the main criterion to assess anti-trust relevant situations and transactions (cartels, mergers and acquisitions, abuses of dominant position) which cause a

concentration of market power that can harm cultural diversity⁵¹. In addition, competition authorities should gather a clear picture on how this investment relates to the cultural origin of films, books and music by players dominating the market of cultural industries. This approach requires the elaboration of predictable and transparent rules to measure marketing investments and to define the cultural origin of the goods and services at stake.

As a recent example one can consider the decision by the European Commission on the merger between Sony and BMG in the music sector. In this case, the Commission subdivided the relevant market for recorded music (including A&R⁵² and the promotion, sales and marketing of recorded music) into distinct product markets based on genre (such as international pop, local pop, classical music) or for compilations. The Commission left open whether these genres or categories constituted separate markets, "as the concentration would not lead to a creation or strengthening of a dominant position under any market definition considered."⁵³

One must stress that the Commission did not assess this merger under Article 151, paragraph 4 of the EC Treaty. This clause requires that the Community shall take cultural aspects into account in its action under other provisions of the EC Treaty, in particular in order to respect and to promote the diversity of its cultures⁵⁴. In my opinion, the Sony /BMG decision clearly violates the cultural clause of the EC Treaty. The Commission should have analysed the question whether the concentration between Sony and BMG could have a negative impact on cultural diversity. It should have assessed whether the possibly increased marketing power of the merged entities would have diminished the supply of recorded music from a variety of cultural origins in terms of competitive marketing investments. This assessment would have required analysing data on the link between marketing expenditures and the cultural origin of the recorded music. All other ways to subdivide the market, in particular on genres and compilations, is without significant relevance, eventually arbitrary, and misleading to assess market power in relation to cultural diversity. Furthermore, the Commission should have evaluated the effect of collective market dominance resulting from a more concentrated oligopoly on

51 See Commission notice on the definition of relevant market for the purposes of Community competition law, OJ C 372 , 09/12/1997, p. 5.

52 A&R = Artist and Repertoire; the music industry's equivalent of research and development.

53 See the decision of the European Commission of 19 July 2004, C(2004) 2815, declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, Case No COMP/M.3333 - Sony/BMG, OJ 62/30, 9.3.2005: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/l_062/l_06220050309en00300033.pdf or, for the full length version, http://www.solv.nl/nieuws_docs/1259SONY-BMG%20merger.pdf

54 OJ C 325/33, 24 December 2002

cultural diversity in a correct way. By judgment of 13 July 2006, the Court of first instance annulled this decision on the grounds that the Commission did not correctly assess the relevant facts and erred in law with respect to the question of a collective dominant position. The Court, however, did not question the Commission's definition of the relevant market, and did not further elaborate on the impact of the merger on cultural diversity⁵⁶.

Marketing means as the main criterion for substitutability

If Article 151 paragraph 4 of the EC Treaty is to be workable for administrative and judicial procedures on cartels, abuses of dominant position, mergers and acquisitions, let me briefly describe the appropriate way to define the relevant market of cultural industries using the example of the film industry. First, the relevant competitors must be defined. For the cinematographic sector, which drives large parts of the audiovisual sector, there are several main markets in the exploitation cascade (theatrical market, various types of television and video markets). If a film is successful in the theatres, it will likely be broadcasted in prime time on television and become a video bestseller. Theatrical exploitation, as the primary market, includes three sub-markets, film producers (supply) and distributors (demand); distributors investing in print and advertising (supply) and exhibitors investing in the screening facilities and local advertising (demand); and eventually exhibitors (supply) and the cinema audience (demand). The most significant theatrical sub-market is the one between the distributors (supply) and exhibitors (demand), since it conditions, to a large extent, what will be available for the public to consume in the theatres, on

television and for home sale and rental, as well as in parallel markets such as books and music which sometimes spin-off from the success of a movie. The territorial market between distributors and exhibitors is international, since, in theory, a local exhibitor can rent a film for screening in his theatre from distributors around the world who are usually acting through local subsidiaries or independent contractors. I will therefore take the second theatrical sub-market between distributors and exhibitors to explore the definition of the product or service relevant market.

According to my thesis, the definition of the product and service market needs to take into account the economic specificity of cultural industries. The common approach under competition law is to assess the substitutable character between goods or services from the perspective of the demand, in order to determine whether such goods or services are in a competitive relationship with each other. According to European Community case law, the relevant product or service market encompasses all products or services that the consumer considers as substitutable or interchangeable with each other based on (1) their physical characteristics, (2) their price, and (3) the use to which they are dedicated⁵⁷. These criteria make limited sense when they are applied to mass cultural goods and services. Films, books and music often show little price differentiation, their physical characteristics are difficult or even practically impossible to define without an arbitrary recourse to aesthetic and content related considerations, and their intended use is commonly entertainment, perhaps combined with personal enlightenment. From the perspective of the exhibitors, the rental price of a film is generally based on a percentage of the box office results, aesthetic and content related aspects are largely irrelevant as long as the use of the film for screening purposes attracts as many moviegoers as possible into their theatres. Therefore, the most relevant criterion for substitutability from the perspective of the exhibitors' demand is the audience appeal of a given film. This appeal is largely unpredictable prior to the launching of the film in the market if one relies on a subjective criterion such as the characteristics (aesthetic and content) of the film. Competitive investments in the marketing of a film will provide more comfort to the exhibitors, and therefore condition their choices.

I therefore suggest that competition authorities replace the criteria of physical characteristics, price and intended use by the more objective one of the amount of investment in print and advertising when they assess the substitutability of films. One should adopt the same market definition for music and books, where hits and bestsellers are also largely conditioned by huge investments in advertising and distribution. In the Sony/BMG case, this approach would make the cultural clause of the EC Treaty operational.

⁵⁷ See OJ C 372, 9 December 1997.

“Like” marketing and distribution

A similar approach may be used in the context of international trade rules where a violation of the NT or MFN principles requires, among other conditions, that the discriminatory treatment takes place between “like products” or “like services”⁵⁸. As a rule, the application of the principle of equal treatment in trade includes a “substitutability” or “interchangeability” test as one of its basic prerequisites. One compares products or services that are “similar” to each other in order to assess whether there is a level playing field for the purposes of competition and cross border trade. Based on the economic specificity of cultural industries, I argue that cultural goods and services that do not enjoy comparable marketing investment are not “like” goods or services.

In the area of human rights, equal treatment of men and women or black and white people relies on the assumption that men and women or black and white people are “like” human beings. From the perspective of the rule of law, when using the principle of equality, this analogy makes sense if one considers that gender, race and culture have in common the challenge of assimilating diversity without causing uniformity. The prohibition of discrimination therefore imposes a similar approach on the normative level between different individuals, communities and cultures to enable their factual diversity to flourish. This abstract rule of law is most often made concrete in practice with respect to economic activities: for example, equal salary for equal work by men and women or equal job opportunities for black and white people. The long standing legal experience of many jurisdictions in this respect could inspire legislators who want to promote cultural diversity by enforceable rules of law. In this sense, economic activities related to culture should be the primary subject matter of the principle of equality of treatment or, at least, the principle of prohibition of discrimination.

One can illustrate these principles applied to trade-related culture by examining film distribution in a small country like Switzerland. It is typical of a U.S. film distributed in this territory by a local subsidiary of a Hollywood major to be released with over 50 copies, and advertising expenditures of more than over 300,000 Euros. In addition, such a film normally enjoys global promotional goodwill, thanks to the worldwide investment in its stars. In comparison, a film that is not distributed by a major will normally be released with not more than 10 copies and less than 50,000 Euros available for its advertising. In addition, such a film does not enjoy any additional goodwill induced by advertising abroad (such as the value of international stars) to appeal to the audience. In the theatrical submarket between distributors and

⁵⁸ See Won-Mog Choi, ‘Like Products’ in International Trade Law, Towards a Consistent GATT/WTO Jurisprudence, Oxford 2003, 11-90.

exhibitors, it is obvious that the exhibitors will tend to rent the film which enjoys the more competitive marketing investments since they are more likely to attract a greater audience into their theatres. In turn, the better box office results achieved during the theatrical release will generate a higher visibility for the film in the subsequent markets; it will cause prime time television exposure, boost video sales and rentals, and increase the demand in subsequent or parallel markets, such as merchandising, books and music. The visibility that a film can acquire in the theatrical market translates into increased public appeal. This visibility triggers media coverage which multiplies this visibility⁵⁹. According to my thesis, the expenditure in marketing to induce visibility is the most objective indicator to assess substitutability or a like character between cultural goods and services. It allows us to define whether two cultural goods or services are in competition with each other or not (substitutability test)⁶⁰.

I therefore argue that the allocation of expenditures on marketing should be the main measurable criterion to assess compliance by private players with cultural non-discrimination principles.

This thesis can be further illustrated by the example of two films that were launched on 2 February 2006 in the German speaking market of Switzerland. They achieved approximately the same box office results after nine weeks of theatrical release with more than 114,000 admissions each. The Swiss film *Vitus*, by the Berlin International Film Festival lifetime achievement award winning director Fredi M. Murer (*Höhenfeuer*), starring Bruno Ganz (*Himmel über Berlin, Pane e Tulipiani, Hitler*), was distributed by a Swiss independent company with 24 copies and a marketing budget of less than 150,000 Euros⁶¹. At the same time and in the same territory, the film *Walk the Line*, a biography of country singer Johnny Cash by James Mangold, starring Joaquin Phoenix (*Gladiator*), which was marketed by the local subsidiary of a Hollywood major, presumably enjoyed a substantially higher investment in advertising, and more screening venues and time⁶².

Bruno Ganz has arguably a higher marketing value than Joaquin Phoenix in Switzerland. However, Johnny Cash's international notoriety may have compensated this advantage. Therefore, the number of prints and the investment in advertising constitutes the primary measurable difference in terms of competitiveness in the commercial distribution circuit. This difference did not influence the box office

59 See Sandra Vinciguerra, "Hollywood pratique une discrimination culturelle à l'échelle planétaire", in: Le Courrier, 13 October 2003, available at:

<http://www.lecourrier.ch/modules.php?op=modload&name=NewsPaper&file=article&sid=2858>

60 See footnote 53.

61 See the Internet Movie Database: www.imdb.com/title/tt0478829/

62 See the Internet Movie Databas: www.imdb.com/title/tt0358273/

results in the German speaking market of Switzerland, where film director Fredi M. Murer is well-known and triggered reasonable media coverage. However, this difference is likely to penalize *Vitus* vis-à-vis *Walk the Line* in markets outside Switzerland where *Vitus* will no longer have a “home field advantage” and competitive advertising⁶³. In this context, it must be recalled again that visibility acquired during a successful theatrical release usually conditions the subsequent commercial exploitation chain such as DVD sales and rental, dissemination via television, and ancillary revenues (from book adaptation, music, video games, etc.).

One can conclude that the intrinsic quality, including unbiased audience appeal, of a given cultural good or service is not as relevant as marketing power from the perspective of the consumers, at least during the first release. This conclusion (which should be empirically tested) is meaningful in view of the fact that cultural goods and services, understood as mass expression, may heavily influence public opinion. Freedom of speech is in danger where such public opinion is based on films, books and music from one single, largely uniform, cultural source. In other words, there is little freedom of speech if there is little cultural diversity. In my opinion, the main purpose of state intervention aimed at promoting cultural diversity is therefore to prevent public and private players from having a dominant market position which restricts the creators’ freedom of expression and the consumers’ freedom of opinion.

In the context of assessing abuses of dominant positions, competition authorities and courts should obtain a clear view of marketing expenditure by cultural origin of the films, books and music supplied in a given geographical market. For example, if, prior to the merger, Sony and BMG each invested 80 per cent of their international advertising budget in blond, blue-eyed stars who sing in English and reflect a mainstream WASP ideology, and only 20 percent in musicians from other ethnic origins, languages and cultural traditions, one can conclude that the private policy of these corporation regarding cultural diversity was quite modest⁶⁴. If, after the merger, this ratio is changed to the further disadvantage of world musicians, one will conclude that this concentration worsened the state of cultural diversity. There is also the possibility that the increased promotion of WASP culture by the newly merged

63 One can also compare the box office results of “Vitus” with the ones of “Da Vinci Code” by Ron Howard starring Tom Hanks and Audrey Tautou (see the Internet Movie Database: <http://www.imdb.com/title/tt0382625>). Eventually, both films attracted more than 160.000 people into the Swiss theatres (status as of June 2006); however, whereas it took “Vitus” more than three months to achieve this result, “Da Vinci Code” (with presumably more than 60 copies and more than Euro 1 million in local advertisement) obtained it within three days only inspite of generally bad critics.

64 WASP is the abbreviation of “White Anglo-Saxon Protestant”; according to the Cambridge Advanced Learner’s Dictionary, Americans having their origins in the North of Europe and belonging to the most influent and rich part of the society in the United States are considered as WASP.

corporation could lead the competitors within the oligopoly to do the same. Eventually, if one calculates the respective ratios of marketing investment to cultural origin for all the music majors before and after the Sony/BMG merger, one could find even more worrying results. This approach should be adopted for all forms of commercial exploitation that are currently practiced in the music industry, from recorded music to online music distribution markets. Conceptually, this proposed shift of paradigm to be specifically applied to cultural industries would allow clearer revealing and assessing abuses of a dominant position based on a culturally discriminatory business practices.

