

“United in Divergency”: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

*Rostam J. Neuwirth**

I. Introduction	820
II. Milestones in “Culture and Trade” Conflicts	821
1. The Nature of “Culture and Trade Conflicts” and Their Part in the “Trade Linkage Debate”	821
2. “Culture and Trade Conflicts” from the Past to the Present	825
III. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions	830
1. Preliminary Remarks	830
2. The Title	831
3. The Preamble	831
a. Substantial Remarks	832
b. The Preamble Revisited	835
4. Title I “Objectives and Guiding Principles”	835
5. Title II “Scope of Application”	837
6. Title III “Definitions”	837
7. Title IV “Rights and Obligations of Parties”	839
8. Title V “Relationship to Other Instruments”	844
a. The Evolution of Article 20 CDCE	845
b. An Evaluation of Article 20 CDCE	846
9. Title VI “Organs of the Convention”	847
10. Title VII “Final Clauses and the Annex”	847
IV. A Critical Evaluation of the Convention in Light of “Culture and Trade”	849
1. Elements of Criticism of the Convention	849
2. The Criticism Revisited	851
a. Respect for Human Rights and Abuse of Governmental Control Over Cultural Life	851
b. The Convention’s Possible Implications for International Trade Law	853
3. Complementarity Between Culture and Trade: What Role of the Convention?	856
V. Conclusion	859

* *Mag. iur.* (University of Graz), LL.M. (McGill), Ph.D. (EUI), is a former researcher at the European University Institute (Florence), worked as a legal adviser in the Völkerrechtsbüro (International Law Bureau) of the Austrian Federal Ministry for Foreign Affairs and is currently teaching European Union Law and the Law of the World Trade Organization at Hidayatullah National Law University in Raipur (India); Email: <rostam.neuwirth@iue.eu>.

I. Introduction

*As variety is the spice of life, so is it the spring of commerce.*¹
T.G. Williams, *The History of Commerce* (1926).

In October 2005, undoubtedly, another page was turned in the book recording the evolution of international law. More precisely, it opened a new chapter in the question of conflicts between the areas of culture and trade, also known as the “culture and trade quandary”.² A quandary usually reflects a state of uncertainty over what to do in a difficult situation. In the case of culture and trade, the uncertainty lies mainly within the mutual impact of culture and trade in the framework of international law. This uncertainty, it is argued here, persists not only since the time of the League of Nations and the adoption of the GATT 1947 following the failure of the International Trade Organisation (ITO) but also continues in the present day.

The reason for the opening of a new chapter is found in the formal adoption of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (“Convention” or CDCE) by the General Conference of the United Nations Education, Scientific and Cultural Organization (UNESCO) at its 133rd meeting held in Paris on October 20, 2005. Despite fierce criticism and strong resistance expressed mainly by the US Government,³ the Convention was adopted by 148 votes in favour, two against (United States of America and Israel) and four abstentions (Australia, Honduras, Nicaragua, and Liberia).

The adoption of the Convention comes at a time when efforts are intensifying under the aegis of the World Trade Organization (WTO) to draw the Doha Development Agenda (DDA) to a close at the end of 2006. Recently there was some movement, although a relatively modest one, in the field of international trade during the WTO Ministerial meeting in Hong Kong.⁴ However, relative to the dispute over the *exception culturelle* during the close of the Uruguay Round, the overall improvement of the situation is still uncertain. In the sphere of trade too, serious doubts remain as to whether a new chapter has been opened that will allow to pave the way for a decade of good global trade relations for the future mutual benefit of all WTO Member States.

Bearing this modest prospect in mind, it is now necessary to examine the principal causes behind the dark cloud hovering above global trade relations for the next decade or two. It could be speculated that one important reason for the staggering

¹ See T.G. Williams, *The History of Commerce*, London 1926 at 1.

² See D. Brown (ed.), *The Culture/Trade Quandary: Canada's Policy Options*, Ottawa 1998.

³ For a short survey of the criticism, see *infra* Section IV.1.

⁴ WTO Draft Ministerial Declaration, Ministerial Conference, 6th Session, Hong Kong (December 13-18, 2005), WT/MIN(05)/W/3/Rev.2 (December 18, 2005).

progress in present trade negotiations is the fear from a majority of the States in the international community of threats to their cultural sovereignty caused by unfettered trade liberalisation. These fears are backed by the uncertainty surrounding the WTO's legal regime governing the cultural industries. Both reasons are perhaps reflected in the great majority vote in favour of the present UNESCO Convention. From this perspective, it is necessary to cast some light on the future implications the new Convention may, or may not have on the present and future multilateral trading regime under the WTO.

