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## The Protection and Promotion of Cultural Diversity at the International Level

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### ABSTRACT

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted under the auspices of the United Nations Educational, Cultural and Scientific Organization (UNESCO) in 2005, entered into force on 18 March 2007 after an incredibly swift ratification process. The Convention is the culmination of multiple-track efforts that spread over many years with the objective of providing a binding instrument for the protection and promotion of cultural diversity at the international level. These efforts, admirable as they may be, are not however isolated undertakings of goodwill, but a reaction to economic globalisation, whose advancement has been significantly furthered by the emergence of enforceable multilateral trade rules. These very rules, whose bearer is the World Trade Organization (WTO), have been perceived as the antipode to “culture” and have commanded the formulation of counteracting norms that may sufficiently “protect” and “promote” it. Against this backdrop of institutional tension and fragmentation, the present chapter explicates the emergence of the concept of cultural diversity on the international policy- and law-making scene and its legal dimensions given by the new UNESCO Convention. It critically analyses the Convention’s provisions, in particular the rights and obligations of the State Parties, and asks whether indeed the UNESCO Convention provides a sufficient and appropriate basis for the protection and promotion of a thriving and diverse cultural environment.

### KEY WORDS

Trade, culture, cultural diversity, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the World Trade Organization.

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# The Protection and Promotion of Cultural Diversity at the International Level

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## 1. Introduction

“Cultural diversity” has become one of the new buzzwords in international policy- and law-making. It is increasingly employed in various contexts – once as a term close to “biological diversity”,<sup>1</sup> other times as correlated to the “*exception culturelle*” and most often, as a generic concept that is opposed to the negative effects of economic globalisation.<sup>2</sup> While no one has yet provided a precise definition of what cultural diversity is, and perhaps fortunately so, what we can observe is the emergence of the notion of cultural diversity as incorporating a distinct set of policy objectives and choices at the international level. These decisions are not confined, as one may expect, to the domain of cultural policy-making, but rather spill over to multiple fields of governance, because of the intrinsic complex linkages related to the concurrent pursuit of economic and other societal goals. Thus, policy domains such as media and intellectual property rights protection, but also less intuitively, telecommunications and antitrust law are affected.

Accounting for these complex interdependencies, we look in the following at the recently adopted under the auspices of the United Nations Educational Scientific and Cultural Organization (UNESCO) international instrument for the protection and promotion of cultural diversity and explore its main tenets. It is our purpose to expose the real and potential effects of the UNESCO act, both in legal and political terms, and to see whether it indeed provides a sufficient and appropriate basis for the protection and promotion of a thriving and diverse cultural environment.

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<sup>\*</sup> This chapter is forthcoming in *Cultural Diversity: Issues, Challenges and Perspectives*, New York: Nova Science Publishers, 2009.

<sup>1</sup> Article 1 of the UNESCO Declaration of Cultural Diversity of 2 November 2001 states that, “[...]a[s] a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature”.

<sup>2</sup> See below section 3.

## 2. Overview of main provisions of the UNESCO Convention on Cultural Diversity

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (henceforth *the UNESCO Convention* or just *the Convention*) was adopted by the 33rd UNESCO General Conference in 2005 with an overwhelming majority of 148 votes with only two countries, the United States and Israel, opposing.<sup>3</sup> After an incredibly swift ratification process (the fastest ever in the history of the UNESCO), the Convention entered into force on 18 March 2007.<sup>4</sup>

Despite this so unequivocal acceptance of the Convention, its negotiation and drafting were rather lengthy and strenuous. They involved some hard bargaining and exposed yet again the starkly different perceptions of states when issues like culture, national identity, sovereignty, and economic freedom are at stake. The output of this process, which we discuss in this section, unmistakably bears the marks of lost (or won) power-plays and political compromise.

### 2.1. The Convention's textual basis

The Convention's text consists of thirty-five Articles and an Annex dealing with conciliation procedures. Its scope of application is defined broadly and ambitiously in Article 3 as covering "the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions".

### 2.2. Rights and Obligations of the Parties

After an introductory part, which lays down the objectives<sup>5</sup> and the guiding principles<sup>6</sup> of the Convention, as well as contains the definitions of its underlying concepts,<sup>7</sup> Part IV of the Convention follows. This Part (encompassing Articles 5 to 19) is critical to evaluating the command and the impact of the UNESCO

<sup>3</sup> Four countries, Australia, Honduras, Nicaragua and Liberia, abstained.

<sup>4</sup> As of 5 March 2009, 96 countries had ratified the UNESCO Convention (see <http://portal.unesco.org/la/convention.asp?KO=31038&language=E>; last accessed 1 April 2009).

<sup>5</sup> Article 1 of the UNESCO Convention defines as its objective: (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.

<sup>6</sup> Article 2 of the UNESCO Convention formulates eight guiding principles. These are: (1) principle of respect for human rights and fundamental freedoms; (2) principle of sovereignty; (3) principle of equal dignity of and respect for all cultures; (4) principle of international solidarity and cooperation; (5) principle of the complementarity of economic and cultural aspects of development; (6) principle of sustainable development; (7) principle of equitable access; and (8) principle of openness and balance.

<sup>7</sup> Article 4 of the UNESCO Convention. These definitions will be looked at, where appropriate, in the following discussion of the Convention (below section 3).

Convention since it formulates the rights and obligations of the State Parties. Within these provisions, a key one is contained in Article 5, which affirms “the *sovereign right* [of the 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”.<sup>8</sup> Article 6 is a specification of this sovereign right with regard to measures promoting and protecting cultural diversity in a Party’s territory and thus relates *sensu stricto* to domestic rules. Paragraph 2 of Article 6 provides a non-exhaustive list including eight categories of regulatory, institutional and financial measures that the Parties may choose to adopt. These measures are broadly defined and do not correspond to any particular typology of cultural policy tools.<sup>9</sup>

Articles 7 to 11 were supposed to build the counterpart to the extensively defined rights of the Parties and formulate corresponding obligations. The attempt to incorporate real obligations was however not politically possible and what is presently left are mere best effort and good faith obligations expressed in the typical treaty language of “shall endeavour”, “shall encourage” or “may”.<sup>10</sup> These so framed “duties” merely motivate the Parties to the Convention to adopt a number of measures, including such that (i) promote access to and dissemination of cultural expressions;<sup>11</sup> (ii) address specific situations where cultural expressions are under serious threat of extinction;<sup>12</sup> (iii) ensure an appropriate exchange of relevant information;<sup>13</sup> (iv) encourage an enhanced public awareness of the need to protect cultural diversity;<sup>14</sup> and (v) the participation of the civil society.<sup>15</sup> No strong normative effect can be expected from any of these provisions, except perhaps for Article 9(a), which obliges the State Parties to report to UNESCO every four years on the measures taken for the protection and promotion of cultural diversity.

While the above Articles 7-11 refer to the national level, Articles 12-19 extend some duties to the international level. These address the cooperation between the State Parties with a view of creating conditions conducive to the protection and promotion of cultural diversity. Many of the norms relate in particular to cooperation with or support of developing countries, including the establishment of

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<sup>8</sup> Emphasis added.

<sup>9</sup> Pursuant to Article 6(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.

<sup>10</sup> The Preliminary Draft of the Convention (CLT-2004/CONF.201/CLD.2, Paris, July 2004), prepared by the International Group of Experts included not only rights but also *obligations* to protect and promote cultural diversity within their territories and internationally.

<sup>11</sup> Article 7 of the UNESCO Convention.