Intellectual property against cultural diversity

The discussion on culture and trade mainly focuses on GATT and GATS, the WTO agreements on trade in goods and services. However, WTO members must also comply with the minimum standards of intellectual property protection as provided in the third pillar of WTO, the TRIPS agreement. This instrument offers a specific approach to deal with the relationship between trade and non-trade concerns that should be explored in the context of promoting cultural diversity. Furthermore, one must stress that intellectual property protection has not only positive affects on cultural diversity, but can also be a threat.

States seem to have a better understanding of the relationship between intellectual property and biological diversity than between intellectual property and cultural diversity, although they agree that both forms of diversity are equally important. According to the first article of the UNESCO Universal Declaration on Cultural Diversity of 2 November 2001, “as a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature.”

Article 16.5 of the Convention on biological diversity of 5 June 1992, provides that the parties shall cooperate in relation to patents and other intellectual property rights in order to ensure “that such rights are supportive of and do not run counter to its objectives” while complying with national and international laws. In comparison, the preamble of the UNESCO convention on cultural diversity merely acknowledges the importance of intellectual property rights in sustaining those involved in cultural creativity.

WTO members gained valuable experience in the context of finding a balance between patent protection and health concerns, in particular around access to essential drugs for the poorer population in developing countries. From the perspective of developing countries, higher standards of protection and enforcement of intellectual property rights could be detrimental to public health and nutrition policies. In the Declaration on TRIPS and Public Health, WTO members recognised

the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics⁶⁵. Ministers stressed that it is important to implement and interpret TRIPS in a way that supports public health, by promoting both access to existing medicines and the creation of new medicines. They issued a separate declaration designed to respond to concerns about the possible implications of TRIPS for access to medicines.

One should highlight in this context Article 5(a) of the Declaration on TRIPS and Public Health, based on Article 17 of the WTO Doha Declaration requiring that, in applying the customary rules of interpretation of public international law, each provision of TRIPS shall be read in the light of the object and purpose of TRIPS as expressed, in particular, in its objectives and principles (Articles 7 and 8)⁶⁶.

Furthermore, Article 19 of the Doha Declaration requires that the Council for TRIPS examines, *inter alia*, the relationship between TRIPS and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments. In undertaking this work, the Council shall also be guided by the objectives and principles set out in TRIPS Articles 7 and 8 and shall take fully into account the development dimension.

I argue that one should learn from the Doha process on TRIPS and health to explore critically the impact of intellectual property protection on cultural diversity. This would be especially advisable to take into account the perspective of economically weaker countries. TRIPS Articles 7 and 8, as well as its preamble, could serve as a starting point for this approach.

Article 7 provides the objectives of the Agreement. It provides that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation 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.

65 For a overview on this question, see World Health Organization (ed.), Commission on Intellectual Property Rights, Innovation and Public health (CIPRH), The Report of the Commission: Public Health, Innovation and Intellectual Property Rights, April 2006: www.who.int/intellectualproperty/documents/thereport/en/index.html

66 Doha Declaration of 14 November 2001, WTO Document WT/MIN(01)/DEC/1; Declaration on the TRIPS Agreement and Public Health of 14 November 2001, WTO Document WT/MIN(01)/DEC/2; Decision on Implementation-Related Issues and Concerns of 14 November 2001, WTO Document WT/MIN(01)/17; Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health of 30 August 2003, WTO Document WT/L/540. See WTO, TRIPS and public health, at: www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm

Article 8 provides the principles of the Agreement. It enables WTO members, in formulating or amending their laws and regulations, to adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of TRIPS. Furthermore, this provision empowers the WTO members to take appropriate measures, provided that they are consistent with the provisions of the Agreement, in order to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Articles 7 and 8 refer variously to “technological innovation”, “transfer and dissemination of technology”, “technological knowledge”, and to “socio-economic and technological development”. Construed in a narrow sense, these provisions seem to address only those forms of intellectual property protection that are technology related: patents and layout designs of integrated circuits, copyright protection for software, and protection of undisclosed information. Consequently, on first reading, one could interpret Articles 7 and 8 as not applying to the other subject matters of intellectual property protection (copyright and related rights for artistic and literary works, rights in industrial design, trademarks, trade names, geographical indications and database protection). I argue, however, that both provisions also protect the public interest in these latter fields. Such interpretation follows from the objective to contribute “to a balance of rights and obligations” and the reference to “social and economic welfare” (Article 7), to the “public interest in sectors of vital importance” to the members’ socio-economic and technological development (Article 8), as well as from the fifth recital of the TRIPS preamble that recognises “the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.” Since the list of public policy objectives mentioned in this recital is not exhaustive, there is ground to consider that Articles 7 and 8 also cover forms of intellectual property protection other than those related exclusively to technology. This interpretation arguably is consistent with Articles 31.1 and 31.2 of the Vienna Convention on the Laws of Treaties. Concretely, this would mean that the protection and enforcement of intellectual property rights based on the TRIPS Agreement should also contribute to the promotion, transfer and dissemination of non-technological content, such as cultural goods and services, in a manner conducive to social and economic welfare.

The rationale of intellectual property law is to provide an incentive for innovation and creation by granting a competitive advantage in the form of exclusive rights. Levels of protection that are too low may lead to a situation where intangible assets risk being used excessively (the so-called, “tragedy of the commons”)⁶⁷. On the other

side, levels of protection that are too high may deter creators, innovators and users because many owners may impede each other (the so-called “tragedy of the anticommons”)⁶⁸. A careful balance between protection and public domain is thus required in order to avoid inappropriate levels of protection both for technological innovation and for artistic creation.

The protection of intellectual property on the international level, as contemplated by Article 7 must achieve a balance between the private right holders interests in an efficient and effective protection of their rights abroad on one side, and the larger public interest on the other side. In this sense, both insufficient and excessive standards of protection can be seen as detrimental to the policy goal of cultural diversity. The TRIPS Agreement aims at ensuring that creation and innovation are not unduly restricted by the protection and enforcement of intellectual property through exclusive private rights, but are effectively and efficiently encouraged, in order to improve general welfare in social and economic terms.

Article 7 attempts to reconcile the public interests underlying the grant of intellectual property rights to inventors, creators and entrepreneurs; that is, the stimulation of, and access to, innovation and creation. Beyond these purposes, I argue that Article 7 also requires taking into consideration non-trade concerns, such as cultural diversity policies, since this provision expressly mentions “social welfare”⁶⁹.

Article 7 requires the parties to contribute to a balance of rights and obligations that pertains to the whole system of multilateral trade rules, including trade in goods and services (GATT, GATS and the other WTO Agreements). In other words, this balance is not confined to the trade-related intellectual property protection of TRIPS⁷⁰. This distinction can be illustrated by the example of the trade sanctions that Ecuador was entitled to take as a consequence of the arbitration ruling in the EC Banana Case.

68 See Michael A. Heller/Rebecca S. Eisenberg, Can Patents Deter Innovation? The Anticommons in Biomedical Research, in: *Science* 280, mai 1998, 698-701.

69 Whereas the overall balance shall be achieved by the application of the national treatment and the most-Favoured-nation principles to trade related intellectual property protection and enforcement, the rationales that are specific to the intellectual property system and to non-trade concerns are articulated in the TRIPS agreement through the restrictions and limitations of protection for each of the forms of intellectual property (e.g. art. 13 for copyright or art. 30 for patents). One has therefore to distinguish, on one hand, between the balance among individual right holders and users, and, on the other hand, the overall equilibrium that the TRIPS Agreement is supposed to establish in terms of trade related intellectual property rights and obligations of the Member States.

70 In Canada - Protection of Pharmaceuticals, the Panel construed art. 30 of the TRIPS Agreement that addresses exceptions to patent rights. In this context, the Panel stated that the words of art. 7 and 8 of the TRIPS Agreement should be borne in mind in terms of context, but that the three limiting conditions of Art. 30 make clear that the TRIPS Agreement negotiators did not intend for a re-negotiation of the basic balance of the Agreement (Paras. 7.24-26).

In the EC Banana Case, the arbitrators authorised Ecuador to suspend the protection of European performers, producers of sound recordings and broadcasting organisations (TRIPS Article 14) in its territory as a means of cross retaliation for a MFN violation under GATS concerning the distribution of bananas⁷¹. Cross retaliation hence implies that TRIPS aims at achieving an overall equilibrium of rights and obligations not only within the area of intellectual property protection, but beyond that within the whole set of WTO multilateral agreements⁷². Furthermore, this interpretation arguably is in line with the negotiating history of TRIPS during which developing countries accepted trade-offs requiring enhanced intellectual property protection and enforcement in exchange for better market access under other agreements and trade areas such as agriculture and textile.

Whereas the first paragraph of Article 8 refers to the rationale underlying the protection of trade-related intellectual property protection, its second paragraph enables WTO members to take appropriate measures against the abuse of intellectual property rights or unreasonable restriction of international trade and transfer of technology provided that they are consistent with TRIPS⁷³. The exercise of exclusive rights provided by intellectual property law can cause market segmentation, for example, licensing practises can restrain trade. Such a situation is not compliant with the rationale of TRIPS Article 8.2 and thus entitles the members to restrict the exercise of intellectual property rights in such cases. Measures under Article 8.2 have to comply with the principle of proportionality, actions must be “appropriate” and confined to “unreasonable” trade restraints.

Article 8.2 of the TRIPS Agreement entitles WTO members to take measures against adverse effects of intellectual property rights that are detrimental to technology transfer. Article 66.2 of the TRIPS Agreement requires members to promote and encourage such transfers to least-developed countries in order to enable them to create a sound and viable technological base. The Council for TRIPS adopted a decision on 19 February 2003 to put in place a mechanism for ensuring the monitoring and full implementation of Article 66.2⁷⁴. From the perspective of sustainable development, the protection should contribute to a legal environment

71 See footnote 4. The WTO Dispute Settlement Understanding (DSU) establishes a system of multilateral review of cross retaliations, which applies if invoked by the non-complying defendant on the grounds set out in its Art. 22.3. This provision lists a set of conditions to be followed in the case where a party applies for authorisation to suspend concessions or other obligations as a means of retaliation via trade sanctions. If the conditions under Art. 22.3 of the DSU are met, a party can request an authorisation to retaliate across WTO agreements (“cross retaliation”).

72 Based on this interpretation, it becomes acceptable from the perspective of WTO law that cross retaliation involving TRIPS obligations means a violation of WIPO administrated agreements (e.g. the Berne Convention in the case of art. 14 TRIPS).

73 Since art. 8 para. 2 requires that such measures must be consistent with the other provisions of TRIPS, it must be considered as a *lex generalis* with respect to those provisions of the TRIPS agreement that more specifically allow the Members to limit the protection of intellectual property rights.

which encourages foreign right holders to make investments and technology transfers. On the other hand, this protection may also be detrimental to the economic interest of developing countries that transfer licence fees abroad, without satisfactory transfer of technology in return. I argue that abuses of dominant market positions that affect cultural diversity and that are based on, or reinforced by, intellectual property rights fall under Article 8 of the TRIPS Agreement.

The reason to apply the non-discrimination principles of National Treatment and Most-Favoured-Nation to intellectual property law, and to reinforce a substantive and procedural harmonisation at a minimum level of intellectual property protection, is to facilitate the transfer and dissemination of technology, knowledge and trade-related culture. From the perspective of developing countries, one may argue that inappropriately high standards of protection of intellectual property rights could hinder this goal. It is difficult for these countries to assess precisely the costs and benefits of implementing intellectual property according to TRIPS in the medium and long-term. This economic assessment is even more difficult if one takes into consideration the bilateral pressures on developing and least developed countries in the field of intellectual property protection. This bilateralism can substantially reduce the flexibilities granted under TRIPs and disturb its delicate equilibrium⁷⁵.

Based on these considerations, I propose to use the TRIPS preamble, as well as Articles 7 and 8, and, by analogy, Article 66.2 as an anchor to elaborate and negotiate rules on special and differential treatment that would be specifically designed to promote cultural diversity within the relevant WTO agreements⁷⁶.

Analogies between film and pharmaceutical majors

The Commission on Intellectual Property Rights that was set up by the British government to look at how intellectual property rights might work better for developing countries summarised its findings on copyright protection as follows:

“There are examples of developing countries which have benefited from copyright protection. The Indian software and film industry are good examples. But other examples are hard to identify. Many developing countries have had copyright protection for a long time but it has not proved sufficient to stimulate the growth of copyright-protected industries. Because most developing countries, particularly smaller ones, are overwhelmingly importers of copyrighted materials and the main beneficiaries are therefore foreign rights holders, the operation of the copyright system as a whole may impose more costs than benefits for them. (...)”⁷⁷

74 Decision on Implementation of Article 66.2 of the TRIPS Agreement of 19 February 2003, WTO Document IP/C/28.

75 See Peter Drahos, *op. cit.*, footnote 32.

76 This approach of developing appropriate rules on special and differential treatment may also apply to other fields of tensions, e.g. trade and agriculture.

If we apply these conclusions to the film industry, we could question whether it makes sense to protect an investment of U.S. \$60 million in stars, prints and advertising to sell a motion picture of a Hollywood major by means of copyright and other relevant exclusive rights, when this investment keeps films from other cultural origins out of the market. When intellectual property rights are used for predatory competition leading to cultural uniformity they arguably no longer fulfil their very purpose.

One can take the example of the pharmaceutical industry of the United States to discuss the right balance of patent protection and translate this discussion into the field of copyright protection for cultural industries⁷⁸. Abbott questions the pharmaceutical majors' arguments that they will not be in a position to provide new medicines based on very costly research without relief from price controls and without patent protection against competition:

- (1) The pharmaceutical majors in the United States benefit from an enormous public subsidy. The National Institute of Health has a budget of \$28 billion per year, most of which goes into funding research into medical technologies. The results of that research are channelled back to the pharmaceutical companies which pay very limited royalties for its use. The pharmaceutical industry is the beneficiary of a tremendous amount of basic research being conducted at universities, teaching hospitals and research institutes.