Inspired by the panel's statement in the *Canada Periodicals* Case, according to which "cultural identity was not at issue here", the present article attempts to question the possible trade implications of the new Convention and its potential for altering the present parameters of culture and trade conflicts. Following a short introduction, Section II looks at selected "milestones" of "culture and trade conflicts" with a view to establishing a continuous thread between past conflicts and the new Convention. Section III, the principal section, analyses each article of the Convention, relating them to observations on the relevant background of each of the problems covered. Section IV reviews the main elements of criticism related to the Convention and its potential implications for the sphere of international trade. Section V concludes the article by analysing the legal value that the Convention may contribute to the debate, once it enters into force.

II. Milestones in "Culture and Trade" Conflicts

1. The Nature of "Culture and Trade Conflicts" and Their Part in the "Trade Linkage Debate"

In order to critically evaluate the impact of the new convention on the multilateral trading rules it is necessary to briefly outline the principal features of the debate surrounding culture and trade. To begin with, a short publication by UNESCO, entitled *Culture, Trade and Globalization*, reaffirms that "the issue of 'culture and trade' has now acquired prime strategic significance" and that when "culture is put on the table, it often prompts complex discussions on the relationship between the economic and non-economic value of things".⁵ The problem of the precise relationship between economic and non-economic values is not limited to the sphere of culture but forms the core of several serious problems such as "trade and ... problems" otherwise referred to as the "trade linkage debate".⁶ Such trade and ... problems usually appear in pairs, such as "trade and environment"⁷,

⁵ UNESCO, *Culture, Trade and Globalization: Questions and Answers*, Paris 2000, at 9.

⁶ See J.P. T r a c h t m a n, *Trade and ... Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EJIL 32 (1998).

⁷ See e.g. A. F i j a l k o w s k i / J. C a m e r o n (eds.), *Trade and the Environment: Bridging the Gap*, The Hague 1998.

“trade and human rights”⁸, “trade and development”⁹, “trade and social, or labour standards”¹⁰, “trade and migration”¹¹, “trade and security”,¹² as well as “trade and education”¹³.

Within the broader trade linkage debate the “culture and trade problem” certainly forms a distinct pair.¹⁴ Considering the width and elasticity of both the term “culture” and the concept of “trade” or “commerce”, which fortunately, for their intrinsic dynamism’s sake, have so far proven to escape any authentic legal definition, it can also be argued that the “culture and trade debate” is in a wider sense about a certain “culture” in trade. Such a “cultured” approach to trade is reflected in the Preamble to the WTO Agreement and consists of efforts to enhance international trade by entering into “reciprocal and mutually advantageous arrangements”.¹⁵ Such a qualification of the culture and trade debate also resonates in the following statement:

Unless trade people can deal with the cultural issue, how do you expect them to deal with environmental issues, labor issues, or social standards?¹⁶

Thus, by way of its etymological origin, found in the cultivation of the Gods, the Earth and later the mind,¹⁷ the term “culture” also refers to concerns for the improvement and proper cultivation of the environment, human rights, and many more values essential to human life. This means that the organisation of human life

⁸ See e.g. S. Bal, International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT, 10 Minn. J. Global Trade 62 (2001).

⁹ See e.g. V.N. Balasubramanyam (ed.), Trade and Development: Essays in Honour of Jagdish Bhagwati, Basingslake 1996.

¹⁰ See e.g. R. Bhala, Clarifying the Trade-Labor Link, 37 Colum. J. Transnat’l L. 11 (1998); E. Alben, GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link, 101 Colum. L. Rev. 1410 (2001).

¹¹ See R. Faini/J. de Melo/K.F. Zimmermann, Trade and Migration: An Introduction, in: R. Faini/J. de Melo/K.F. Zimmermann (eds.), Migration – The Controversies and the Evidence, Cambridge 1999, 1.

¹² See e.g. H.L. Schloemann/St. Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 A.J.I.L. 424 (1999).

¹³ See e.g. J. Knight, Trade in Higher Education Services: The Implications of GATS, The Observatory on Borderless Education (March 2002), available online at <<http://www.obhe.ac.uk/products/reports/publicaccesspdf/March2002.pdf>>.