<sup>12</sup> Article 8 of the UNESCO Convention.

<sup>13</sup> Article 9 of the UNESCO Convention.

<sup>14</sup> Article 10 of the UNESCO Convention.

<sup>15</sup> Article 11 of the UNESCO Convention.

an International Fund for Cultural Diversity,<sup>16</sup> which is meant to cater for the culturally pertinent financial needs of developing and least developed nations.

Very interestingly, one can find in this context also two of the most far-reaching obligations of the Convention. The first is embodied in Article 16 and creates a duty for developed countries to facilitate cultural exchanges with developing countries by granting preferential treatment to artists and other cultural professionals and practitioners, as well as to cultural goods and services from developing countries. The other duty that can be singled out is admittedly of lesser importance and obliges the State Parties to cooperate and assist developing countries in specific situations, where there is a risk of extinction or serious threat for cultural expressions (as defined by Article 8).<sup>17</sup> It is worth noting that in previous versions of the Convention's text, the Parties could be obliged by the Intergovernmental Committee to take appropriate measures to preserve vulnerable cultural expressions<sup>18</sup> (i.e. a sort of supranational interference was prescribed). What is left now in the treaty text is the *right* to take such measures and the mentioned cooperation engagement.

### 2.3. Other provisions

Part V of the Convention contains two norms dealing with its relationship with other legal instruments – Articles 20 and 21. The latter provision, in a rather non-binding manner, encourages the Parties to promote the objectives and principles of the UNESCO Convention in other international forums and to consult each other for this purpose. The former, Article 20 of the Convention incorporates the critical “conflict of laws” rules and had been for this reason at the centre of intense discussions throughout the negotiations. Its scope remains uncertain and controversial, as we explain in more detail in the next analytical section.

The last two parts of the Convention deal with matters of institutional and organisational nature (Part VI: Articles 22 to 24) and final clauses (Part VII: Articles 25 to 35).<sup>19</sup> The two organs foreseen under the Convention are the Conference of Parties (as a plenary and supreme body)<sup>20</sup> and the Intergovernmental Committee (as an executive body),<sup>21</sup> with specific role assigned to the UNESCO Secretariat.<sup>22</sup> We look at elements of these provisions, where relevant in the critical assessment of the Convention following hereupon.

<sup>16</sup> Articles 14(d)(i) and 18 of the UNESCO Convention.

<sup>17</sup> Article 17 of the UNESCO Convention.

<sup>18</sup> Jan Wouters and Bart De Meester, “The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law” (2008) *Journal of Trade Law* 41:1, pp. 205-240.

<sup>19</sup> The final clauses include: Article 25 – Settlement of disputes; Article 26 – Ratification, acceptance, approval or accession by Member States; Article 27 – Accession; Article 28 – Point of contact; Article 29 – Entry into force; Article 30 – Federal or non-unitary constitutional systems; Article 31 – Denunciation; Article 32 – Depositary functions; Article 33 – Amendments; Article 34 – Authoritative texts; and Article 35 – Registration.

<sup>20</sup> Article 22 of the UNESCO Convention.

<sup>21</sup> Article 23 of the UNESCO Convention.

<sup>22</sup> Article 24 of the UNESCO Convention.

### 3. The UNESCO Convention: An appraisal in context

The UNESCO Convention is not a sudden act of international goodwill but the pinnacle of multiple-track efforts that spread over many years<sup>23</sup> with the objective of providing a binding instrument for the protection and promotion of cultural diversity at the international level. The Convention is thus a crystallisation of some previous, mostly exhortatory acts<sup>24</sup> in the fields of culture and trade,<sup>25</sup> and of cultural heritage.<sup>26</sup> On the other hand, it is also a clear reaction to economic globalisation,<sup>27</sup> whose advancement has been significantly furthered by the emergence of enforceable multilateral trade rules and whose bearer, the World Trade Organization (WTO), has been perceived as the very antipode to “culture”. In this sense and this should be stressed here, the UNESCO Convention as a legally binding agreement was meant above all to counterbalance the WTO and fill “a lacuna in public international law regarding cultural values”.<sup>28</sup>

In both of the above aspects, the UNESCO Convention has been celebrated as a remarkable success. Particularly contented are those state and non-state actors, who can be collectively referred to as proponents of the “*exception culturelle*” doctrine<sup>29</sup> and who have fervently for many years now argued that cultural products are not just commodities but “reflect who we are as a people, [...] shape our society, develop our understanding of one another and give us a sense of pride in who we are as a nation”.<sup>30</sup> Beyond this rhetoric, however, the odd thing about the Convention is that when one looks at it closely and construes it as a treaty basis for any future undertaking aimed at protecting and promoting cultural diversity, most of the highly optimistic labels that cultural advocates put to it simply do not stick. Against the above overview of the Convention’s main provisions, in the next section we offer a critical analysis of these<sup>31</sup> in light of the initially stated objective

<sup>23</sup> See Ivan Bernier, “A UNESCO International Convention on Cultural Diversity” in Christoph Beat Graber, Michael Girsberger and Mira Nenova (eds.), *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services*, Zurich: Schulthess, 2004, pp. 65-76; Americo Beviglia-Zampetti, “WTO Rules in the Audio-Visual Sector” in Paulo Guerrieri, P. Lelio Iapadre and Georg Koopmann (eds.), *Cultural Diversity and International Economic Integration: The Global Governance of the Audio-Visual Sector*, Cheltenham, UK: Edward Elgar, 2005, pp. 261-284; Tania Voon, “UNESCO and the WTO: A Clash of Cultures?” (2006) *International and Comparative Law Quarterly* 55:3, pp. 635-652; Tania Voon, *Cultural Products and the World Trade Organization*, Cambridge: Cambridge University Press, 2007, at pp. 173-216.

<sup>24</sup> Rachael Craufurd Smith, “The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?” (2007) *International Journal of Communication* 1, pp. 24-55, at pp. 28-29.

<sup>25</sup> See UNESCO, Agreement on the Importation of Educational, Scientific and Cultural Materials, done at Florence, 17 June 1950 (“Florence Agreement”). The Agreement was updated with the Nairobi Protocol (done at Nairobi, 26 November 1976). More recent acts are the Council of Europe Declaration on Cultural Diversity, done at Strasbourg, 7 December 2000 and the UNESCO Universal Declaration on Cultural Diversity, done at Paris, 2 November 2001.

<sup>26</sup> See e.g. UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, done at Paris, 16 November 1972; UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, done at Paris, 17 October 2003, and Council of Europe, European Landscape Convention, European Treaty Series No 176, done at Florence, 20 October 2000.

<sup>27</sup> See e.g. Christoph Beat Graber, “The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO” (2006) *Journal of International Economic Law* 9:3, pp. 553-574.

<sup>28</sup> Graber, *ibid.* at pp. 564-565.

<sup>29</sup> See e.g. Frederick Scott Galt, “The Life, Death, and Rebirth of the ‘Cultural Exception’ in the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture’s Hegemony” (2004) *Washington University Global Studies Law Review* 3:3, pp. 909-935.

<sup>30</sup> Canadian Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), *New Strategies for Culture and Trade: Canadian Culture in a Global World*, 1999, at Executive Summary, paras 1-2.

<sup>31</sup> The UNESCO Convention has been discussed by a number of authors. See e.g. Michael Hahn, “A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law” (2006) *Journal of International*

of this chapter to assess whether the UNESCO Convention appropriately protects and promotes cultural diversity in the contemporary media environment.