77 Report of the Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London 2002, Executive Summary, p. 20: www.iprcommission.org. The idea of the Commission on Intellectual Property Rights originated in the UK Government's White Paper on International Development "Eliminating World Poverty: Making Globalisation Work for the Poor" published in December 2000 (paragraphs 142-149). The aim was to look at the ways that intellectual property rules need to develop in the future in order to take greater account of the interests of developing countries and poor people. The Commission was asked to consider:

- How national IPR regimes could best be designed to benefit developing countries within the context of international agreements, including TRIPS.
- How the international framework of rules and agreements might be improved and developed, for instance in the area of traditional knowledge - and the relationship between IPR rules and regimes covering access to genetic resources.
- The broader policy framework needed to complement intellectual property regimes, including for instance controlling anti-competitive practices through competition policy and law.

78 Several studies have shown that U.S. "copyright industries", including movies, TV, home video, music, publishing and computer software, generate revenues that are, for example, five times the export revenues of the U.S. drug and pharmaceutical sector and that the total foreign sales and exports of US copyright-protected products totalled USD 79.85 billion in 1999. The overall value of "copyright industries" to the gross U.S. domestic product has increased an astounding 360 per cent between 1977 and 1999 and currently totals more than USD 460 billion; for references see Alan Story, *op. cit.*, p. 11.

- (2) The pharmaceutical majors today have a weak record of innovation and this phenomenon appears to be driving a trend toward consolidation. Only few new chemical entities are being discovered.
- (3) The pharmaceutical majors focus their attention on blockbuster discoveries — drugs with a market potential of over \$1 billion per year — and heavily promote drugs such as Viagra and Cialis based on potential market demand, rather than public health requirements⁷⁹.

This author comes to the conclusion that the “golden goose” of pharmaceutical innovation is cooked only partly in pharmaceutical majors’ laboratories. He stresses that none of this is to say that “the U.S. pharmaceutical industry does not play a useful role in the development of new medicines.” It is rather to say that “one should be cautious about over-simplifying the situation by reducing it to a phrase like ‘killing the goose that lays the golden eggs’.”⁸⁰

In my opinion, one can apply these arguments on the malfunctioning of intellectual property protection for pharmaceutical majors *mutatis mutandis* to the film, music and book majors, and learn from the experience of the health industries with trade and development in order to improve the situation for cultural industries with respect to trade and cultural diversity⁸¹.

The first argument revolves around the allocation of intellectual property rights that are generated by film production in Europe. The funding schemes maintained by the 25 EU members and the European Union (Media programme) grant over 1 billion Euros each year to local film production and distribution companies. Most of the intellectual property rights holders in the European Union are heavily subsidised private players. Since these are small and medium-sized enterprises, there is a great fragmentation in the ownership of the rights. In my assessment, this fragmentation causes the European film industry to be substantially less competitive than the U.S. industry in which ownership of intellectual property rights catalogues is highly

79 The major expenditures and risk for the pharmaceutical industry lie in clinical trials - part of the process in which new drugs obtain marketing approval from the U.S. Food and Drug Administration and foreign regulatory authorities. According to Abbott, this is where investors risk their capital.

80 Frederick M. Abbott, Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism, in: *Journal of International Economic Law* 8(1) 2005, 77-100.

81 Except for the last argument dealing with health security motivated approval procedures by regulatory authorities that is not relevant for cultural goods and services. Instead one can add the argument that the cultural majors’ marketing investments drive cultural contents and content providers from diversified cultural origins out of the market if they do not enjoy comparable investments in print and advertisement.

concentrated. This critical mass of concentration allows the Hollywood majors to attract the huge capital that is necessary to feed considerable production and marketing costs⁸². Full private ownership of rights substantially generated via public funds therefore makes little sense from the economic perspective. Furthermore, the currently prevailing allocation of intellectual property rights raises questions of equity: why should private producers and distributors who are substantially aided by the state own the exclusive rights generated by the collective creative efforts involving many different artistic professions (screenwriters, directors, actors, etc.)?

The second argument deals with the major firms in film, music and books which focus their activities mainly on mainstream cultural goods and services, that is, on content to which the broad audience is already accustomed as a consequence of marketing. Creative innovation typically comes from small independent creators and cultural entrepreneurs, and it feeds the majors' production allowing them to pick and choose without significant entrepreneurial risks. The small and medium-sized players have much higher economic risks due to the prototype nature of their cultural goods and services, considering that audience tastes for new and original content are more unpredictable. Given the rationale underlying the grant of intellectual property rights, the considerable protection that majors enjoy should provide much greater benefits for creativity, if it is to work as a real incentive for taking the creative risks so vital to the economic sustainability of cultural industries.

Eventually, the third argument is also relevant for cultural industries. Highly valuable contents from a great variety of cultural origins may be marginalised as a result of the heavily advertised "feel good" entertainment which essentially reflects the economically dominant culture and ideology. Is this form of cultural discrimination consistent with the very purpose of intellectual property protection and in particular of copyright and related rights?

Elaborating cultural non-discrimination principles

Under WTO law, Member States must refrain from practicing trade-related discrimination based on nationality⁸³. This obligation is based on two fundamental rules, the National Treatment (NT) principle which prohibits discrimination between local and foreign goods and services and providers thereof, and the Most Favoured Nation (MFN) principle which prohibits discrimination between countries. MFN means that if country A grants a trade advantage to country B, country A must also grant the same advantage to country C; country A cannot discriminate between

82 Furthermore, the majors' high corporate concentration allow them to better manage the huge entrepreneurial risk that are inherent to cultural industries mainly dealing with prototype goods and services: The majors can compensate huge losses from the many flops by the revenues from few (around 5%) blockbusters, hits and bestsellers.

83 See footnote 25.

country B and country C. NT means that, for example, if Turkey taxes the cinema tickets only of foreign films, or taxes them at a higher percentage than those of local films, it violates the National Treatment principle vis-à-vis other WTO members, because it discriminates between national and foreign films in a way that causes a competitive disadvantage to the latter ones in the domestic market⁸⁴. If the European Community favours bananas from certain African countries in relation to bananas from Latin America, it infringes the Most Favoured Nation principle⁸⁵. This basic rule obliges the European Community not to discriminate between countries from Africa and countries from Latin America. WTO law, in particular the National Treatment and the Most Favoured Nation principles, therefore serve to remove obstacles to trade through a prohibition to discriminate economically based on the national origin of the goods and services and of their suppliers.

Given the economic specificity of cultural industries, one can argue that not only states, but also private players with a dominant market position can restrict the free movement of mass market cultural goods and services. In other words, private dominant market positions, such as those enjoyed by oligarchic multinational corporations, are in the position to control cross-border trade of cultural goods and services. For the time being, cultural commercialisation arguably keeps the gate open for the films, books and music from one single, largely homogeneous cultural source, and keeps the gate closed for the contents from all other cultural sources. It therefore makes sense to use a combination of competition, intellectual property and “free culture” laws on these private sector players. As a matter of fact, intellectual property protection is the *nerf de la guerre* of cultural industries. This protection relies on state action, such as on the elaboration and implementation of national and regional legislation and policies in copyright, neighbouring rights, trade marks, trade names, etc. The protection of copyright, related rights, trademarks and trade names is the Achilles heel of private and public cultural players which abuse their dominant

84 Turkey - Taxation of Foreign Film Revenues Turquie, WT/DS43/3. This request for consultations by the United States, dated 12 June 1996, concerned Turkey’s taxation of revenues generated from the showing of foreign films. The United States alleged the violation of art. III GATT. On 9 January 1997, the United States requested the establishment of a panel. At its meeting on 25 February 1997, the Dispute Settlement Body (DSB) established a panel. Canada reserved its third-party rights to the dispute. On 14 July 1997, both parties notified the DSB of a mutually agreed solution.

85 In this arbitration case, the WTO Dispute Settlement Body authorized Ecuador to suspend intellectual property protection for right holders from the EC as sanction against the EC’s violation *inter alia* of the Most Favoured Nation clauses concerning the distribution of Ecuadorian bananas into the EC (GATT and GATS violation were “cross retaliated” by a suspension of protection granted under TRIPS). In other words, this ruling legalized in Ecuador the copying of films, music and books of European right holders without their consent and without remuneration for determined period of time. This suspension of intellectual property protection meant a retaliation against the European Community’s discrimination between African and Latin American bananas. See the reference in footnote 4.

market position and practice systematic cultural discrimination. The economically weakest state can hit this heel to force such players to contribute to the promotion of cultural diversity on its territory.

If a state is eager to promote cultural diversity on its territory, it should make the receipt of public support by private sector firms contingent on their contributing to the state's cultural policy goals. I concretely envisage a "Cultural Contract" according to which the states should protect the intellectual property of a rights holder having a dominant market position only if the rights holder contributes commercially to preserving and promoting cultural diversity in that state's territory. On the other hand, if such a rights holder systematically discriminates on the basis of the cultural origin of films, music or books, that is, if it violates the principles of "Cultural Treatment" or "Most Favoured Culture" outlined below, the state should be entitled to refuse to grant intellectual property protection to its works, by analogy to the cross retaliation applied in the banana arbitration procedure between Ecuador and the European Community⁸⁶.

Why should such a sanction be available against an infringement of international trade rules, and not against a violation of the desirable prohibition of cultural discrimination? I believe states should be entitled to suspend the application of the National Treatment principle to trade-related intellectual property rights of foreign rights holders if they have a business practice that is detrimental to cultural diversity.

In order to structure this new approach, I propose to distinguish between:

- factors of creation and production of cultural goods and services (artists, creative technicians and producers),
- factors of commercial distribution and exhibition (marketing) of cultural goods and services (distributors and others who invest in marketing and exhibition), and
- factors of consumption of cultural goods and services (audiences and other media which uses the original content in other forms and markets)⁸⁷.

The first and last category of factors of the film, music and book markets are affected by the distribution "bottleneck" of the second category where distribution and exhibition (marketing) commercially and culturally filter mass cultural goods and services.

⁸⁶ See footnote 5.

⁸⁷ "Factors" means here labor and capital in the context of creation, production, distribution and exhibition, whereas it means intermediary or end consumers in the context of consumption. "Distribution and exhibition (marketing)" includes all forms of supply and communication to the public.

A new balance should be implemented between the factors of creation and production, distribution, and consumption of cultural goods and services based on new principles of law prohibiting “cultural discrimination”⁸⁸. These “meta-rules” which I shall label “Cultural Treatment” and “Most Favoured Culture” principles would mirror the WTO principles of National Treatment and Most Favoured Nation. To illustrate this proposal, I have adapted GATS Articles II and XVII as follows:

Article I
Most Favoured Culture Treatment

With respect to any measure covered by this Agreement, each public, private or mixed-economy factor of commercial distribution and exhibition (marketing) of cultural goods and services from a cultural origin having a dominant market position shall accord immediately and unconditionally to cultural goods and services and to the factors of cultural creation and production of another cultural origin treatment no less favorable than that it accords to like cultural goods and services and their suppliers of any other cultural origin.

Article II
Cultural Treatment

Each public, private or mixed-economy factor of commercial distribution and exhibition (marketing) of cultural goods and services from a cultural origin having a dominant market position shall accord to cultural goods and services and to factors of cultural creation and production of any other cultural origin, in respect of all measures affecting the distribution and exhibition (marketing) of cultural goods and services, treatment no less favorable than that it accords to its own like cultural goods and services and like factors of cultural creation and production.

Article III
Maintenance of a culturally discriminatory measure

The public, private or mixed-economy factors of distribution and exhibition (marketing) of cultural goods and services having a dominant market position may maintain a measure inconsistent with articles I and II provided that such a measure is effectively demanded by the factors of consumption.

This tentative formulation of the principles of Cultural Treatment and Most Favoured Culture require more comprehensive elaboration. Private and

⁸⁸ For the relationship between intellectual property and competition law, see European Court of Justice, Judgement of 6 April 1995, Magill, C-241/91 P and C-242/91 P, Rec. p. I-743, and European Court of Justice, Judgement of 29 avril 2004, IMS Health GmbH & Co. OHG / NDC Health GmbH & Co. KG, C-418/01, Rec. 2004. See also footnote 51.

mixed-economy factors will be bound under these principle by the states that grant them the protection of their intellectual property rights. In other words, the states that adhere to these principles will no longer protect the intellectual property rights of private and mixed-economy factors engaged in commercial activities on their respective territories if these factors do not comply with these principles.

The parties to the GATT and, since 1995, the members of the WTO, have developed the National Treatment and Most Favoured Nation principles over half a century, and the full meaning of these rules needs still to be further explored. This relatively long period of time illustrates the complexity of non-discrimination principles applied to trade. It will presumably require similar time to fully develop the cultural non-discrimination principles of Cultural Treatment and Most Favoured Culture.

A new *sui generis* system to implement cultural diversity

Given that states are the source of rules of law, it would be contradictory to seek to centrally impose cultural diversity. This policy objective should rather start to flourish from grassroots initiatives and find its way up to the international level. I envisage a three step approach starting from local action over national legislation and concluding with the international system. First, local public bodies such as cities or rural collectives would set up moot courts where creators, producers and consumers of cultural goods and services could sue private and public players having a dominant market position that are suspected of discriminating culturally. In such trials, the court would hear the stakeholders in order to establish the relevant facts and apply the principles of Cultural Treatment and Most Favoured Culture to these facts. The procedural rules could be inspired by those of the WTO Dispute Settlement Understanding⁸⁹. If a moot court comes to the conclusion that a corporation or a state practices cultural discrimination that affects the jurisdiction where the court is located, such a court can order the entity to change its behaviour in an appropriate way.