¹⁴ See M.E. Footer/Ch.B. Graber, Trade Liberalization and Cultural Policy, 3 J.I.E.L. 115 (2000); see also B. de Witte, Trade in Culture: International Legal Regimes and EU Constitutional Values, in: G. de Búrca/J. Scott (eds.), The EU and the WTO – Legal and Constitutional Issues, Oxford 2001, 237 at 237.

¹⁵ See especially Indents 1 and 3 of the Preamble of the WTO Agreement; Marrakesh Agreement Establishing the World Trade Organization (with Annexes, Final Act and Protocol), concluded at Marrakesh on April 15, 1994, 33 ILM 1144 (1994).

¹⁶ See K.C.C. Stein, The Management and Resolution of Cross Border Disputes as Canada/U.S. Enter the 21st Century: Telecommunications and Culture: Transborder Freedom of Information or Cultural Identity?, 26 Can.-U.S. L.J. 313 at 314 (2000).

¹⁷ Cf. the concepts “*cultus deorum*”, “*cultura agris*” and “*cultura mentis*” in A.L. Kroeber/C. Kluckhohn, Culture – A Critical Review of Concepts and Definitions, New York 1952, at 15 and J. Rundlell/St. Mennell (eds.), Classical Readings in Culture and Civilization, London 1998, at 12.

until today has progressively increased in complexity. This process of “complexification”, as used by Pierre Teilhard de Chardin in *Le Phénomène humain* (1955), requires in the framework of global governance that any single policy can only be dealt with successfully by considering the entirety of other policies simultaneously.

As for trade and commerce, the evolution of the GATT regime over the past fifty years has shown the creeping extension of trade from goods to services, to investment, subsidies, and intellectual property rights (IPRs). Linked to this is the issue of what kind of “culture” or what form of “trade” commentators are talking about. Usually there exists less disagreement when it comes to questions on the general relationship between “culture” and “trade”, yet this is likely to increase when it comes to more specific questions on cultural taste, cultural contents, the nature of cultural products in the sphere of culture, or the form of trade liberalisation, such as whether to include services or the free movement of persons in the sphere of trade. As a further element to the debate, one can identify a tendency to confuse ideological disagreements with disagreements over the nature of a new phenomenon and the appropriate regulatory response to it. As a result, the quandary concerning the right regulatory response may persist with regard to each field alone and only intensifies when they are treated as a whole; something for which most governments, public authorities, institutions and international organisations lack the political will, and are not prepared and most of all, not well-equipped.¹⁸

While one aspect of the culture and trade conflict concerns questions about the right architecture of the legal framework governing their interaction, another aspect concerns the subjection of certain phenomena under their respective rules. With regard to the second aspect, aside from the cultural industries, cases have shown that practically every product, such as meat,¹⁹ spaghetti,²⁰ cheese, alcoholic drinks including beer, wine and *shochu*,²¹ and even toasters with or without pictures, bear some cultural traits but certainly to a different degree. Their degree of cultural content generally depends on distinct factors, such as their origin, quan-

¹⁸ See also the quotes *infra* in note 118.

¹⁹ See Article 8 (Special Exception for Kashruth) Israel-United States Free Trade Area Agreement, 24 I.L.M. 657 (1985), which stipulates that “This Agreement shall not preclude the adoption or enforcement by either Party of measures relating to prohibitions on religious or ritual grounds provided that they are applied in accordance with the principle of national treatment”; see also Annex 4.1. (Exceptions to Article 4.1. National Treatment) Section B para. 1 *lit. c*) Free Trade Agreement between Canada and Israel. See also *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/AB/R (January 16, 1998) (Appellate Body Report) [hereinafter *Hormones Case*].

²⁰ See Case 407/85, *3 Glocken GmbH and Gertraud Kritzinger v. USL Centro-Sud and Provincia autonoma di Bolzano*, (1988) E.C.R. 4233.

²¹ See e.g. Case 178/84, *Commission v. Germany*, (1987) E.C.R. 1227; Case 170/78, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, (1983) E.C.R. 2265 and *Japan – Taxes on Alcoholic beverages*, WT/DS1/AB/R, WT/DS10/AB/R, WT/DS22/AB/R (October 4, 1996).

tity, quality, or their service life, and particularly the way they are manufactured, reproduced, transported and consumed.