### 3.1. Plenty of rights, no obligations

As an act of international law, the UNESCO Convention contains certain rights and obligations,<sup>32</sup> as we showed above. These are with varying degrees of binding intensity upon which the Parties have agreed. The UNESCO Convention has however precious few obligations and these are formulated as mere stimuli for the Parties to adopt measures for the protection and promotion of cultural diversity at the national and international levels, rather than as genuine duties. The only provision of real binding nature (Article 16) resembles the WTO's enabling clause<sup>33</sup> and relates, as noted above, to the preferential treatment for developing countries, whereby developed countries must facilitate cultural exchanges with developing countries by granting preferential treatment to cultural workers, as well as to cultural goods.<sup>34</sup> If one cautiously considers this binding norm, however, its potential scope and impact appears quite narrow. As one well-informed commentator noted, "[i]ndeed, it can be argued that the main benefits are defined in terms of cultural cooperation and not in commercial terms. What Article 16 can facilitate are cultural exchanges, training, technical assistance and collaborations. The prospects for advancing the aims of expanding cultural industries and generating cultural exports are limited in scope and consequently it is difficult to see how Article 16 of the Convention, on its own, can adequately contribute to the protection and promotion of diversity of cultural expressions in a rapidly commercializing global cultural economy".<sup>35</sup>

Looking at the remaining duties under the UNESCO Convention, the vagueness of the core obligation embodied in Article 7(1) to "endeavour to create [...] 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; [and] (b) to have access to diverse cultural expressions from within their

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Economic Law 9:3, pp. 515-552; Graber, above note 27; Christoph Beat Graber, "Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity" in Hildegard Schneider and Peter van den Bossche (eds.), *Protection of Cultural Diversity from an International and European Perspective*, Antwerpen: Intersentia, 2008, pp. 141-162; Craufurd Smith, above note 24; Wouters and De Meester, above note 18; Rolf H. Weber, "Cultural Diversity and International Trade – Taking Stock and Looking Ahead" in Kern Alexander and Mads Andenas (eds.), *The World Trade Organization and Trade in Services*, Leiden: Martinus Nijhoff, 2008, pp. 823-843; Christopher M. Bruner, "Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products" (2008) *International Law and Politics* 40, pp. 351-436, as well as the contributions to Nina Obuljen and Joost Smiers (eds.), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work*, Zagreb: Institute for International Relations, 2006.

<sup>32</sup> Articles 5-19 of the UNESCO Convention.

<sup>33</sup> See GATT, Decision of 28 November 1979 (L/4903), Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause"). See also Bernard Hoekman, "More Favorable Treatment of Developing Countries: Ways Forward" in Richard Newfarmer (ed.), *Trade, Doha, and Development: Window into the Issues*, Washington, DC: World Bank, 2006, pp. 213-221; Seung Wha Chang, "WTO for Trade and Development Post-Doha" (2007) *Journal of International Economic Law* 10:3, pp. 553-570.

<sup>34</sup> Article 16 of the UNESCO Convention. For a comprehensive analysis, see Keith Nurse, Expert Report on Preferential Treatment (Article 16) in the UNESCO Convention on the Protections and Promotion of the Diversity of Cultural Expressions, 10 October 2008.

<sup>35</sup> Nurse, *ibid.* at p. 24.



territory as well as from other countries of the world”,<sup>36</sup> is truly astounding. Furthermore, no “punishment” for non-compliance is envisaged. Lack of action to achieve this “environment” or any of the other best endeavour obligations contained in Articles 7-19, as Craufurd Smith notes, “at worst, could result in a state being criticised by the Intergovernmental Committee or Conference of Parties [...] on the basis of the state’s own four yearly reports”.<sup>37</sup> And, while such reporting exercises have proven advantageous in different settings,<sup>38</sup> they are unlikely to have any value here, since there exist neither any implementation criteria, nor any threat of sanctions.<sup>39</sup> Even if these reporting obligations are to be taken seriously by the State Parties, the reporting requirements are constrained to the measures that the Party has taken and not to the state of the diversity of cultural expressions that these measures should address.<sup>40</sup>

Despite the extremely limited obligations on the Parties to take action to protect and promote cultural diversity, the Convention formulates an extensive block of rights to that end. As explained above, Article 6(2) of the UNESCO Convention provides a non-exhaustive list of measures that the Parties may adopt,<sup>41</sup> depicting “with variable clarity”<sup>42</sup> basically all known cultural policy measures that states put in place, ranging from any “regulatory measures aimed at protecting and promoting diversity of cultural expressions”<sup>43</sup> to the concrete example of public service broadcasting.<sup>44</sup> This “all inclusive” approach signals that the Convention’s object has been “to endorse forms of market intervention rather than to preclude them”.<sup>45</sup>

Admittedly, non-exhaustive lists are not a rare phenomenon in intergovernmental treaty-making. They allow, through some vagueness and constructive ambiguity, the bringing together of an array of (at times diverging) interests and the actual closing of the deal. Yet, what makes the UNESCO Convention peculiar in this regard is the complete lack of criteria and/or mechanisms that would make these definitions workable, separating the licit from the illicit cultural policy measures.

This normative incompleteness is a striking feature of the UNESCO Convention and has been much criticised both by prominent negotiation Parties, notably the US,<sup>46</sup> and by a host of scholars,<sup>47</sup> who warn against protectionism, be it

<sup>36</sup> Emphasis added.

<sup>37</sup> Craufurd Smith, above note 24, at p. 39 and Article 9(a) of the UNESCO Convention.

<sup>38</sup> For instance, in the framework of the media rules in the European Union.

<sup>39</sup> Craufurd Smith, above note 24, at pp. 37-38.

<sup>40</sup> Craufurd Smith, *ibid.* at p. 37.

<sup>41</sup> See Article 6(2)(a)-(h) of the UNESCO Convention.

<sup>42</sup> Hélène Ruiz Fabri, “Reflections on Possible Future Legal Implications of the Convention” in Obuljen and Smiers, above note 31, pp. 73-87, at p. 80.

<sup>43</sup> Article 6(2)(a) of the UNESCO Convention.

<sup>44</sup> Article 6(2)(h) of the UNESCO Convention. For an overview of the domestic cultural policy measures, see Mary E. Footer and Christoph Beat Graber, “Trade Liberalisation and Cultural Policy” (2000) *Journal of International Economic Law* 3:1, pp. 115-144, at pp. 122-126.

<sup>45</sup> Craufurd Smith, above note 24, at p. 40. In this sense, it also diverges from the contemporary theory of regulation seeking the slightest possible interference. See e.g. Richard R. Nelson (ed.), *The Limits of Market Organisation*, New York: Russell Sage, 2005; Anthony I. Ogus, *Regulation: Legal Form and Economic Theory*, Oxford: Clarendon Press, 1994.

<sup>46</sup> The US noted in this regard: “This instrument remains too flawed, too open to misinterpretation, and too prone to abuse for us to support”. See “Explanation of Vote of the United States on the Convention on the

disguised or less so. It is indeed odd that while the Convention clearly acknowledges the dual nature of cultural goods and services and celebrates their cultural side,<sup>48</sup> no attempt is made to provide guidance on how states might reduce the market- and trade-distorting effects of cultural policy measures. While a balance between the economic and cultural nature of goods, services and activities is undoubtedly complex, the UNESCO Convention could have at least made “reference to principles such as proportionality or effectiveness, which could guide the application of these measures and serve to prevent more blatant forms of protectionism”.<sup>49</sup> This innate defect of normative incompleteness is aggravated by the lack of institutional or adjudicatory mechanisms that could procedurally clarify and complete the contract.