Concretely, this could mean that the convicted players would be required to open their marketing and distribution facilities to contents from a greater variety of cultural origins. If such players refuse to follow the moot court ruling, the court could order as a sanction that the intellectual property of the infringer would no longer be protected in the jurisdiction of the court for a given period of time. This sanction should be commensurate with the damage incurred to local cultural diversity.

This trial and error process based on litigation would generate case law which would refine over the years what is a coherent Cultural Contract between the cultural

89 See footnote 25.

creators, the cultural industries and the public. This non-binding but authoritative case law could be transformed progressively into state law by a codification on the national level as constitutional and legal norms. Once this codification process is achieved, the moot courts would become instruments of hard law, and their moot rulings and moot sanctions would become enforceable. Arguably, this approach would be consistent with the Preamble and Articles 7 and 8 of the TRIPS Agreement, and would rely on national competition laws appropriately constructed to address cultural diversity concerns.

Eventually, WTO members would negotiate the integration of cultural diversity law developed via moot courts and national courts into the multilateral trading system in a similar way as public health concerns were addressed in the Doha round. UNESCO and WIPO, as well as other relevant international, regional governmental and non governmental organisations, would be invited to contribute to this process which is aimed at elaborating rules on special and differential treatment to promote cultural diversity in the context of trade liberalisation⁹⁰. According to a more ambitious vision, this process would ultimately lead to the creation of a World Cultural Diversity Organisation (wCDo) which would develop a world culture system based on a global Cultural Contract with predictable and enforceable rules. This system would enable the wCDo to act on a level playing field as a counterpart to the WTO and other relevant international institutions. The Cultural Contract would adopt a single undertaking approach as opposed to the anarchy of rules based on state sovereignty and the resulting law of the jungle of the economically strongest countries that is contemplated *de facto* by the UNESCO Convention on cultural diversity.

From grass root action to a global Cultural Contract

Let me summarise this scenario using the hypothetical example of the fictional city of Terraperta in the small and poor country of Utopia located in Africa. In this city, you find that 95 percent of the market share of cultural goods and services is occupied by U.S. films, music and books, and the rest is productions from the European Union. Utopia has many very talented artists, but they are not marketed and distributed within the country on a level playing field. As a WTO member, Utopia is eager to comply with the TRIPS Agreement. For this purpose, it obtained technical assistance from WIPO to reduce piracy. WTO, WIPO, UNESCO, many regional organisations and developed countries have led Utopia to believe that the situation of its local filmmakers, musicians and writers would improve if it provided better protection for

⁹⁰ See Thomas Cottier, From Progressive Liberalisation to Progressive Regulation in WTO Law, NCCR Working Paper IP3, Berne 2006: www.nccr-trade.org/ For a selection of further papers on special and differential treatment, see: www.ictsd.org/issarea/S&DT/resources/

intellectual property rights. Furthermore, they argued that stronger implementation of copyright and other exclusive rights would increase Utopia's tax revenues to subsidise local culture creation. Utopia followed this advice and, after a few years, it discovered that the "promised land" remained out of reach, although infringement of intellectual property rights became as serious as stealing a car in the minds of Utopia's law enforcement agencies and its citizens.

A group of artists and cultural rights activists launches a case before the Culture and Entertainment Moot Court (CEMC) of the city of Terraperta against Sony and France. The plaintiffs observed that France and Sony had a dominant position in Utopia's market of cultural goods and services. They claim that the defendants are abusing their marketing and distribution power effectively to exclude from the market local content and content originating from third cultures.

As opposed to the European Commission in merger case Sony/BMG, the CEMC of Terraperta would apply a definition of the relevant market that was not based on arbitrary criteria referring to genres, aesthetics and other largely irrelevant categories⁹¹. The CEMC of Terraperta would apply a measurable criterion by defining that cultural goods and services were substitutable from the demand perspective if they enjoyed similar investments in advertising, including stars. This new definition allows the plaintiffs *inter alia*, to demonstrate that the supply of cultural goods and services from Sony and France was able to control local access to cultural goods and services without genuinely reflecting local demand. In fact, the public of Utopia wants to purchase films, music and books in languages other than English and French, and they want sights and sounds from other cultural origins, including local ones.

The CEMC of Terraperta would apply the Cultural Treatment and Most Favoured Culture principles to the facts as found by the trial, and order Sony and France to grant access to their essential marketing and distribution facilities within the territory of Terraperta, for artists and artistic content from local and third cultures. France eventually would comply with this ruling because it accepted the CEMC's argumentation and would adapt its *Fonds Sud* and similar cooperation and development programmes in Utopia⁹². Sony, on the hand, would refuse to play the game. The CEMC of Terraperta therefore would suspend national treatment for Sony's with respect to its trade-related intellectual property rights and declare that these rights will no longer be protected in its jurisdiction⁹³. For a period of time, it therefore would become legal in the city of Terraperta to copy Sony's cultural goods

91 See footnote 55.

92 See footnote 37.

93 See footnote 5.

and services without compensation and to export these contents to all jurisdictions that accepted the CEMC's ruling.

This trial would be widely imitated by other cities and regions, and the WTO, WIPO as well as all the other concerned organisations, countries and stakeholders would begin to think twice about the relationship between cultural diversity and intellectual property. In many countries, these moot courts would transform into real courts applying real law with real sanctions. Eventually, Sony would announce that it would no longer culturally discriminate as a matter of private policy. This corporation could then most likely make even more money than before, from films, music and books from a great variety of cultural sources. The city of Terraperta and other like-minded cities and regional bodies in the world would re-establish an efficient protection of Sony's intellectual property rights. As a consequence, the prohibition of cultural discrimination would serve to elaborate special and differential treatment clauses in the WTO Agreements that would be relevant to trade-related culture.

Eventually, the wCDo would be established as an institution administering a World Culture and Entertainment Dispute Settlement Body implementing a global Cultural Contract based on the Cultural Treatment and Most Favoured Culture principles.

Conclusions

Cultural diversity is a complex matter and the awareness of its full significance remains low⁹⁴. The UNESCO Convention on cultural diversity celebrates "the importance of cultural diversity for the full realisation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognised instruments" (Preamble, fifth recital). According to the UNESCO Universal Declaration on Cultural Diversity of 2 November 2001, this policy goal is as important as biological diversity. Whereas biological diversity is essential to the physical existence of humankind, cultural diversity plays a comparable role with respect to the spiritual and emotional life of individuals and communities worldwide. Most recently, the subject matter received attention from a broader public when the General Conference of UNESCO approved the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* in fall 2005, an international normative instrument that will enter into force three months after its ratification by 30 states⁹⁵.

94 See in particular Joost Smiers, *Arts under pressure, Promoting culture diversity in the age of globalization*, Londres / New York 2003, and Fábio de Sá Cesnik/Priscila Akemi Beltrame, *Globalização da Cultura*, Barueri SP 2005.

95 See footnote 4.

Obviously, culture is a vast field, and accordingly definitions that are operational for legal purposes are difficult to elaborate. In this chapter, I focused on the role of so-called “cultural industries” including the film, book and music industries, as well as other forms of production and distribution of art, entertainment and information. From the legal perspective, however, one should consider that there is a complex interplay between such trade- related culture and “non-commodified” cultural expressions and political information. This dynamic relationship arguably conditions not only the collective mindsets and emotions within society – the audiences’ common imagination – but also shapes the opinion-building and decision-making processes within democracies.

Cultural diversity must exist, if individual freedom of opinion and expression are to flourish wherever intellectual and emotional content in the form of artistic expressions, which may include entertainment and political information, is disseminated. For this purpose, the state, as the democratically legitimate collective power, must ensure *vis-à-vis* private and public players, the supply of information, entertainment and art from culturally diverse sources. This state action constitutes a safeguard against uniform thinking and feeling and thus reduces the risk of audiences being manipulated. Furthermore, this public policy objective benefits from the inherent values of cultural identity and diversity as public goods.

The advantage of having a strong local content industry is not limited to economic aspects; it also contributes to fostering cultural identity and, as a consequence, to social cohesion. Cultural industries in particular can contribute substantially to identity building, especially in nations that are not culturally homogeneous.

Cultural goods and services arguably have both a cultural and an economic component, since they typically qualify as high risk “prototype industries”⁹⁶. The feature of cultural specificity that commonly provides the main argument for a so-called “cultural exception” from trade regulations or, at least, for special and differential treatment of cultural goods and services, may be paraphrased by quoting the European Commission on the significance of the audiovisual sector:

“The audiovisual media play a central role in the functioning of modern democratic societies. Without the free flow of information, such societies cannot function. Moreover, the audiovisual media play a fundamental role in the development and transmission of social values. (...) They therefore help to

96 The “economic specificity” of cultural goods and services comes from the considerable entrepreneurial risks that are related to the prototype character of these contents. This business reality causes the cultural industries to use cross-financing schemes that allow the costs of the many flops to be offset by the revenues of the statistically rare blockbusters, bestsellers and hits. In other words, within cultural industries, the factors of commercialization such as distributors typically play a pivotal role with respect to risk management ensuring a sustainable economic viability for the sectors at stake.

determine not only what we see of the world but also how we see it. The audiovisual industry is therefore not an industry like any other and does not simply produce goods to be sold on the market like other goods.”⁹⁷

States should be entitled to take measures, in their respective territories and legitimate spheres of influence, against the insufficiencies of supply of cultural goods and services from a diversity of national and cultural origins. In view of the important concerns at stake, however, the UNESCO Convention on cultural diversity will not be sufficient. Consequently, I recommend a radical paradigm shift based on a new legal instrument establishing the cultural non-discrimination principles of Cultural Treatment and Most Favoured Culture.

The paradigm shift proposed in this chapter is likely to face resistance from those conservative private and public players within the cultural industries who are satisfied with the status quo, i.e. the private players dominating the markets and the rich states granting subsidies to implement cultural policies that weaker economies cannot afford. Its feasibility will depend on the strength and perseverance of progressive actors who are genuinely engaged in promoting cultural diversity without discrimination. If the conservative forces should prevail over the progressive ones, the creative people and publics from all cultural origins, especially from transitional, developing and least developed countries, would be the big losers, and with them society at large.

97 COM 1999 657.

Concluding texts

Human, cultural rights: Universalism and/or cultural relativism

Joost Smiers

The Preamble of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* celebrates "the importance of cultural diversity for the full realisation of the human rights and fundamental freedoms proclaimed in the *Universal Declaration of Human Rights* and other universally recognized instruments." This text implicitly refers, for instance, to Article 19 of the 1948 *Universal Declaration of Human Rights* which says: "Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 27.1 of the *Universal Declaration* states: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in the scientific advancement and its benefits."

The 1966 *International Covenant on Economic, Social and Cultural Rights* stresses in Article 15 that the State Parties to this Covenant recognize the right of everyone to take part in cultural life. Clause 2 provides that the steps to be taken by the State Parties "to achieve the full realisation of this right shall include those necessary for the conservation, the development and the diffusion of science and culture."

One might wonder why it is necessary to have a convention on cultural diversity at the beginning of the 21st century when, for decades, other instruments have provided at least the moral obligation on states to ensure that *everyone* can take part in the cultural life of the community and that *everyone* should have the freedom to hold opinions and to seek, receive and impart information and ideas. These existing instruments also provide that states *shall* take steps to promote the conservation,

development and diffusion of science and culture. Presumably, the use of “everyone” implies that no one should have a privileged and dominant position in cultural life or be able to exclude others from cultural communication and participation, whether by censorship, market behaviour, or otherwise.

It is also clear that steps *should* be taken to guarantee the full realisation of these rights, and these steps *shall* include measures necessary for the conservation, development and diffusion of science and culture. The result of such extensive rights and measures should be a flourishing of cultural expressions, in every corner of the globe and between different parts of the world. Given all these promises, why do we need a convention on cultural diversity?

The immediate answer is, of course, the fact that all different forms of art – or as some call it, cultural production, distribution and promotion – have been brought under a WTO free trade regime that is hostile to regulations favouring the protection and the promotion of cultural diversity. Thus, one of the purposes of the Convention is to return this regulatory right to nation states and their regional and local authorities. At the same time, one should understand that the decades-old human rights declarations and treaties have not been respected, or have been insufficiently implemented to raise a question as to whether states actually favour the development of cultural diversity, or have any interest in analysing what might threaten the flourishing of cultural diversities, or taking appropriate measures in response to the threats.

It is therefore important to analyse the reasons why the human rights have not been implemented thoroughly; in our context, this question will focus on the cultural aspects of human rights. This might clarify why it was so difficult to frame a Convention focussing on the celebration of “the importance of cultural diversity for the full realisation of the human rights and fundamental freedoms proclaimed in the *Universal Declaration of Human Rights* and other universally recognized instruments.”

I will start with some preliminary observations which will be followed by the discussion of two major challenges for human rights in general, with specific attention to cultural rights. The first challenge is that human rights pretend to be universal. However, if that is the case, non-Western countries in the 1960s and 70s began to claim the right to be able to practise those cultural rights. They accused Western countries of dominating the information and cultural landscapes in all corners of the planet. The universalism claim was then met with a contrary assertion: that those human rights are Western inventions not applicable to other specific cultures, such as Arab or Asian ones. This is the cultural relativism claim.

The struggle between universalism and cultural relativism is profound and makes it difficult for all countries to agree, even on whether cultural diversities should be promoted actively, and not only with words. What is the origin of those contradictions and what is at stake?