Considering these factors, it is argued that the core of most culture and trade conflicts is best exemplified in the category of various cultural goods and services as summarised in the term “cultural industries”. Looking at the legal definition in the NAFTA, the cultural industries include various cultural goods and services such as books, magazines, film, video and music recordings as well as radio-communications and broadcasting.²² These and other categories following the broad trend of convergence through digitisation, such as computer games, are characterised by their strong dependence on technological progress, innovation, creative input and on copyright protection; partly due to the combined characteristics of goods and services, of public and private goods attributes, and, mostly to their dual, economic and cultural nature. Additionally, the cultural industries bear specific traits with regard to their production, reproduction, and distribution before their final consumption. Such specificity of the industry is found, for instance, in the initial investment risk caused by high production costs and dependence on volatile consumer taste and relatively low unit costs which may be compensated by the comparably very low reproduction and distribution costs. These elements often attract producers to different kinds of competitive as well as anti-competitive business practices, such as vertical and horizontal integration, or concerted practices (e.g. star system, prototypes, block booking, zoning) in order to minimise risks yet at the same time maximise sales in the greatest number of markets (transnational market imperative) so as to generate the highest possible revenues (profit maximisation). Based on their mode of consumption, which usually relies on a perceptive process involving the mind, another unique feature is found in their secondary promoting effect on other goods and services, warranting them the categorisation as “trade getters” or “silent salesmen”.²³ Equally, they have been identified, both negatively as a threat to,²⁴ and positively as the foundation of a democratic society.²⁵ Finally, to give but one last example, another central role of cultural industries has been confirmed in the field of development.²⁶

²² Cf. Article 2107 NAFTA; North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States, December 17, 1992, 32 I.L.M. 605 (1993).

²³ F.A. Tichenor, Motion Pictures as Trade Getters, 128 *Annals Am. Acad. Pol. & Soc. Sci.* 84 (1926) and J. Klein, What are Motion Pictures Doing for Industry, *ibid.* 79.

²⁴ See e.g. G. Orwell, *Nineteen Eighty-Four*, London 2000, at 185, summing up the various sub-sectors of the cultural industries as follows: “The invention of print, however, made it easier to manipulate public opinion, and the film and the radio carried the process further. With the development of television, and the technical advance which made it possible to receive and transmit simultaneously on the same instrument, private life came to an end.”

²⁵ See e.g. European Parliament Resolution on Cultural Industries, P5_TA-PROV(2003)0382 (September 4, 2003) at Recital P, recognising “the importance of television and other mass media services for the democratic opinion-forming process, with a view to ensuring and enhancing diversity of opinion and pluralism”; see also N. Weinstock Netanel, Asserting Copyright’s Democratic Principles in the Global Arena, 51 *Vand. L. Rev.* 217 (1998) at 329, writing that: “A democratic culture, supported by the widespread dissemination of information and opinion, an independent and pluralist me-

In short, the cultural industries, therefore, are the most complex category of products, falling within the culture and trade quandary, not because they are situated at the extreme point of each single concept, but because they oscillate between the two, thereby creating a centre of gravity drawing everything without mercy into its gravitational field.

2. “Culture and Trade Conflicts” from the Past to the Present

The assumption that the cultural industries are from a legal point of view the most important operational field for culture and trade conflicts is also supported by records from the historical past. There are records of legal problems, which suggest that already in the early days of human history the question arose as to whether all things can be subject to trade and commerce or whether there are certain categories of products that should be exempted due to some special, viz. cultural, features.²⁷ Aside from these precedents, the conflicts underlying the present global culture and trade debate are very much a phenomenon of the twentieth century. The reason for their relatively recent emergence is a combination of the emergence of important technological inventions, such as cinematograph and radio-communication technology at a global scale, which in turn led to the gradual introduction of modes of mass production and mass distribution into the cultural field. The various consequences of these inventions for the cultural field and, notably, the work of art are well presented and analysed in the famous article “Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit” published by Walter Benjamin in 1936.²⁸ His analysis was soon complemented by a conceptual innovation introduced by Theodor W. Adorno and Max Horkheimer by way of the term “*Kulturindustrie*” or “culture industry”.²⁹ The culture industry was first designed to contrast two apparently contradictory terms but gradually

dia, and a belief in the efficacy of individual contributions to public discourse, is central to that process of democratization.”

²⁶ See e.g. G. Pagniet, *Industries de la culture et développement*, 194 *Le Courrier ACP* 42 (2002), characterising the role of the cultural industries as follows: “Phénomène social aux caractéristiques très diverses et aux multiples ramifications, les industries culturelles doivent être étudiées à travers les divers sous-secteurs qui les composent. Au fil du temps, une prise de conscience de plus en plus forte des enjeux liés aux ‘industries culturelles’ a abouti à l’idée que culture et développement sont intimement liés.”