The Convention’s exponents still hope that the Intergovernmental Committee and the Convention’s own dispute resolution will fill in some of the existing gaps, since both allow evolutionary advances, depending upon the willingness of the Parties. It should be noted however that the dispute settlement is ultimately not compulsory<sup>50</sup> and the tasks of the Intergovernmental Committee, as defined in Article 23(6), may not provide a solid legal basis for it to engage in interpretation of the Convention beyond commenting on the State Parties’ reports.<sup>51</sup>

### 3.2. Incompleteness of the UNESCO Convention

Next to the almost entirely missing obligations and implementation criteria, one should note that the framework of the UNESCO Convention is not comprehensive enough to secure the protection and promotion of cultural diversity, leaving some critical elements outside its otherwise generously defined scope of application.<sup>52</sup> Some of these missing elements are related to the centrality of state sovereignty, which is intrinsic to the UNESCO Convention. Indeed, the sovereignty of the State Parties in the cultural field is included as one of the eight guiding principles underpinning the Convention (Article 2(2)<sup>53</sup>) and all rights and obligations stemming from the Convention are attributed to states. While this is understandable for an intergovernmental treaty, cultural rights do not correspond to national boundaries.<sup>54</sup> The subscription to human rights and fundamental

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Protection and Promotion of the Diversity of Cultural Expressions”, Statement by Louise V. Oliver, US Ambassador to UNESCO, Distributed by the Bureau of International Information Programs, US Department of State, available at <http://usinfo.state.gov> (last accessed 1 April 2009).

<sup>47</sup> See above note 31. See also Mira Burri-Nenova, “Trade and Culture: Making the WTO Legal Framework Conducive to Cultural Considerations” (2008) *Manchester Journal of International Economic Law* 5:3, pp. 3-39 and Mira Burri-Nenova, “Trade versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition” (2009) *Journal of International Economic Law* 12:1, pp. 1-46.

<sup>48</sup> The UNESCO Convention stresses that cultural goods and services have a distinctive nature as “vehicles of identity, values and meaning” and that they intrinsically “embody or convey cultural expressions, irrespective of the commercial value they may have”. See Articles 1(g) and 4(4) of the UNESCO Convention.

<sup>49</sup> Craufurd Smith, above note 24, at pp. 40-41.

<sup>50</sup> See Hahn, above note 31, at p. 533, who critically remarks that the UNESCO Convention’s dispute settlement is “worth mentioning only as being reminiscent of the very early days of modern international law”.

<sup>51</sup> See Article 23(6)(c) of the UNESCO Convention.

<sup>52</sup> As noted above in Article 3 of the UNESCO Convention.

<sup>53</sup> The principle of sovereignty reads: “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”. See also Craufurd Smith, above note 24, at p. 37.

<sup>54</sup> In the narrow sense we mean here, above all, Article 27 of the International Covenant on Civil and Political Rights (CCPR) and Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (CESCR). See Asbjørn Eide, “Cultural Rights as Individual Human Rights” in Asbjørn Eide, Catarina

freedoms<sup>55</sup> may remedy this situation to some extent. It is nonetheless disappointing that specific cultural rights, which states must respect (such as access to education or use of language of choice) did not make it into the text,<sup>56</sup> in particular since they were acknowledged by the earlier but non-binding UNESCO Declaration on Cultural Diversity.<sup>57</sup> Furthermore, while the Convention does mention indigenous peoples and traditional cultural expressions a few times,<sup>58</sup> the relevant provisions remain declarative in nature and again address not the rights of the indigenous peoples themselves but those of the states whose territory is affected. The Convention in this sense ignores recent developments in international law, such as the UN Declaration on the Rights of Indigenous Peoples of 2007.<sup>59</sup> Besides this ethnocentricity in the formulation of the rights,<sup>60</sup> the UNESCO Convention establishes no specific rights for media organisations, journalists or individuals. Their interests are to be realised only through state action, if at all.<sup>61</sup>

A vital piece omitted from the regulatory domain of the UNESCO Convention, except for the brief remark in the preamble,<sup>62</sup> is intellectual property rights (IPRs). This omission is particularly awkward since IPRs have as their core objective the protection and promotion of creativity and innovation, and are thus an indispensable element of all processes related to the creation, distribution of and access to cultural content.<sup>63</sup> Seeking an interface with the highly sophisticated IPR system could have contributed to a more balanced IPR application, including

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Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights*, 2nd ed., The Hague: Kluwer Law International, 2001, pp. 289-301; Elsa Stamatopoulou, *Cultural Rights in International Law*, Leiden: Brill, 2007.

<sup>55</sup> Articles 2(1), 2(3) and 7 of the UNESCO Convention. On the relationship between the Convention and human rights, see Graber, above note 27, at pp. 560-563.

<sup>56</sup> Craufurd Smith, above note 24, at pp. 28 and 37.

<sup>57</sup> Article 5 of the UNESCO Declaration on Cultural Diversity states in the relevant part that, "[a]ll persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms".

<sup>58</sup> Recitals 8, 13 and 15 of the preamble, Articles 2(3) and 7(1)(a) of the UNESCO Convention.

<sup>59</sup> United Nations Declaration on the Rights of Indigenous Peoples, adopted with General Assembly Resolution 61/295, 13 September 2007.

<sup>60</sup> See Nicole Aylwin and Rosemary J. Coombe, "Cultural Pluralism Protects Traditional Knowledge", 2006, available at [http://www.wacc.org.uk/wacc/publications/media\\_development/2006\\_3/cultural\\_pluralism\\_protects\\_traditional\\_knowledge](http://www.wacc.org.uk/wacc/publications/media_development/2006_3/cultural_pluralism_protects_traditional_knowledge) (last accessed 1 April 2009). See also Craufurd Smith, above note 24, at p. 54.

<sup>61</sup> Craufurd Smith, *ibid.* at pp. 26 and 28.

<sup>62</sup> Recital 17 of the UNESCO Convention's preamble recognises "the importance of intellectual property rights in sustaining those involved in cultural creativity". Intellectual property rights used to be part of the definition of cultural goods and services during the drafting of the Convention. Article 7(2)(b) of the Preliminary Draft (CLT-2004/CONF.201/CLD.2, Paris, July 2004) provided further that Parties "shall ensure that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy". For a full account of the existing IPR references during the negotiation of the UNESCO Convention, see Laurence R. Helfer, "Towards a Human Rights Framework for Intellectual Property" (2007) *UC Davis Law Review* 40, pp. 971-1020, at pp. 1004-1006.