Preliminary Observations

In discussing human rights, it is necessary to establish that there are different categories of rights, for instance security rights (life, integrity, liberty); social and economic rights (food, health care, education, labour conditions); and rights that are related to culture, science and the environment. Conflicts and contradictions concerning these different categories of rights may differ between states and social groups, and may sometimes involve the whole package of rights. While this article is about cultural rights, observations about contradictions in other clusters of human rights may be reviewed.

Human rights are embedded in international declarations and covenants on which some or all nation states agree. The key question is, of course, what happens after the signing celebration? It is up to each nation state either to refrain from intervening in the personal life of citizens or to take measures to recognise and implement the agreed rights. There is no international mechanism which can force nation states to respect human rights in all their nuances. International pressure by a coalition of states might be a tool, but it is a weak mechanism exerted mostly opportunistically. The ineffectiveness of the international enforcement of human rights is remarkable compared to the effectiveness of the enforcement of the WTO agreements. This has huge human rights consequences.

Article 1 of the *Universal Declaration of Human Rights* states: “All human beings are born free and equal in dignity and rights.” This text is nearly the same as that found in the French revolution declaration. But, is it true that all human beings are born equal? Costas Douzinas observes that abstract and universal human nature, “the essence of the human species, is parcelled out to everyone at birth in equal shares. This is evidently a great fallacy. People are not born equal but totally unequal... once we move from the declarations onto the concrete embodied person, with gender, race, class and age, human nature with its equality and dignity retreats rapidly... after sex, colour and ethnicity were added, this abstract disembodied human nature took a very concrete form, that of a white, property-owning man” (Douzinas 2000, 96-7). And here, of course, is the beginning of the problems concerning cultural rights that are analysed below.

Let us imagine that the beautiful rhetoric of equality has been meant as an intention, rather than as an accurate description of the present state of affairs: all

people should be entitled to the same rights. In this case we must conclude that there is a serious flaw in the human rights declarations, since they do not tell us how to reach this ideal. What are the strategies? They are silent on how to reach the objectives of equality, respect for the human being and cultural participation.

However, we should be aware that human rights “were initially linked with specific class interests and were the ideological and political weapons in the fight of the rising bourgeoisie against despotic political power and static social organisation” (Douzinas 2000: 1). There is nothing wrong with such a start for a bright idea and desire, all social developments begin somewhere, under specific historical conditions. But, the key issue is how were human rights conceptualised and formulated: what is in and what is out; what matters more and what has been neglected? Maybe it is no coincidence that the appearance of the 1948 *Universal Declaration of Human Rights* “coincides with the globalisation of the market economy, which has, particularly in the latter part of the 20th century, penetrated and connected all nations and peoples on Earth into an interdependent network” (Bruun 2000, 11).

Human rights were formulated explicitly for the first time a couple of centuries ago, in France, a Western country. This fact does not preclude the possibility that several similar and other extremely important human values, including human dignity, already existed as well in other societies and cultures, in all parts of the world, clearly formulated, enforced and respected. Second, it would be an exaggeration to claim that all human rights are a living reality in the Western world. The existence of democracy, for instance, does not guarantee that human rights have been respected.

“Real democracies are replete with problems and evils. Democracy is but a political mechanism for trying to grapple with a nation’s problem.... And yet, because democracy is but a means for dealing with political issues, it does not assure a people that a democratic government will even promote their human rights. This is why human rights organisations grow inside democracies. They invariably have lots of work to do protecting groups that are stigmatised – women, aliens, particular religions or ethnicities, prisoners, poor, etc. The political mechanisms of democracy should not be confused with basic human rights” (Friedman 2000, 25).

To this enumeration should be added that, for many people and for many artists in most Western societies, it is wishful thinking to believe they have equal access to the means of cultural communication.

Edward Friedman asserts it is also a misunderstanding to think that human rights and democracy have been implanted in the West for centuries.

“Few people who embrace the West as the home of democracy and human rights have even an inkling of how recent and politically charged that notion, the ‘West’ is.... The notion of a democratic West is largely a creation infused by Cold War propaganda, a trope to stigmatise invidiously a ‘totalitarian’ East..... The myth of a democratic West became popular and is conventionally mistaken for a deep historical truth, something embodying ancient verities and long continuities” (Friedman 2000, 22-3).

This revelation should make Western contributions to the human rights debates more modest and less self-congratulatory.

This observation leaves unimpeded the question of the character of the rights formulated in the *Universal Declaration of Human Rights* and in other human rights declarations and covenants. Are they as universal as has been pretended? We have seen that they are less Western in origin than many people would think, and it would be exaggerated to claim that they are the life and blood of Western societies. Nevertheless in 1948, at the moment of adoption of the Declaration, many countries were still colonies or economically and politically otherwise dependent on the West. In this sense, it cannot be denied that there is a strong Western impetus in the proclamation of the human rights treaties. Does this diminish their claim on universality? For some, a little; for others, a great deal. If the work of the formulation of a human rights treaty would be done anew, from scratch, in the beginning of the 21st Century, would we arrive at the same result again? Or, to put the question another way, would we arrive at any result at all?

These serious questions refer to the fact that the universalism claim of human rights has become contested and replaced in several parts of the world by the cultural relativism theory. “According to the advocates of cultural relativism, to judge a society by values exogenous to the society in question amounts to cultural imperialism” (Svensson 2000, 199). It is thought-provoking to observe that in several parts of the world, for instance in Arab and Asian countries, and within certain groups, the cultural relativism theory concerning human rights has today taken root. The claim is that in any country or society different norms and values can exist and these should not be pushed aside by universal human rights. However, from the 1960s to the beginning of the 1980s, those parts of the world insisted that the *universal* human rights should be applied to them as well and that it should not stay a Western privilege. In the case of culture and information, the request was that the universal human right to access to the means of communication should not be defeated by the Western domination of those means of communication and this resulted in the demand for a New World Information and Communication Order.

One of the important issues in this discussion is that it may sound strange to many people in the non-Western world that rights can exist without duties, as expressed in the report *Our Creative Diversity*:

“In many cultures, rights are not separable from duties. In South Asia, for example, human rights activists have discovered that indigenous people often find it difficult to respond to a general question as to ‘what are your rights?’ in the absence of a contextual framework (such as a religion, a family, or some other institution). Second, they have found that, in responding, people begin by explaining duties before they elaborate on rights’ (Pérez de Cuellar 1995, 41).

It would increase understanding between people living in different countries if awareness were to grow in the Western world that a society is missing something if people think only of their rights, and forget they also have responsibilities, without which no society can function. The big challenge is to find the right balance between the two.

Universalism

In 1961, leaders of newly independent nations and of other countries that did not wish to make a choice in the Cold War between the Soviet Union and the U.S, preferring a third way, formed the Movement of Non-Aligned Countries. This movement marked the beginning of an effort by those states, whose economic and cultural independence remained to be achieved, to change the structures and the rules of the international economic and information order. Focusing on the field of information and cultural communication, the Non-Aligned Countries were “seeking a more just and equitable balance in the flow and content of information, a right to national self-determination of domestic communication policies, and, finally, at the international level, a two-way information flow reflecting more accurately the aspirations and activities of the less-developed countries” (McPhail 1981: 14).

In the Report of a decisive symposium of the Movement, held in Tunis in March 1976, it was stated that “the peoples of developing countries are the victims of domination in information and this domination is a blow to their most authentic values.” The Report went on to claim that “every developing country has the right to exercise their full sovereignty over information, as much over information about their daily realities as that diffused to their people, equally have a right to be informed objectively about external events and the right to publicise widely their national reality” (in Nordenstreng 1989: 89-90).

The movement worked in two directions. The first was practical and aimed at strengthening the information and communication capacities of the developing countries. The second was political and aimed at the democratisation of international information and communication relations. This purpose received a name, which also conveyed the concept that a New World Information and Communication Order (NWICO) was needed.

In several Western countries, the suspicion grew that the purpose of this endeavour was to legitimise censorship and state control of information and cultural communication. In some cases this was true. However, this did not disprove the fact there were huge imbalances between the rich and the poor countries in the field of information and cultural communication possibilities. Moreover, in those economically weak countries it was only the state that could build the infrastructure for the exchange of knowledge, news and creativity. What was the matter if at the time in England and France the broadcasting companies were state-owned, and in the United States the Internet was being developed as a state-run endeavour? It is also not without reason that newly developing countries were, for the purpose of nation building, in great need of media that were independent from outside forces. The basic principle, those countries claimed, was that media concentration and cultural domination should not exist at all, from a human rights perspective.

To underline that their claim was a *universal* one, the countries of the Non-Aligned Movement did put the question of the unequal information and communication balance on the agenda of UNESCO, probably the correct place for such a demand. This culminated, on 22 November 1978 at the 20th General Conference of UNESCO held in Paris, with the adoption by acclamation of the *Declaration of Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War* (Mass Media Declaration). During the Assembly, Amadou M'Bow, UNESCO Director-General, highlighted several areas which required further research and clarification, among them the dialectical conflict between the notions of freedom and responsibility. He mentioned as well the superabundance of goods and services in the information field now becoming increasingly available to industrialised societies, while many Third World nations lacked modern telecommunications infrastructures (McPhail 1981: 113).

Herbert Schiller summarises that, at a number of meetings of UN bodies and Third World nations in the mid-1970s, the characteristics and extent of the Western information monopoly were discussed. The one-way flows of news from a few Western centres drew special criticism:

“three main demands emerged: greater variety in sources of information, less monopolisation of the forms of cultural expression, and preservation of some national cultural space from the pervasive commercialisation of Western cultural outpourings. From all these statements and meetings, no doubt was left in the minds of Third World cultural figures that the products of Western cultural industries had an effect on the peoples to whom they were targeted” (Schiller 1989: 142).

An urgent question became, who would establish the agenda of social discourse?

“From 1970 to 1976, the Third World aggressively sought to reverse U.S. and Western domination, and introduce new international norms regarding media content, balanced coverage, reciprocal exchanges, and technological equality. Focusing on the right to seek and impart information as well as the right to receive it, these proposals fostered the democratisation of access to mass communications and its social accountability to the people it addressed and served. The reform movement also demanded an equitable share of the spectrum as a global resource, held in trust for all nations, not simply for those who had got there first” (Preston 1989: 124).

Meanwhile UNESCO had commissioned the Irish legal scholar Séan MacBride to chair an International Commission for the Study of Communication Problems, which released a report in 1980, titled *Many Voices, One World. Towards a new more just and more efficient world information and communication order*. One of the recommendations (number 58) claims that concerning culture and information, effective legal instruments should be designed to:

“(a) limit the process of concentration and monopolisation; (b) circumscribe the action of trans-nationals by requiring them to comply with specific criteria and conditions defined by national legislation and development policies; (c) reverse trends to reduce the number of decision-makers at a time when the media’s public is growing larger and the impact of communication is increasing; (d) reduce the influence of advertising upon editorial policy and broadcast programming; (e) seek and improve models which would ensure greater independence and autonomy of the media concerning their management and editorial policy, whether these media are under private, public or government ownership” (MacBride 1980: 266).

The Report urged that the information and communication capacities of developing countries be strengthened. Adequate infrastructures should be installed and developed “to provide self-reliant communications capacity” (ibid.: 255).

The movement for a New World Information and Communication Order soon clashed with the Western-sustained philosophy of the *free flow* of communication and information. This doctrine insists that no national need or purpose can justify interference with the prevailing flow of messages and imagery, wherever its source and whatever its character of production. A nation that departs from a privately-owned, advertising-supported media system is on the road to tyranny (Schiller 1989b: 288). Edward Herman and Robert McChesney comment that the free flow doctrine:

“... was at once an eloquent democratic principle and an aggressive trade position on behalf of U.S. media interests. The core operational idea behind the principle was that trans-national media firms and advertisers should be permitted to operate globally, with minimum governmental intervention. In the view of the U.S. policy-makers, this was the only notion of a free press suitable for a democratic world order” (Herman 1997: 17).

It became more and more clear that the movement for the New World Information and Communication Order was contrary to what the supporters of the free flow of communication had in mind.

By 1976, at UNESCO's General Conference in Nairobi, the U.S. threatened to withdraw from the organisation if the Mass Media Declaration under discussion would endorse unacceptable press standards. As we have seen above, this Declaration was adopted in 1978, while the U.S. was a member of UNESCO. However, on 1 January 1985, the United States left UNESCO and was followed later by the United Kingdom and Singapore.

“In his memorandum of February 1984 explaining the U.S. position on the withdrawal, William Harley, a State Department consultant on communications, stated that UNESCO ‘has taken on an anti-Western tone. . . [and] has become a comfortable home for statist, collectivist solutions to world problems and for ideological polemics’” (in Herman 1989: 245,6).

Edward Herman comments that for William Harley and his government, “statist” solutions apparently are unnatural, illicit, and “political”, whereas private-enterprise initiatives are natural and apolitical.

“This is completely arbitrary and an expression of a *political* preference, a preference that is not even consistently maintained by U.S. officials. They do not insist that ‘statist’ illiteracy programs are illicit, and even in the communications field they do not maintain that government underwriting of satellite technology for the private sector produces an unfair, ‘statist’ basis for the technological edge of the private U.S. communications industry. ‘Statist,’ means government intervention in those selected areas where the government does not intrude in the United States, and/or where it is U.S. policy to support private sector initiatives” (Herman 1989: 245-6).

The U.S. withdrawal from UNESCO weakened the organisation considerably and it was the death blow for the development of a New World Information and Communication Order.

The United States did a second thing at the same time as it was preparing its withdrawal from UNESCO. It had another new world order in mind, a new world order of “free market” economics. Jerry Mander writes that this neo-liberal agenda would oblige countries, for instance, to open their markets to foreign trade and investment without requiring majority local ownership, and eliminating all tariff barriers. It would severely reduce government spending, especially in areas of services to the poor; convert small-scale self-sufficient family farming into high-tech, pesticide-intensive agribusiness that produces one crop export commodities such as coffee and cattle. And it would demonstrate an unwavering dedication to clearing the last forests, mining the last minerals, diverting and damming the last rivers, and

getting native peoples off their lands and resources by any means necessary (Mander 1993: 19).

At the same time that UNESCO was becoming toothless, a new round of negotiations inside the General Agreement on Tariffs and Trade, the Uruguay Round, was beginning. It had trade liberalisation as its main aim more than ever before, resulting in the establishment of the World Trade Organisation in 1995, with new treaties, such as GATS (the General Agreement on Trade in Services which includes cultural services) and TRIPs (the agreement on Trade Related Aspects of Intellectual Property Rights). In 1993, Martin Khor foresaw that this liberalisation would accelerate the evolution of monocultures. Governments would find it increasingly difficult to regulate or prevent cultural services imports. "Since the largest and most powerful enterprises belong to the North, the already rapid spread of modern Western-originating culture will be accelerated even more. Cultural diversity would thus be rapidly eroded" (Khor 1993: 104). A decade later, we can conclude that this is both true and not true. Cultural conglomerates are growing, month after month. At the same time, multitudes of cultural initiatives of artists, associations and small enterprises take place, everywhere in the world, day after day (Smiers 2003: 88-102). Their problem is that the channels of distribution and promotion are in the hands of the few giant cultural industries. This prevents the existing diversity of artistic expressions from being made available to diverse audiences.

Thusfar, we have observed that non-Western countries claimed that the *universal* human right to access to the means of communication should apply as well to them. On this point those countries have not been well served. Is the Israeli siege of Beirut, Lebanon in the summer of 1982 a turning point when many people and their governments in the Arab countries, together with their Asian partners, lost their belief in the universalistic character of human rights in general and started to promote the cultural relativism approach of human rights? (Kassir 2004: 67, 8). Or, is this a tendency that was going on already for a longer period?

Cultural relativism

In the introduction of this chapter I mentioned that one should understand that the decades-old human rights declarations and treaties have not been respected, or have been insufficiently implemented to raise a question as to whether states actually favour the development of cultural diversity, or have any interest in analysing what might threaten the flourishing of cultural diversities and taking appropriate measures in response. One of the reasons for the failure of the universal human rights principle concerning artistic communication and artistic expressions is that worldwide the unequal communication balance continues to exist (McChesney 1999, 2002). A completely different reason for the failure can be found in the fact that in several parts

of the world the idea has grown that no universal human rights can exist. On the contrary, this argument suggests that human rights are related to the culture and the society where people live: this is the approach of cultural relativism.

Several Arab and Asian countries believe that the concept of cultural diversity, as promoted in the convention on cultural diversity, is related to the cultural relativist approach which says that, for instance, the freedom of communication is subject to, and limited by, religious rules. This is not the idea of diversity within countries, but only between countries. In this philosophy, every country has its own set of values and each country has a monopoly on which human rights apply internally and this may differ from other countries. Thus, universal human rights cannot exist, including in the fields of information, communication and cultural expression. For people who defend freedom of expression and communication, this cultural relativist approach is a terrifying scenario.

It was defended by the old Soviet Union, which asserted that the political and ideological structures of Communist states pointed toward a different understanding of rights than was favoured in the West, charging the West with violations of economic and social rights.

“That debate died more-or-less together with the Soviet Union. Today it continues in a different form, often in the North-South (or West-East) framework, or in a religious (West-Islam) framework, or more broadly between developing (Third World) and developed (Western-Northern) countries. It also includes non-state actors such as indigenous peoples.” (Steiner 1996: 193)

It must be said that some Western countries also use, misuse, or neglect the development of a universal world order. This does not help to give much credence to the international world order and the construction of respect for the idea and practice of *universal* human rights. Whereas China recently signed the *International Covenant on Economic, Social and Cultural Rights*, the U.S. has not yet done so. Marina Svensson comments that this situation, “gives wrongly the impression that the West is not interested in economic and social rights at all” (Svensson 2000: 214). Together with Somalia, the U.S. is the only country that has not ratified the *Convention on the Rights of Children*. Costas Douzinas observes that the United States “usually promotes the universalism of rights. Its rejection of the world criminal court was a case of cultural relativism which took the form of an imperial escape clause” (Douzinas 2000: 122). But, the continuing process of mergers of cultural industries which increasingly dominate worldwide cultural production, distribution and promotion, is a permanent violation of the cultural rights articles embedded in the *Universal Declaration of Human Rights*. It is a form of cultural relativism that exempts huge slices of cultural life from the universality principle of human rights.

Several Arab and Asian countries claim explicitly that values other than the universal human rights should govern the lives of their citizens. Samir Kassir analyses that, until the 1970s, in many Arab countries a considerable cultural openness existed. This changed with the siege of Beirut in the summer of 1982. Trevor Mostyn is inclined to put this moment earlier. "Since the humiliating defeat of Arab countries in the 1967 Arab-Israeli war (often known as the Six-Day War), a distinction between the Islamic legal tradition based on the Shari'a and the concept of international human rights has become a serious factor" (Mostyn 2002: 171). Somewhere near the end of 1970s the idea of the existence of so-called Asian values and the claim of cultural relativism also emerged.

Ole Bruun summarises those Asian values as follows. First of all there is the straightforward "cultural" argument that human rights emanate from particular historical, social, economic, cultural and political conditions. Second, there is the reflexive, "collective" argument that Asian values differ from Western ones by being communitarian in spirit as opposed to Western individualism. Since the community takes precedence over individuals, individual rights are destructive to the social order and the harmonious function of society. Third, there is the "disciplinary" argument, stressing the importance that Asians allegedly attribute to voluntary discipline in social life. Finally, there is the "organic" argument, building on a notion of state and society as a single body (Bruun 2000: 3).

An important reproach of the Asian values theory to the universal human rights idea is that it concentrates only on individuals, and the Western person is consequently accused of individualism. If this were true, how can it be explained, Ole Bruun wonders, that it "is after all in Western countries that the most finely-masked social-security nets are found?" (Bruun 2000: 14). Moreover, when looked upon in isolation, "Asian values closely resemble commonplace conservative values: strong leadership, respect for authority, law and order, a communitarian orientation placing the good of the collective over the rights of the individual, emphasis on the family, etc." (Bruun 2000: 2).

However, Ziauddin Sardar points out that the *Universal Declaration of Human Rights* assumes a universal human nature common to all peoples. "The Declaration presupposes a social order based on liberal democracy where the society is simply a collection of 'free' individuals. Again, the individual is seen as absolute, irreducible, separate and ontologically prior to society" (Sardar 1998: 68-9). The basic philosophy of many social and cultural systems in several parts of the world is different from this. This is the reality Western countries do not want to know about. "Since an autonomous, isolated individual does not exist in non-Western cultures and traditions, it does not make sense to talk of his or her rights; and where there are no rights, it is quite absurd to speak of their denial or annulment."

Ziauddin Sardar gives the example of Hinduism, in which the notion of dharma, one of the fundamental concepts of Indian tradition, leads us to symbolic correspondence with the Western idea of human rights.

“Dharma is a multilayered concept and incorporates the terms, elements, data, quality and origination, as well as law, norm of conduct, character of things, rights, truth, ritual, morality, justice, righteousness, religion and destiny. In Sikhism, the prime duty of a human being is *sewa*: there is no salvation without *sewa*, the disinterested service of the community. The rights of the individual are thus earned by participating in the community’s endeavour and thereby seeking *sakti*.” (Sardar 1998: 70).

This does not mean that individual rights do not have any value, but they should be seen in a broader context, which Ziauddin Sardar again elucidates with an example: “The notion of an individual person’s rights is not unknown to Islam. Thus, individual rights in Islam do not stop at personal freedoms but include economic, social, cultural, civil and personal rights as well.” (Sardar 1998: 72-3). His observations make clear that much work needs to be done, first, to understand the different concepts of human rights, and second, to understand what can be learned from such varied concepts and what differences cannot be accommodated (Smiers 2003: 172-3).

From 14 to 25 June 1993, the United Nations convened in Vienna a World Conference on Human Rights that had as a purpose the reaffirmation of the basic principles of human rights and to assert the propriety of culturally-diverse interpretations of human rights principles. This was the moment for Arab and Asian countries to reflect on their position concerning the *Universal Declaration on Human Rights*. Forty-nine Asian countries organised a meeting in Bangkok from 29 March to 2 April 1993. In the Final Declaration of the conference it was stated that the participating countries “recognise that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.” This makes Hugo Stokke conclude that, “the Declaration, although it nominally upholds the universality of human rights, does seem to introduce so many reservations as far as norm-setting and application are concerned as to compromise the universality of human rights and thereby provides less room for dialogue on the matter.” (Stokke 2000: 135; see as well Steiner 1996: 229).

In the end, the Vienna Declaration from June 1993 reaffirmed the principle that all human rights are universal, but qualified this by stating that “the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind.” Michael Freeman concludes that “this authoritative UN text left unresolved the relation between the universality of human

rights and the legitimacy of culturally particular conceptions of human rights.” (Freeman 2000: 46).

However, there is also a positive side to mention concerning the 1993 Vienna Declaration and its Programme of Action which reaffirmed not only the universality, but also the interdependence, of all human rights. This should not be underestimated. By doing this, the artificial distinction between civil and political, and economic, social and cultural rights (as adopted in the different documents referred to earlier) was rectified. Moreover, the text of the Vienna Declaration was adopted by consensus by all member states of the United Nations, including those which underwent decolonisation after the creation of the organisation itself.

There we are. The universalism claim concerning human cultural rights is polluted by the continuing unequal communications relations worldwide. The cultural relativism approach has been more than once the cover for cruel practices and the suppression of the freedom of expression, also from a cultural perspective. This might seem sombre. However, Costas Douzinas suggests that all this:

“does not mean that human rights treaties and declarations are devoid of value. At this point in the development of international law, their value is mainly symbolic. Human rights are violated inside the state, the nation, the community, the group. Similarly, the struggle to uphold them belongs to the dissidents, the victims, those whose identity is denied or denigrated, the opposition groups, all those who are the targets of repression and domination.” (Douzinas 2000: 144).

It is an enormous step forward that UNESCO succeeded in forging a convention on cultural diversity that takes seriously universalism and equal rights in the cultural fields, and that respects at the same time that human beings are different and express themselves differently, the positive side of cultural relativism.

What the Convention means to me

Kader Asmal

My contact with the United Nations International, Scientific and Cultural Organisation goes back to over 40 years. In the sixties as an anti-apartheid activist, I found the work of UNESCO in the area of racism to be an electrifying experience. In the seventies, the UNESCO agenda for human rights was expanded to cover areas of development, information and self-determination. Human rights issues were no longer the domain of lawyers only and encompassed – much to the disgust of anglo-saxon thinking – the wider area of social science.

On my return to South Africa from an exile of over thirty years, the issue of the recognition of cultural diversity loomed very large in our discussions on the nature of a post-apartheid constitution for a free South Africa as apartheid had demonised and therefore marginalised the cultures of the vast majority of the people of South Africa.

Subsequently, as Minister of Education, we had to address the issue of diversity in the context of creating a cohesive national educational system. Diversity would only flourish, in our view, in conditions of freedom and the creation of public space where the dignity of all peoples was recognised.

It was because of our experience in drafting our Constitution that I accepted the invitation from member States of UNESCO to allow my name to go forward, in September 2004, as the president of the inter-governmental committee of experts to draft the proposed *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.

In reality, the forum, which discussed the draft Convention, was a negotiating body representing members States of UNESCO, together with observers from international organisations and international non-governmental bodies.

At a personal level, the year-long negotiating process was both illuminating and stimulating. There were three categories of States involved in the process: States who were broadly in support of the preliminary draft submitted by the Director General to the plenary, member States who were uncertain about the implications of some of the provisions but who were broadly in support and a small minority who were totally opposed to the very idea of a Convention but who used stalling tactics, intervening virtually line-by-line or phrase-by-phrase to impede any progress in the negotiations.

An unusual, if not unique, feature of the process was the way in which the negotiating forum came to a conclusion. First, in the usual manner for negotiating a treaty, there was a broad political discussion in September 2004 when the overwhelming majority of States expressed support for the preliminary draft. A drafting committee comprising of the usual regional representation was set up. Little progress was made as the drafting committee was unable to reach any consensus, even in relation to the first five articles. Early in 2005, the plenary meeting received a report from the drafting committee. It was quite clear that leaving the issues to the drafting committee would result in consigning the treaty to oblivion. Subsequently, it was decided that, together with the rapporteurs, the chairman of the drafting committee and officials of UNESCO, I would prepare a presidential draft to the plenary. This was done at a Cape Town meeting.

The remarkable aspect of this process was that the member States were able to conclude their deliberations after an exhausting session in June 2005. Less than nine months after the General Conference of UNESCO provided the mandate for the conclusion of negotiations, the plenary was able to submit a comprehensive draft convention to the executive board of UNESCO for transmission to the General Conference of UNESCO to be held in October 2005.

The adoption of the Convention by the General Conference in October 2005 was an enormous victory for cultural diversity.