<sup>63</sup> As Tomer Broude has observed, "... intellectual property rights influence cultural change or stability in a number of ways. On one hand, they provide simplified channels of communication in the form of protected inventions, creative content, brands, titles, etc., which make the diffusion of knowledge more efficient. Such simplification is particularly necessary in cross-cultural exchanges, in which the heterophily of participants is increased due to cultural differences. In this respect, intellectual property rights may be expected to facilitate cultural exchange and indeed change. On the other hand, the exclusivity of intellectual property rights may raise the diffusion costs of new knowledge, hampering cultural exchange, or permitting it to occur only in knowledge areas in which the rights' holders consider the exchange to be cost-effective, thus making it contingent on their particular interests. Cultural shifts might then be restrained, having lower impact on the knowledge-receiving society. For the same reasons, intellectual property protection may also have a preserving effect on a knowledge-supplying society, if rights are used to protect cultural practices from dilution and abuse through duplication and diffusion". See Tomer Broude, "Conflict and Complementarity in Trade, Cultural Diversity and Intellectual Property Rights" (2007) *Asian Journal of WTO and International Health Law and Policy (AJWH)* 2, pp. 346-368, at pp. 355-356.

providing for a thriving public domain, which is an essential prerequisite for cultural creativity.<sup>64</sup>

A significant drawback of the Convention in terms of the critical role it was supposed to play as a counterforce to purely economic globalisation (epitomised by the WTO Agreements) is to be found in its “conflict of laws” provision.<sup>65</sup> This crucial norm, as provided by Article 20 of the UNESCO Convention, has fallen victim of unfortunate negotiating and drafting and fails short of ensuring any meaningful interface with the rules of the WTO (or any other of the existing international agreements) in case of a conflict between them.<sup>66</sup>

Article 20 provides simultaneously that, “[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties”,<sup>67</sup> and that, “without subordinating this Convention to any other treaty”, Parties shall foster mutual supportiveness between the Convention and the other treaties to which they are parties.<sup>68</sup> Even without lengthy deliberations on the possible implementation and interpretation scenarios,<sup>69</sup> it is evident that this rather paradoxical formulation involves no modification of rights and obligations of the Parties under other existing treaties. Notwithstanding this, Parties are to take into account the relevant provisions of the Convention, when interpreting and applying other treaties or when entering into other international obligations.<sup>70</sup> Interestingly in this context, Garry Neil has shown that the outcome of the only WTO case so far dealing with trade in cultural products, *Canada–Periodicals*,<sup>71</sup> would have been identical even if the UNESCO Convention had been in force at the time the decisions were taken, and regardless of whether the US had or had not joined the Convention.<sup>72</sup>

Even if a new “trade *versus* culture” WTO case emerges, which has been the hope of many observers as a final resolution of the conflict through the WTO jurisprudence, we think it highly unlikely that such a resolution would materialise. Glancing at the practice of the WTO adjudication until now, it is improbable that the Panel (and/or the Appellate Body) would dare to radically alter the “delicate

<sup>64</sup> The initiatives within the World Intellectual Property Organization in this context were not taken into account at all. For a fully-fledged analysis, see Neil W. Netanel, *The Development Agenda*, Oxford: Oxford University Press, 2009.

<sup>65</sup> On the notion of “conflict”, see Joost Pauwelyn, *Conflict of Norms in Public International Law*, Cambridge: Cambridge University Press, 2003, at pp. 5-11.

<sup>66</sup> For all possibilities of conflict between the norms of the WTO, the commitments of the Members under them, and the measures taken under the UNESCO Convention for the protection and promotion of the diversity of cultural expressions, see Anke Dahrendorf, “Free Trade Meets Cultural Diversity: The Legal Relationship between WTO Rules and the UNESCO Convention on the Protection of the Diversity of Cultural Expressions” in Schneider and Van den Bossche, above note 31, pp. 31-84. See also Graber, above note 27; Wouters and De Meester, above note 18; Bruner, and Hahn, both above note 31.

<sup>67</sup> Article 20(2) of the UNESCO Convention.

<sup>68</sup> Article 20(1) of the Convention.

<sup>69</sup> See in this regard e.g. Graber, above note 27, at pp. 565-568; Hahn, above note 31, at pp. 540-546.

<sup>70</sup> Article 20(1) of the Convention.

<sup>71</sup> WTO Panel Report, *Canada–Certain Measures Concerning Periodicals (Canada–Periodicals)*, WT/DS31/R, adopted 14 March 1997 and WTO Appellate Body Report, *Canada–Certain Measures Concerning Periodicals (Canada–Periodicals)*, WT/DS31/AB/R, adopted 30 June 1997.

<sup>72</sup> Garry Neil, “How Effectively Does the Convention Respond to the Cultural Challenges of Economic Globalization?”, 6 March 2006, available at <http://www.suisseculture.ch/doss/ridc/x-ridc.php> (last accessed 1 April 2009), at pp. 19-21.

and carefully negotiated balance”<sup>73</sup> of the WTO Agreements. Most likely, the adjudicative bodies would follow the conventional (less imaginative but solid) analysis, which justifies the legal expectations and concentrates on the core trade-related questions that fall within the DSB’s authority<sup>74</sup> (even though the instance of *US–Shrimp*<sup>75</sup> still offers fruitful soil for academic debates<sup>76</sup>).

We deem it not very plausible in this regard that the WTO adjudicatory bodies would substantially “soften” their standards<sup>77</sup> with regard to applying provisions key to the overall functioning of the multilateral trade system, such as the general exceptions contained in Articles XX GATT and XIV GATS (in particular the *chapeau* test).<sup>78</sup> Accounting for the vagueness of the UNESCO Convention’s provisions, Acheson and Maule note in addition that, “Panels of the WTO cannot take into account fuzzy concepts of cultural diversity without losing their legitimacy and ultimately their effectiveness”.<sup>79</sup> In any situation, the ongoing case against China and its measures affecting trading rights and distribution services for audiovisual entertainment products and certain publications<sup>80</sup> offers a test bed for these speculations since China has made use in its argumentation of both the UNESCO Declaration on Cultural Diversity and its legally binding successor.

Closing our critical glimpse of the UNESCO Convention, we concur with Craufurd Smith in saying that, what we have “is a document that evades controversy, which establishes general objectives and frames them in purely exhortatory terms. As a political manifesto, with little legal substance, it is hardly an advance on the international declarations on cultural diversity which preceded

<sup>73</sup> WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 16 January 1998, at para 177 (referring to the specific context of the WTO Agreement on the Applications of Sanitary and Phytosanitary Measures (SPS Agreement)).

<sup>74</sup> Article 3(2) of the DSU reads: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”.

<sup>75</sup> WTO Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products (US–Shrimp)*, WT/DS58/R, adopted 15 May 1998, modified by WTO Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products (US–Shrimp)*, WT/DS58/AB/R, adopted 12 October 1998.

<sup>76</sup> See e.g. Graber, above note 27, at p. 567.

<sup>77</sup> More than the deference the WTO adjudicatory bodies have already shown towards domestic regulators. See e.g. Eric H. Leroux, “From Periodicals to Gambling: A Review of the Systemic Issues Addressed by WTO Adjudicatory Bodies under the GATS” in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds.), *GATS and the Regulation of International Trade in Services*, Cambridge: Cambridge University Press, 2008, pp. 236-275, at pp. 266-270.

<sup>78</sup> This is in contrast to the opinion expressed by Shaffer and Pollack. See Gregory Shaffer and Mark Pollack, “How Hard and Soft Law Interact in International Regulatory Governance: Alternatives, Complements and Antagonists” (Paper presented at the Conference “Trade-And? The World Trade Organization’s Fuzzy Borders”, Graduate Institute of International and Development Studies Geneva, 5-6 February 2009; on file with the author), at pp. 58-62.

<sup>79</sup> Keith Acheson and Christopher Maule, “Convention on Cultural Diversity” (2004) *Journal of Cultural Economics* 28, pp. 243-256, at p. 251. As Bruner also notes, “[i]f article 20 can be read to require nothing more than a good faith effort to interpret prior treaties in a manner consistent with the Culture Convention’s goals, then there is real reason to doubt that a WTO dispute resolution panel would exert itself to locate outcome-determinative rules and principles in the Culture Convention – particularly when the little relevant WTO case law indicates that cultural products will not be treated differently from anything else subject to trade disciplines”. See Bruner, above note 31, at p. 407 (footnotes omitted).