I asked myself why I should have been involved in this tortuous process when I faced various parliamentary challenges at home. There were four reasons which impelled me towards Paris.

First, the preliminary draft covered an area previously untouched by any international organisation.

Second, there has been a general feeling that the special nature of cultural goods has not been generally recognised, especially in bilateral and regional trade agreements. The lapsing of the "cultural exception rule" would leave government-sponsored measures vulnerable to complaints, and without any legal grounds for their defence. This becomes even more significant as some powerful

states are inducing more vulnerable states to enter into bilateral agreements because of the perceived difficulties concerning the completion of the Doha Round.

The response for this development was an attempt to ensure that cultural goods and services should be fully covered under WTO and regional and bilateral agreements.

Third was an anxiety concerning the uneven aspect of benefits under globalisation. The quantum leap in information technology has made it possible for multi-national broadcasting and electronic companies to invest in and control news, cinema and other programmes, and in a market economy to gobble up native companies leading to virtual monopolies in some countries. The effect of such concentration of ownership and distribution of television, radio and film products threatens cultural diversity by inhibiting pluralism.

Fourth, free-trade in services and in cultural goods leads to greater homogeneity in the world and the imposition of values, life-styles and attitudes generated by the powerful, squeezing out and marginalising the cultural expressions of a large part of humanity who do not have access to production and distribution facilities. In such a world, there is no parity of esteem, as the “invisible hand” of the market does not subscribe to cultural values, except to transmit the implicit value system of the producer.

States were no longer prepared to be bystanders but were pushing for an initiative which would open up a serious international debate and which would reconcile the UNESCO slogan concerning the “promotion of free flow of ideas by word and image”, with the “protection and promotion of the fruitful diversity of cultures”. The South, in particular, felt strongly about the reminder in the Universal Declaration on Cultural Diversity that “culture is at the heart of contemporary debates about identity, social cohesion and sustainable development”. An enabling environment had to be built and sustained. Exchanges between states and communities could not flourish on the basis of unequal relations or by a free trade in markets. A number of countries in the North, especially France and Canada, had similar views and needs.

I was also allowed to speak to the General Conference – itself a unique recognition of the role of the president of the negotiating forum – following the adoption of the Convention on 20 October 2005. My thoughts at that closing ceremony are reflected in what follows.

We are the participants in and witnesses to a truly historic event – the international community has now adopted a truly “cultural treaty” reaffirming the bonds linking development, dialogue, international co-operation, social cohesion and the cultures of all the peoples of the world, including – I am most happy to say – women, persons belonging to minorities and indigenous peoples who, as we know, are very vulnerable to pressures from different sources.

Moreover, the Convention guarantees that any measure undertaken to protect and promote the diversity of cultural expressions shall in no way infringe human rights and fundamental freedoms. I think it is absolutely vital to say that far from diminishing any aspects of fundamental freedoms for which many people have made great sacrifices, this Convention gives real content to and expands fundamental rights.

By adopting UNESCO's newest standard-setting instrument, we have established the most innovative platform for international cultural co-operation that the world has ever known.

You see it belongs to all of us. As the President of the Executive Board has said, it has been a long road. Even though we had the draft text of the independent experts, the signposts were not always before us.

Let me say this very clearly: this Convention belongs to all of us. It is neither a French, nor a European Union, nor a Canadian Convention. It is a valuable contribution by the entire international community, and I only became President of the negotiation forum because I felt the South could contribute to this Convention. But it is not a Convention for the South or of the South either. It belongs to humanity.

We also should recognise that adopting the Convention is not part of the power play between different nations, regions or social groups. Neither is it only about controlling access to radio and television. It is much wider than that.

So, for me personally, and for most of the South, it has been an enormously moving experience. The weeks I spent with your representatives struggling for consensus have been inspiring, frustrating, infuriating and exciting. Together we have managed to bring our work to a successful conclusion.

Our Convention – and I need to reiterate this — is based on respect; respect for the diversity of all cultures, respect for the dignity of each of us and acknowledgment of our common humanity. These are the values of my own South African Constitution. These are the values of what we call *ubuntu*, the profound tenet of African philosophy, which holds that one is only fully human when recognising the humanity of others.

I thank you for your recognition of these values. I thank someone who has not been thanked until now — that is the Director-General of UNESCO, who has been through tumultuous times and been under enormous pressures. And he has come out steadfast. We have carried out the mandate that the General Conference gave us two years ago.

And please remember, this Convention was not adopted light-heartedly or frivolously, in such a speedy way that not everybody could in fact participate in it. It underwent the most thorough analysis and review.

Let me refer to Article 20, which is considered by so many to be the heart of the Convention. This article deals with the Convention's relationship with other international instruments. As an international lawyer, I can say that this Convention respects the basis of international law, and it does not supersede other conventions, but is complementary to other obligations but does not subordinate it to other instruments.

I find it most appropriate that this milestone coincides with the celebration of UNESCO's 60 years of existence. My own relationship with the Organisation goes back decades. I believe that this new legal instrument will represent the most effective contribution towards "preserving the independence, integrity and fruitful diversity of cultures" as well as promoting "the free flow of ideas by word and image", which, we all know, constitute two fundamental pillars of the Organisation's mission as specified in its Constitution.

This Convention is no frontal assault on the diversity of cultures or the free flow of ideas by word and image as has been suggested. This Convention enables all of us to participate in the genuine free flow of ideas.

But finalising the article of the Convention does not mean that our work is ended. In the words of one of Africa's most famous playwright and writers, Ben Okri from Nigeria:

"They are only the exhausted
Who think that they have arrived
At their final destination
The end of the road
With all their dreams achieved
And no new dreams to hold."

But we continue to have many new dreams. We want you to fulfil our dreams, to maintain and develop them. Ratify this Convention; accede to the Convention; set up the structures that Japan has asked for so that we can have the kind of interplay between countries and nations and cultures that would make us truly universal.

Annex I

**Convention on the Protection and Promotion of the
Diversity of Cultural Expressions**

Paris, 20 October 2005

CL-2005/CONVENTION DIVERSITE-CULT REV.

**Convention on the Protection and Promotion of the Diversity
of Cultural Expressions**

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 3 to 21 October 2005 at its 33rd session,

Affirming that cultural diversity is a defining characteristic of humanity,

Conscious that cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all,

Being aware that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples and nations,

Recalling that cultural diversity, flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, is indispensable for peace and security at the local, national and international levels,

Celebrating the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments,

Emphasizing the need to incorporate culture as a strategic element in national and international development policies, as well as in international development cooperation, taking into account also the United Nations Millennium Declaration (2000) with its special emphasis on poverty eradication,

Taking into account that culture takes diverse forms across time and space and that this diversity is embodied in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity,

Recognizing the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion,

Recognizing the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment,

Emphasizing the importance of culture for social cohesion in general, and in particular its potential for the enhancement of the status and role of women in society,

Being aware that cultural diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures,

Reaffirming that freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies,

Recognizing that the diversity of cultural expressions, including traditional cultural expressions, is an important factor that allows individuals and peoples to express and to share with others their ideas and values,

Recalling that linguistic diversity is a fundamental element of cultural diversity, and *reaffirming* the fundamental role that education plays in the protection and promotion of cultural expressions,

Taking into account the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development,

Emphasizing the vital role of cultural interaction and creativity, which nurture and renew cultural expressions and enhance the role played by those involved in the development of culture for the progress of society at large,

Recognizing the importance of intellectual property rights in sustaining those involved in cultural creativity,

Being convinced that cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value,

Noting that while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, they also

represent a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries,

Being aware of UNESCO's specific mandate to ensure respect for the diversity of cultures and to recommend such international agreements as may be necessary to promote the free flow of ideas by word and image,

Referring to the provisions of the international instruments adopted by UNESCO relating to cultural diversity and the exercise of cultural rights, and in particular the Universal Declaration on Cultural Diversity of 2001,

Adopts this Convention on 20 October 2005.

I. Objectives and guiding principles

Article 1 – Objectives

The objectives of this Convention are:

- (a) to protect and promote the diversity of cultural expressions;
- (b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner;
- (c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace;
- (d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples;
- (e) to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels;
- (f) to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link;
- (g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning;
- (h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory;

- (i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.

Article 2 – Guiding principles

1. Principle of respect for human rights and fundamental freedoms

Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

2. Principle of sovereignty

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory.

3. Principle of equal dignity of and respect for all cultures

The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.

4. Principle of international solidarity and cooperation

International cooperation and solidarity should be aimed at enabling countries, especially developing countries, to create and strengthen their means of cultural expression, including their cultural industries, whether nascent or established, at the local, national and international levels.

5. Principle of the complementarity of economic and cultural aspects of development

Since culture is one of the mainsprings of development, the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and enjoy.

6. Principle of sustainable development

Cultural diversity is a rich asset for individuals and societies. The protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations.

7. Principle of equitable access

Equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding.

8. Principle of openness and balance

When States adopt measures to support the diversity of cultural expressions, they should seek to promote, in an appropriate manner, openness to other cultures of the world and to ensure that these measures are geared to the objectives pursued under the present Convention.

II. Scope of application

Article 3 – Scope of application

This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions.

III. Definitions

Article 4 – Definitions

For the purposes of this Convention, it is understood that:

1. Cultural diversity

“Cultural diversity” refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.

Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.

2. Cultural content

“Cultural content” refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.

3. Cultural expressions

“Cultural expressions” are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.

4. Cultural activities, goods and services

“Cultural activities, goods and services” refers to those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services.

5. Cultural industries

“Cultural industries” refers to industries producing and distributing cultural goods or services as defined in paragraph 4 above.

6. Cultural policies and measures

“Cultural policies and measures” refers to those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.

7. Protection

“Protection” means the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions. “Protect” means to adopt such measures.

8. Interculturality

“Interculturality” refers to the existence and equitable interaction of diverse cultures and the possibility of generating shared cultural expressions through dialogue and mutual respect.

IV. Rights and obligations of Parties

Article 5 – General rule regarding rights and obligations

1. The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.

2. When a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention.

Article 6 – Rights of parties at the national level

1. Within the framework of its cultural policies and measures as defined in Article 4.6 and taking into account its own particular circumstances and needs, each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.

2. Such measures may include the following:

- (a) regulatory measures aimed at protecting and promoting diversity of cultural expressions;
- (b) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services;
- (c) measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services;
- (d) measures aimed at providing public financial assistance;
- (e) measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities;
- (f) measures aimed at establishing and supporting public institutions, as appropriate;
- (g) measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions;
- (h) measures aimed at enhancing diversity of the media, including through public service broadcasting.

Article 7 – Measures to promote cultural expressions

1. Parties shall endeavour to create in their territory an environment which encourages individuals and social groups:

- (a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;

(b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.

2. Parties shall also endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions.

Article 8 – Measures to protect cultural expressions

1. Without prejudice to the provisions of Articles 5 and 6, a Party may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.

2. Parties may take all appropriate measures to protect and preserve cultural expressions in situations referred to in paragraph 1 in a manner consistent with the provisions of this Convention.

3. Parties shall report to the Intergovernmental Committee referred to in Article 23 all measures taken to meet the exigencies of the situation, and the Committee may make appropriate recommendations.

Article 9 – Information sharing and transparency

Parties shall:

(a) provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level;

(b) designate a point of contact responsible for information sharing in relation to this Convention;

(c) share and exchange information relating to the protection and promotion of the diversity of cultural expressions.

Article 10 – Education and public awareness

Parties shall:

(a) encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions, *inter alia*, through educational and greater public awareness programmes;

(b) cooperate with other Parties and international and regional organizations in achieving the purpose of this article;

- (c) endeavour to encourage creativity and strengthen production capacities by setting up educational, training and exchange programmes in the field of cultural industries. These measures should be implemented in a manner which does not have a negative impact on traditional forms of production.

Article 11 – Participation of civil society

Parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention.

Article 12 – Promotion of international cooperation

Parties shall endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions, taking particular account of the situations referred to in Articles 8 and 17, notably in order to:

- (a) facilitate dialogue among Parties on cultural policy;
- (b) enhance public sector strategic and management capacities in cultural public sector institutions, through professional and international cultural exchanges and sharing of best practices;
- (c) reinforce partnerships with and among civil society, non-governmental organizations and the private sector in fostering and promoting the diversity of cultural expressions;
- (d) promote the use of new technologies, encourage partnerships to enhance information sharing and cultural understanding, and foster the diversity of cultural expressions;
- (e) encourage the conclusion of co-production and co-distribution agreements.

Article 13 – Integration of culture in sustainable development

Parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.

Article 14 – Cooperation for development

Parties shall endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries,

in order to foster the emergence of a dynamic cultural sector by, *inter alia*, the following means:

- (a) the strengthening of the cultural industries in developing countries through:
 - (i) creating and strengthening cultural production and distribution capacities in developing countries;
 - (ii) facilitating wider access to the global market and international distribution networks for their cultural activities, goods and services;
 - (iii) enabling the emergence of viable local and regional markets;
 - (iv) adopting, where possible, appropriate measures in developed countries with a view to facilitating access to their territory for the cultural activities, goods and services of developing countries;
 - (v) providing support for creative work and facilitating the mobility, to the extent possible, of artists from the developing world;
 - (vi) encouraging appropriate collaboration between developed and developing countries in the areas, *inter alia*, of music and film;
- (b) capacity-building through the exchange of information, experience and expertise, as well as the training of human resources in developing countries, in the public and private sector relating to, *inter alia*, strategic and management capacities, policy development and implementation, promotion and distribution of cultural expressions, small-, medium- and micro-enterprise development, the use of technology, and skills development and transfer;
- (c) technology transfer through the introduction of appropriate incentive measures for the transfer of technology and know-how, especially in the areas of cultural industries and enterprises;
- (d) financial support through:
 - (i) the establishment of an International Fund for Cultural Diversity as provided in Article 18;
 - (ii) the provision of official development assistance, as appropriate, including technical assistance, to stimulate and support creativity;

(iii) other forms of financial assistance such as low interest loans, grants and other funding mechanisms.