<sup>80</sup> See Henry Gao, “The Mighty Pen, the Almighty Dollar and the Holy Hammer and Sickle: Examination of the Conflict between Trade Liberalization and Domestic Cultural Policy with Special Regard to the Recent Dispute between the United States and China” (2007) *Asian Journal of WTO and International Health Law and Policy (AJWH)* 2, pp. 313-343, at pp. 332-337 (referring to the case *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363, 16 April 2007; current state: panel formed; reports not yet distributed).

it”.<sup>81</sup> Alternatively, and less sharply, one can plainly say that what made the adoption of the UNESCO Convention possible also emptied it of some of its valuable content. This shows on the one hand the complexity of the issues that arise whenever cultural diversity is to be addressed and on the other hand, in a political context, the starkly different sensibilities and motivation of the Parties when drafting a legally binding international instrument on cultural matters.<sup>82</sup>

Exploring the interface between the UNESCO Convention and other regimes, the Convention will certainly influence the existing international agreements indirectly in the process of their interpretation.<sup>83</sup> Above all, the UNESCO Convention is likely to influence the political context of international agreements by changing the power-plays in negotiations and shaping the content of future agreements (since Parties are to take the Convention into account “when entering into other international obligations”<sup>84</sup>). With specific regard to the WTO, this has been one of the main stimuli (if not the only one) for a number of states to pursue the adoption of the UNESCO Convention – in particular as recent free trade agreements (FTAs) of the US have increased the level of liberalisation in the particularly sensitive domains of audiovisual services, digital trade and of intellectual property rights protection and enforcement.<sup>85</sup>

#### **4. Disconnecting trade and culture: The UNESCO Convention as part of the problem rather than the solution**

As already noted, much of the political muscle that led to the adoption of the UNESCO Convention came from the strong opposition to the effects of economic globalisation and the lack of adequate solutions in the WTO Agreements that would give Members sufficient policy space for domestic cultural policy measures. This being said, one needs to qualify the statement and admit that categorising the WTO Agreements “as solely trade-oriented and therefore culture-insensitive is not fully deserved”.<sup>86</sup> Indeed, if one looks into the evolutionary path of the trade and culture quandary, it has been the predecessor of the WTO – the General Agreement on Tariffs and Trade (GATT) 1947 – that first<sup>87</sup> accommodated some cultural concerns in the context of international trade after the World War II when the older but much smaller European industries received state protection (mostly through

<sup>81</sup> Craufurd Smith, above note 24, at pp. 53-54 (footnote omitted).

<sup>82</sup> Ibid. at pp. 30-32. See also Caroline Pauwels, Jan Loisen and Karen Donders, “Culture Incorporated; or Trade Revisited? How the Position of Different Countries Affects the Outcome of the Debate on Cultural Trade and Diversity” in Obuljen and Smiers, above note 31, pp. 125-158.

<sup>83</sup> Graber, above note 27, at pp. 567 and 571; Voon (2006), above note 23, at p. 652.

<sup>84</sup> Article 20(1)(b) of the UNESCO Convention.

<sup>85</sup> Craufurd Smith, above note 24, at p. 48. See also Sacha Wunsch-Vincent, *The WTO, the Internet and Trade in Digital Products*, Oxford: Hart, at pp. 201-232; Ivan Bernier, “The Recent Free Trade Agreements of the United States as Illustration of Their New Strategy Regarding the Audiovisual Sector”, April 2004, available at <http://www.suisseculture.ch/doss/ridc/x-ridc.php> (last accessed 1 April 2009).

<sup>86</sup> Wouters and De Meester, above note 18, at p. 218.

<sup>87</sup> In the context of UNESCO, it was only in the 1990s that the organisation took a concrete interest in protecting cultural diversity from the alleged negative effects of international trade and economic globalisation. Key steps in this process were the publication of the seminal report ‘Our Creative Diversity’ by the World Commission on Culture and Development in 1995 and the 1998 Stockholm Conference on Cultural Policies for Development. For a detailed account, see Bernier, *supra* note 23 and Bruner, *supra* note 31, at pp. 378-383.

import and screen quotas) against the incoming Hollywood supply.<sup>88</sup> Article IV GATT was the response to these policies and while prohibiting quantitative restrictions of imports<sup>89</sup> provided for some flexibility with regard to screening cinematograph films.<sup>90</sup>

Next to the leeway for screen quotas expressly devised in Article IV GATT, plenty of other norms scattered within the body of the WTO law<sup>91</sup> can be found relevant and allow certain flexibility as far as trade in cultural goods and services is concerned.<sup>92</sup> In particular, the General Agreement on Trade in Services (GATS) offers more wiggle room than the GATT,<sup>93</sup> since the GATS framework involves primarily a “bottom-up” (or “positive list”) approach, whereby Members can choose the services sectors and sub-sectors in which they are willing to make national treatment or market access commitments, and can define the modalities of these commitments. In contrast, obligations under GATT regarding national treatment and quantitative restrictions apply across the board, subject to specified exceptions (a “top-down” or “negative list” approach).<sup>94</sup>

The existing scope for domestic measures regarding trade in culture was however never found sufficient.<sup>95</sup> The inner tension between trade and culture has always been there, even within the GATT 1947, as the WTO’s less far-reaching institutional predecessor.<sup>96</sup> This tension exploded during the Uruguay Round (1986-1994), when France and Canada fought the “*exception culturelle*” battle with

<sup>88</sup> The European industries were also to substantial degree destroyed by the wars. At the same time, Hollywood was flourishing and its productions, whose access to Europe was constrained due to the war, flooded the market after the war. See Bruner, *supra* note 31, at p 367, referring to Hernan Galperin, “Cultural Industries in the Age of Free-Trade Agreements” (1999) *Canadian Journal of Communication* 24:1, pp. 49-77, at p. 68. See also John Trumpbour, *Selling Hollywood to the World: US and European Struggles for Mastery of the Global Film Industry, 1920-1950*, Cambridge: Cambridge University Press, 2007.

<sup>89</sup> Article XI GATT.

<sup>90</sup> Article IV GATT covers “internal quantitative regulations relating to exposed cinematograph films”, which must take the form of “screen quotas” conforming to certain requirements (Article IV, paras (a) to (d)). Such quotas “may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized” (Article IV(a) GATT) and may “reserve a minimum proportion of screen time for films of a specified origin other than that of the Member imposing such screen quotas” (Article IV(c) GATT). On Article IV GATT, see Rostam J. Neuwirth, “The Cultural Industries and the Legacy of Article IV GATT: Rethinking the Relation of Culture and Trade in Light of the New WTO Round” (Paper presented at the Conference “Cultural Traffic: Policy, Culture, and the New Technologies in the European Union and Canada”, Carleton University, 22-23 November 2002). On the most infamous South-Korean screen quota system, see Won-Mog Choi, “Screen Quota and Cultural Diversity: Debates in Korea-US FTA Talks and Convention on Cultural Diversity” (2007) *Asian Journal of WTO & International Health Law and Policy* (AJWH) 2:2, pp. 267-286.

<sup>91</sup> The law of the WTO is contained in several agreements, attached as annexes to the WTO Agreement that encompass the General Agreement on Trade and Tariffs (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). We refer to these as the *WTO Agreements*. They are contained in Annex 1 of the WTO Agreement. Other Annexes organise additional aspects of liberalisation such as the dispute settlement procedure (Annex 2), the trade policy review mechanism (Annex 3) and certain plurilateral agreements (Annex 4).

<sup>92</sup> For an overview of all relevant provisions, see Christoph Beat Graber, “Audiovisual Media and the Law of the WTO” in Graber et al., *above* note 23, at pp. 47-56.

<sup>93</sup> Graber, *above* note 27, at pp. 555 and 569.

<sup>94</sup> See generally by John H. Jackson, William J. Davey, Alan O. Sykes, *Legal Problems of International Economic Relations*, 5th ed., Eagan, MN: West, 2008.

<sup>95</sup> See e.g. Sandrine Cahn and Daniel Schimmel, “The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect or Is It Affected by the Agreement on TRIPS?” (1997) *Cardozo Arts and Entertainment Law Journal* 15, pp. 281-314, at pp. 287-289.

<sup>96</sup> See e.g. GATT, *EEC-Directive on Transfrontier Television: Response to Request for Consultations under Article XXVII:1 by the United States*, DS4/4, 8 November 1989. Later WTO cases worth mentioning are WTO, *Turkey-Taxation of Foreign Film Revenues: Request for Consultations by the United States*, WT/DS43/1, 17 June 1996; WTO, *Turkey-Taxation of Foreign Film Revenues: Request for Establishment of a Panel by the United States*, WT/DS43/2, 10 January 1997; and *Canada-Periodicals*, *above* note 71. For an overview, see Hahn, *above* note 31, at pp. 528-530.

the goal of exempting cultural services (in particular audiovisual ones) from the newly created agreement on services.<sup>97</sup> The infamous “Agreement to Disagree” was a sort of a ceasefire, whereby GATS covers *all* services sectors but permits commitment flexibilities.<sup>98</sup> However, it did not provide a real solution and cultural proponents were well aware of this. The further liberalisation commitment<sup>99</sup> was impending and the MFN exemptions made were at least theoretically limited in time.<sup>100</sup> A particularly unpleasant blow to cultural exception backers was the *Canada–Periodicals* case,<sup>101</sup> decided by the Panel and the Appellate Body to the benefit of the US and despite the fact that the Canada-US Free Trade Agreement (CUSFTA)<sup>102</sup> envisaged a cultural exception clause.<sup>103</sup>

Against this backdrop, the UNESCO Convention could be interpreted as a sort of “forum-shopping” – moving matters related to culture outside the WTO realm and seeking an impact on the negotiation processes within the WTO with a newly charged political strength. In this sense, while the Convention elevates “the status of cultural diversity as a matter of international concern, just as international agreements on the environment and health have helped to underline the importance of these considerations in other international fora such as the WTO”,<sup>104</sup> we see this only partially as an advancement towards better functioning global governance system. Indeed, and here lies our core argument, one can view the UNESCO Convention as part of the problem rather than the solution. It is a sign of extreme disconnection between issues of trade and culture – a disconnection that does none of these domains good and does not reflect the recent developments in contemporary media markets.

Whereas there are a number of critique points that can be formulated, we address here only one that is in our opinion fundamental to the whole discussion of cultural diversity in a global and local context, and has to do with the understanding of the effects of trade upon culture. This understanding is also

<sup>97</sup> See Christoph Beat Graber, “Audio-visual Policy: The Stumbling Block of Trade Liberalisation” in Damien Geradin and David Luff (eds.), *The WTO and Global Convergence in Telecommunications and Audiovisual Services*, Cambridge: Cambridge University Press, 2004, pp. 165-214; Martin Roy, “Audiovisual Services in the Doha Round: *Dialogue de Sourds*, The Sequel?” (2005) *Journal of World Investment and Trade* 6:6, pp. 923-952.

<sup>98</sup> See Bruner, above note 31, p. 374; Galt, above note 29, at p. 914; Cahn and Schimmel, above note 95, at pp. 291-301.

<sup>99</sup> See Part IV GATS. Article XIX therein states: “In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization”.

<sup>100</sup> The GATS Annex on Article II Exemptions states (at para 6) that, “[i]n principle, such exemptions [to MFN] should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds”. The exemptions made should have thus theoretically expired in 2005.

<sup>101</sup> See above note 96.

<sup>102</sup> Canada-US Free Trade Agreement, 22 December 1987-2 January 1988, 27 ILM 281 (1988).

<sup>103</sup> In CUSFTA, the culture exception was coupled with a retaliation provision. Article 2005 CUSFTA provides that, “[c]ultural industries are exempt from the provisions of this Agreement”, but also that either party could “take measures of equivalent commercial effect in response to [such] actions”. The North American Free Trade Agreement (NAFTA; 17 December 1992, 32 ILM 289 (1993)) incorporated by reference CUSFTA this cultural exception. It exists only as between Canada and both the US and Mexico, but not between the US and Mexico. In practice, this provision comforting the Canadian cultural sector had little effect. See Cahn and Schimmel, above note 95, at p. 30.

<sup>104</sup> Craufurd Smith, above note 24, at pp. 29-30. See also Voon (2006), above note 23, at p. 652.



symptomatic to the formation of political antagonism, which is often detrimental to constructive solutions.

While it is undoubted that “trade generates complex and often contradictory effects”,<sup>105</sup> it is equally certain that trade is not a “zero-sum” game,<sup>106</sup> and there are various ways in which trade enhances cultural flows and exchanges. In the “trade and culture” discourse however the common (and particularly loud) statements are that cultural diversity is impoverished and indeed almost extinguished as the globalised flow of easy entertainment coming from Hollywood dominates and homogenises.<sup>107</sup> This (mis)conception<sup>108</sup> is difficult to put right or at least soften. The discussion on “trade values” and “non-trade values” is extremely over-politicised and often resembles a clash between two religions that find no communication path between them.

In the specific sense of cultural policy-making, the above debate is additionally burdened with notions of cultural and national identity that lead to national sovereignty susceptibilities. In the sub-context of policy-making in audiovisual media, the discussion is further complicated since “one’s view on the role of media in society is intimately bound up with one’s view of democracy and the proper bounds of governmental power”.<sup>109</sup> Ultimately, all these interrelated discourses are in a profound state of transition: endogenously (within the nation state), “as the audiovisual sector moves from being a separable and quarantined domain of governance to its enactment as part of a whole-of-government modelling in which it emerges as a service industry in a ‘digital economy’”,<sup>110</sup> and exogenously (outside the nation state), as liberalisation, migration and other forces of

<sup>105</sup> *The Multilateral Trade Regime: Which Way Forward?*, The Report of the First Warwick Commission, Coventry, UK: University of Warwick, 2007, at p. 26.

<sup>106</sup> For some classic thoughts in this regard, see Paul Krugman, “Competitiveness: A Dangerous Obsession” (1994) *Foreign Affairs* 73:2, pp. 28-44.

<sup>107</sup> For a critique of the cultural industries and on the homogeneity of content, see Christoph Beat Graber, *Handel und Kultur im Audiovisionsrecht der WTO*, Bern: Staempfli, 2003, at pp. 18 et seq.