Article 15 – Collaborative arrangements

Parties shall encourage the development of partnerships, between and within the public and private sectors and non-profit organizations, in order to cooperate with developing countries in the enhancement of their capacities in the protection and promotion of the diversity of cultural expressions. These innovative partnerships shall, according to the practical needs of developing countries, emphasize the further development of infrastructure, human resources and policies, as well as the exchange of cultural activities, goods and services.

Article 16 – Preferential treatment for developing countries

Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.

Article 17 – International cooperation in situations of serious threat to cultural expressions

Parties shall cooperate in providing assistance to each other, and, in particular to developing countries, in situations referred to under Article 8.

Article 18 – International Fund for Cultural Diversity

1. An International Fund for Cultural Diversity, hereinafter referred to as “the Fund”, is hereby established.
2. The Fund shall consist of funds-in-trust established in accordance with the Financial Regulations of UNESCO.
3. The resources of the Fund shall consist of:
 - (a) voluntary contributions made by Parties;
 - (b) funds appropriated for this purpose by the General Conference of UNESCO;
 - (c) contributions, gifts or bequests by other States; organizations and programmes of the United Nations system, other regional or international organizations; and public or private bodies or individuals;
 - (d) any interest due on resources of the Fund;
 - (e) funds raised through collections and receipts from events organized for the

benefit of the Fund;

(f) any other resources authorized by the Fund's regulations.

4. The use of resources of the Fund shall be decided by the Intergovernmental Committee on the basis of guidelines determined by the Conference of Parties referred to in Article 22.
5. The Intergovernmental Committee may accept contributions and other forms of assistance for general and specific purposes relating to specific projects, provided that those projects have been approved by it.
6. No political, economic or other conditions that are incompatible with the objectives of this Convention may be attached to contributions made to the Fund.
7. Parties shall endeavour to provide voluntary contributions on a regular basis towards the implementation of this Convention.

Article 19 – Exchange, analysis and dissemination of information

1. Parties agree to exchange information and share expertise concerning data collection and statistics on the diversity of cultural expressions as well as on best practices for its protection and promotion.
2. UNESCO shall facilitate, through the use of existing mechanisms within the Secretariat, the collection, analysis and dissemination of all relevant information, statistics and best practices.
3. UNESCO shall also establish and update a data bank on different sectors and governmental, private and non-profit organizations involved in the area of cultural expressions.
4. To facilitate the collection of data, UNESCO shall pay particular attention to capacity-building and the strengthening of expertise for Parties that submit a request for such assistance.
5. The collection of information identified in this Article shall complement the information collected under the provisions of Article 9.

V. Relationship to other instruments

Article 20 – Relationship to other treaties: mutual supportiveness, complementarity and non-subordination

1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,

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- (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and
- (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.
2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

Article 21 – International consultation and coordination

Parties undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles.

VI. Organs of the Convention

Article 22 – Conference of Parties

1. A Conference of Parties shall be established. The Conference of Parties shall be the plenary and supreme body of this Convention.
2. The Conference of Parties shall meet in ordinary session every two years, as far as possible, in conjunction with the General Conference of UNESCO. It may meet in extraordinary session if it so decides or if the Intergovernmental Committee receives a request to that effect from at least one-third of the Parties.
3. The Conference of Parties shall adopt its own rules of procedure.
4. The functions of the Conference of Parties shall be, *inter alia*:
 - (a) to elect the Members of the Intergovernmental Committee;
 - (b) to receive and examine reports of the Parties to this Convention transmitted by the Intergovernmental Committee;
 - (c) to approve the operational guidelines prepared upon its request by the Intergovernmental Committee;
 - (d) to take whatever other measures it may consider necessary to further the objectives of this Convention.

Article 23 – Intergovernmental Committee

1. An Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, hereinafter referred to as “the Intergovernmental Committee”, shall be established within UNESCO. It shall be composed of representatives of 18 States Parties to the Convention, elected for a term of four years by the Conference of Parties upon entry into force of this Convention pursuant to Article 29.
2. The Intergovernmental Committee shall meet annually.
3. The Intergovernmental Committee shall function under the authority and guidance of and be accountable to the Conference of Parties.
4. The Members of the Intergovernmental Committee shall be increased to 24 once the number of Parties to the Convention reaches 50.
5. The election of Members of the Intergovernmental Committee shall be based on the principles of equitable geographical representation as well as rotation.
6. Without prejudice to the other responsibilities conferred upon it by this Convention, the functions of the Intergovernmental Committee shall be:
 - (a) to promote the objectives of this Convention and to encourage and monitor the implementation thereof;
 - (b) to prepare and submit for approval by the Conference of Parties, upon its request, the operational guidelines for the implementation and application of the provisions of the Convention;
 - (c) to transmit to the Conference of Parties reports from Parties to the Convention, together with its comments and a summary of their contents;
 - (d) to make appropriate recommendations to be taken in situations brought to its attention by Parties to the Convention in accordance with relevant provisions of the Convention, in particular Article 8;
 - (e) to establish procedures and other mechanisms for consultation aimed at promoting the objectives and principles of this Convention in other international forums;
 - (f) to perform any other tasks as may be requested by the Conference of Parties.

7. The Intergovernmental Committee, in accordance with its Rules of Procedure, may invite at any time public or private organizations or individuals to participate in its meetings for consultation on specific issues.
8. The Intergovernmental Committee shall prepare and submit to the Conference of Parties, for approval, its own Rules of Procedure.

Article 24 – UNESCO Secretariat

1. The organs of the Convention shall be assisted by the UNESCO Secretariat.
2. The Secretariat shall prepare the documentation of the Conference of Parties and the Intergovernmental Committee as well as the agenda of their meetings and shall assist in and report on the implementation of their decisions.

VII. Final clauses

Article 25 – Settlement of disputes

1. In the event of a dispute between Parties to this Convention concerning the interpretation or the application of the Convention, the Parties shall seek a solution by negotiation.
2. If the Parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.
3. If good offices or mediation are not undertaken or if there is no settlement by negotiation, good offices or mediation, a Party may have recourse to conciliation in accordance with the procedure laid down in the Annex of this Convention. The Parties shall consider in good faith the proposal made by the Conciliation Commission for the resolution of the dispute.
4. Each Party may, at the time of ratification, acceptance, approval or accession, declare that it does not recognize the conciliation procedure provided for above. Any Party having made such a declaration may, at any time, withdraw this declaration by notification to the Director-General of UNESCO.

Article 26 – Ratification, acceptance, approval or accession by Member States

1. This Convention shall be subject to ratification, acceptance, approval or accession by Member States of UNESCO in accordance with their respective constitutional procedures.
2. The instruments of ratification, acceptance, approval or accession shall be deposited with the Director-General of UNESCO.

Article 27 – Accession

1. This Convention shall be open to accession by all States not Members of UNESCO but members of the United Nations, or of any of its specialized agencies, that are invited by the General Conference of UNESCO to accede to it.
2. This Convention shall also be open to accession by territories which enjoy full internal self-government recognized as such by the United Nations, but which have not attained full independence in accordance with General Assembly resolution 1514 (XV), and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters.
3. The following provisions apply to regional economic integration organizations:
 - (a) This Convention shall also be open to accession by any regional economic integration organization, which shall, except as provided below, be fully bound by the provisions of the Convention in the same manner as States Parties;
 - (b) In the event that one or more Member States of such an organization is also Party to this Convention, the organization and such Member State or States shall decide on their responsibility for the performance of their obligations under this Convention. Such distribution of responsibility shall take effect following completion of the notification procedure described in subparagraph;
 - (c) The organization and the Member States shall not be entitled to exercise rights under this Convention concurrently. In addition, regional economic integration organizations, in matters within their competence, shall exercise their rights to vote with a number of votes equal to the number of their Member States that are Parties to this Convention. Such an organization shall not exercise its right to vote if any of its Member States exercises its right, and vice-versa;
 - (d) A regional economic integration organization and its Member State or States which have agreed on a distribution of responsibilities as provided in subparagraph (b) shall inform the Parties of any such proposed distribution of responsibilities in the following manner:
 - (i) in their instrument of accession, such organization shall declare with specificity, the distribution of their responsibilities with respect to matters governed by the Convention;
 - (ii) in the event of any later modification of their respective responsibilities, the

regional economic integration organization shall inform the depositary of any such proposed modification of their respective responsibilities; the depositary shall in turn inform the Parties of such modification;

(d) Member States of a regional economic integration organization which become Parties to this Convention shall be presumed to retain competence over all matters in respect of which transfers of competence to the organization have not been specifically declared or informed to the depositary;

(e) “Regional economic integration organization” means an organization constituted by sovereign States, members of the United Nations or of any of its specialized agencies, to which those States have transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to become a Party to it.

4. The instrument of accession shall be deposited with the Director-General of UNESCO.

Article 28 – Point of contact

Upon becoming Parties to this Convention, each Party shall designate a point of contact as referred to in Article 9.

Article 29 – Entry into force

1. This Convention shall enter into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States or regional economic integration organizations that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date. It shall enter into force with respect to any other Party three months after the deposit of its instrument of ratification, acceptance, approval or accession.
2. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by Member States of the organization.

Article 30 – Federal or non-unitary constitutional systems

Recognizing that international agreements are equally binding on Parties regardless of their constitutional systems, the following provisions shall apply to Parties which have a federal or non-unitary constitutional system:

- (a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the

obligations of the federal or central government shall be the same as for those Parties which are not federal States;

- (b) with regard to the provisions of the Convention, the implementation of which comes under the jurisdiction of individual constituent units such as States, counties, provinces, or cantons which are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform, as necessary, the competent authorities of constituent units such as States, counties, provinces or cantons of the said provisions, with its recommendation for their adoption.

Article 31 – Denunciation

1. Any Party to this Convention may denounce this Convention.
2. The denunciation shall be notified by an instrument in writing deposited with the Director-General of UNESCO.
3. The denunciation shall take effect 12 months after the receipt of the instrument of denunciation. It shall in no way affect the financial obligations of the Party denouncing the Convention until the date on which the withdrawal takes effect.

Article 32 – Depositary functions

The Director-General of UNESCO, as the depositary of this Convention, shall inform the Member States of the Organization, the States not members of the Organization and regional economic integration organizations referred to in Article 27, as well as the United Nations, of the deposit of all the instruments of ratification, acceptance, approval or accession provided for in Articles 26 and 27, and of the denunciations provided for in Article 31.

Article 33 – Amendments

1. A Party to this Convention may, by written communication addressed to the Director-General, propose amendments to this Convention. The Director-General shall circulate such communication to all Parties. If, within six months from the date of dispatch of the communication, no less than one half of the Parties reply favourably to the request, the Director-General shall present such proposal to the next session of the Conference of Parties for discussion and possible adoption.
2. Amendments shall be adopted by a two-thirds majority of Parties present and voting.
3. Once adopted, amendments to this Convention shall be submitted to the Parties for ratification, acceptance, approval or accession.

4. For Parties which have ratified, accepted, approved or acceded to them, amendments to this Convention shall enter into force three months after the deposit of the instruments referred to in paragraph 3 of this Article by two-thirds of the Parties. Thereafter, for each Party that ratifies, accepts, approves or accedes to an amendment, the said amendment shall enter into force three months after the date of deposit by that Party of its instrument of ratification, acceptance, approval or accession.
5. The procedure set out in paragraphs 3 and 4 shall not apply to amendments to Article 23 concerning the number of Members of the Intergovernmental Committee. These amendments shall enter into force at the time they are adopted.
6. A State or a regional economic integration organization referred to in Article 27 which becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention, be considered to be:
 - (a) Party to this Convention as so amended; and
 - (b) a Party to the unamended Convention in relation to any Party not bound by the amendments.

Article 34 – Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, all six texts being equally authoritative.

Article 35 – Registration

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of UNESCO.

ANNEX

Conciliation Procedure

Article 1 – Conciliation Commission

A Conciliation Commission shall be created upon the request of one of the Parties to the dispute. The Commission shall, unless the Parties otherwise agree, be composed of five members, two appointed by each Party concerned and a President chosen jointly by those members.

Article 2 – Members of the Commission

In disputes between more than two Parties, Parties in the same interest shall appoint their members of the Commission jointly by agreement. Where two or more Parties have separate interests or there is a disagreement as to whether they are of the same interest, they shall appoint their members separately.

Article 3 – Appointments

If any appointments by the Parties are not made within two months of the date of the request to create a Conciliation Commission, the Director-General of UNESCO shall, if asked to do so by the Party that made the request, make those appointments within a further two-month period.

Article 4 – President of the Commission

If a President of the Conciliation Commission has not been chosen within two months of the last of the members of the Commission being appointed, the Director-General of UNESCO shall, if asked to do so by a Party, designate a President within a further two month period.

Article 5 – Decisions

The Conciliation Commission shall take its decisions by majority vote of its members. It shall, unless the Parties to the dispute otherwise agree, determine its own procedure. It shall render a proposal for resolution of the dispute, which the Parties shall consider in good faith.

Article 6 – Disagreement

A disagreement as to whether the Conciliation Commission has competence shall be decided by the Commission.

Annex II

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