<sup>108</sup> See e.g. Anthony Giddens, *Runaway World: How Globalisation Is Reshaping Our Lives*, London: Routledge, 2002. With regard to culture, Giddens (at p. xxiv) holds: “Western, and more specifically American, cultural influence is visible everywhere – in films, television, popular music and other areas. Cultural standardisation is an intrinsic part of this process. Yet all this is relatively superficial cultural veneer; a more profound effect of globalisation is to produce greater local cultural diversity, not homogeneity. The United States itself is the very opposite of a cultural monolith, comprising as it does a dazzling variety of different ethnic and cultural groups. Because of its ‘push-down’ effect [...] globalisation tends to promote a renewal of local cultural identities. Sometimes these reflect wider world patterns, but very often they self-consciously diverge from them”. Tyler Cowen also insists that global monopolies and imported technologies have led to promoting local creativity by generating new markets for innovative, high-quality artistic productions. See Tyler Cowen, *Creative Destruction: How Globalization Is Changing the World's Cultures*, Princeton: Princeton University Press, 2002, at p. 146 and Tyler Cowen, *In Praise of Commercial Culture*, Cambridge, MA: Harvard University Press, 1998, in particular at pp. 15-43.

<sup>109</sup> Bruner, above note 31, at p. 432, referring also to Neil W. Netanel, “The Commercial Mass Media’s Continuing Fourth Estate Role” in Niva Elkin-Koren and Neil W. Netanel (eds.), *The Commodification of Information*, The Hague: Kluwer Law International, 2002, pp. 317-339, at pp. 317-18; C. Edwin Baker, *Media, Markets, and Democracy*, Cambridge: Cambridge University Press, 2001, at pp. 125-216.

<sup>110</sup> Tom O’Regan and Ben Goldsmith, “Making Cultural Policy: Meeting Cultural Objectives in a Digital Environment” (2006) *Television and New Media* 7:1, pp. 68-91, at p. 88. For a comprehensive analysis of the changes in the media landscape due to the advent of digital technologies, see Mira Burri-Nenova, “New Technologies, New Patterns of Consumer/Business Behaviour and Their Implications for Audiovisual Media Regulation” (2007) *medialex: The Swiss Journal of Communications Law* 4, pp. 171-179.

globalisation<sup>111</sup> induce sweeping societal shifts that make modern society increasingly homogeneous across cultures and heterogeneous within them.<sup>112</sup>

Under these circumstances, it becomes outdated and increasingly inappropriate to apply notions of cultural diversity, which “tend to favour ‘billiard ball’ representations of cultures as neatly bounded wholes whose contents are given and static. These understandings downplay ‘the ways in which meanings and symbols of culture are produced through complex processes of translations, negotiation and enunciation’, as well as by contestation and conflict”.<sup>113</sup> To be clear, these are precisely the perceptions of the UNESCO Convention, whose premise is that it is cultural diversity *between* nations and not *within* nations that needs to be protected and promoted, and this stance shapes the cultural policy measures taken by the State Parties.

## 5. Concluding remarks

The UNESCO Convention on Cultural Diversity that has been at the core of this chapter’s analysis is a major international endeavour that was meant to provide for the emancipation of certain “non-trade” values – notably, a culturally diverse environment – to the international scene of policy- and rule-making. The UNESCO Convention has succeeded in some aspects of this ambitious exercise. It has certainly augmented the value of cultural diversity as a legitimate public interest objective and it is from now on likely to be taken seriously into account when related international agreements are negotiated and adopted. The Convention would also stimulate the State Parties to design specifically targeted domestic measures for the protection and promotion of the diversity of cultural expressions and has undoubtedly given international cooperation in the field, in particular with developing countries, more concrete dimensions.

Yet, the UNESCO Convention is also somewhat disappointing. As we have shown above, it involves no real obligations for the State Parties, has no enforcement or adjudicatory mechanisms, no criteria to distinguish licit from illicit cultural policy measures and can thus be seen as a door wide open for protectionism. This is likely to be especially well felt in the context of the WTO, where Members would refuse to further open their markets by simply waving the banner of cultural diversity.

<sup>111</sup> Madhavi Sunder, “Cultural Dissent” (2001) *Stanford Law Review* 54, pp. 495-567, at p. 498.

<sup>112</sup> See e.g. Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization*, Minneapolis, MN: University of Minnesota Press, 1996, at p. 48; Arif Dirlik, *The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism*, Boulder, CO: Westview Press, 1998, at p. 72.

<sup>113</sup> Yudhishtir Raj Isar, “Cultural Diversity” (2006) *Theory, Culture and Society* 23:2/3, pp. 371-375, at p. 372, referring to Nick Stevenson, *Cultural Citizenship: Cosmopolitan Questions*, Maidenhead: Open University Press, 2003, at p. 62. In terms of trade and culture, Singh has also noted that, “[t]he cultural voices coming through on the international commercial networks rely less on some primeval notion on authentic diversity than on hybridity and innovation. They serve to illustrate not just the complexity of cultures and their transnational linkages but, more importantly, a distinctiveness that is confident of borrowing from genres around the world and more or less unafraid of commercial processes”. See J.P. Singh, “Culture or Commerce? A Comparative Assessment of International Interactions and Developing Countries at UNESCO, WTO, and Beyond” (2007) *International Studies Perspectives* 8, pp. 36-53, at p. 50, referring to Nestor Garcia Caclini, *Hybrid Cultures: Strategies for Entering and Leaving Modernity*, Minneapolis: University of Minnesota Press, 1995; Ulf Hannerz, *Cultural Complexity: Studies in the Social Organization of Meaning*, New York: Columbia University Press, 1993; Ulf Hannerz, *Transnational Connections: Culture, People, Places*, London: Routledge, 1996.

Indeed, the case of “trade *versus* culture” becomes very attractive for politicians as the popularity of globalisation wanes, in particular in industrialised countries,<sup>114</sup> and as national values and interests, especially after the 9/11, gain prominence.<sup>115</sup> Yet, the politically driven disconnect between trade and culture, while easily justified before the respective constituencies, is not necessarily beneficial for either the domain of trade or that of culture. The relationship between the two is somehow natural and it has been in fact explicitly recognised by the UNESCO Convention that cultural goods and services have *dual* nature and constitute commodities that can be traded, as well as “vehicles of identity, values and meaning”.<sup>116</sup>

A simple carve-out of cultural matters from the trade context and their transfer to the venue of UNESCO is unlikely to resolve the complex issues related to cultural exchanges, diversity, hybridity, global/local relationships, national identities, etc. This does not mean that cultural policy measures should be all together abandoned and that the free flow of goods and services alone will cater for a diversity of expressions. Yet, the benefits of the existing trade restrictions may very well prove not to outweigh their costs and may even be detrimental to the goal of cultural diversity.<sup>117</sup> In this sense, one may indeed argue that it is within the mandate of the UNESCO Convention, the scope of which certainly goes beyond the plain reservation of “shelf-space for domestic productions in television programs and cinemas”,<sup>118</sup> to encourage the ratifying Parties to dismantle some trade barriers and to adopt a more differentiated approach towards the matters of trade and culture.

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<sup>114</sup> The Warwick Commission Report, above note 105, at p. 19 and chapter 1.

<sup>115</sup> For a critique of the cultural exception doctrine, see Galt, above note 29, at pp. 915-922.

<sup>116</sup> Article 1(g) of the UNESCO Convention.

<sup>117</sup> “[E]ven a cursory look at international trade in cultural products shows two contradictory but important trends. Developed countries at the forefront of efforts to ‘protect’ cultural diversity are at the forefront of cultural trade as well. Developing countries as a whole, band-wagoning on the protections wagon, in fear of losing out from such trade, are actually gaining increased shares, even though they remain marginal”. Singh, above note 113, at p. 42. See also the data exemplifying this statement, at pp. 43-45.

<sup>118</sup> Hahn, above note 31, at p. 533.