²⁷ The Roman lawyer Gaius (130-180 BCE), for instance, identified in his *Institutiones* certain categories of things, such as things subject to divine dominion like statues, altars or cultic objects, which cannot be the object of exchange or of any legal commercial transaction (*res extra commercium* or *res quarum commercium non est*); see M. Kaser, *Römisches Privatrecht*, 15th ed., München 1989, at 90-1.

²⁸ “The work of Art in the Age of Mechanical Reproduction”; see W. Benjamin, *Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit*, in: R. Tiedemann/H. Schweppenhäuser (eds.), *Walter Benjamin – Gesammelte Schriften*, vol. I, 2nd ed., Frankfurt a. M. 1978, 436.

²⁹ See Th.W. Adorno/M. Horkheimer, *Dialectic of Enlightenment*, New York 1997; see also Th.W. Adorno (ed.), *The Culture Industry: Selected Essays on Mass Culture*, London 1991, at 98.

evolved into a special category of cultural goods and services. A remnant from its philosophical origin is its role as a paradoxical riddle, something we are – most probably – still trying to resolve today.

Such technological and philosophical innovations were soon accompanied by respective legal responses, for which the predecessor of UNESCO, the International Committee for Intellectual Cooperation (ICIC), established by the League of Nations in 1922 and four years later transformed into the International Institute of Intellectual Cooperation (IICI), provided the proper link.³⁰ Confronted with the new phenomenon of mass media, particularly films and broadcasting, the IICI was involved in the drafting of two early relevant international conventions, the 1933 Convention for Facilitating the International Circulation of Films of an Educational Character and the 1936 International Convention Concerning the Use of Broadcasting in the Cause of Peace.³¹ They were designed to respectively contribute to international peace and security through the exemption of all customs duties and accessory charges for films for international educational aims in order to encourage moral disarmament, to ensure physical, intellectual and moral progress and to prevent broadcasting from being used in a manner prejudicial to good international understanding. Their major intent was to utilise the possibilities offered by this medium of intercommunication for a better mutual understanding between peoples.

The next legal milestone in the culture and trade quandary was the adoption of Art. IV on “cinematograph films” in the GATT 1947, which is still in force today.³² Its text was based on Art. 19 of the Havana Charter for an International Trade Organization (ITO)³³ and was inspired by a similar provision in the so-called “Blum-Byrnes Agreement”, concluded between the United States of America and the Provisional Government of the French Republic in 1946.³⁴ In regulatory terms, Art. IV effectively stipulates that if GATT Contracting Parties and, now WTO Members, want to establish or maintain internal quantitative regulations relating to exposed cinematograph films, i.e. movies, then such regulations shall take the form of screen quotas. According to John H. Jackson the rationale for the introduction of Art. IV GATT was the closer regulatory connection of

³⁰ See generally H. Bonnet, *L'œuvre de l'institut international de coopération intellectuelle*, 61 *Rec. des Cours* 457 (1937).

³¹ See the Convention for Facilitating the International Circulation of Films of an Educational Character, signed at Geneva, October 11, 1933, 1 L.N.T.S. 333; and the International Convention concerning the Use of Broadcasting in the Cause of Peace, signed in Geneva, September 23, 1936, 186 L.N.T.S. 301.

³² General Agreement on Tariffs and Trade, signed at Geneva on October 30, 1947, 55 U.N.T.S. 187.

³³ UN Conference on Trade and Employment, Havana Charter for an International Trade Organization and Final Act and Related Documents (Havana November 21, 1947 to March 24, 1948), UN Doc ICITO/1/4/1948.

³⁴ See especially the Declaration by the Government of the United States of America and the Provisional Government of the French Republic on Commercial Policy and Related Matters, in: France Lend-Lease Settlement, signed on May 28, 1946, 418 U.S.T. LEXIS 1 (1946) at 69 *et seq.*

films to domestic cultural policies rather than to economics and trade.³⁵ Such an approach still reflects the then predominant separation of cultural issues from commercial ones on the basis of the old legal adage *expressio unius est exclusio alterius* (the choice of one part of an alternative excludes the other), at a time when the economic features of a good or service could still be regarded separate from its cultural features.³⁶ Moreover, it shows only the gradual awareness of the dual, i.e. both economic and cultural dimension to cinematograph films and other cultural goods and services.³⁷ Since then, Art. IV can be considered as the most important legal recognition of a cultural specificity of a certain category of cultural goods and services now commonly referred to as the cultural industries in the international trading regime.³⁸ Even if its legal significance and use has decreased over the years due to extremely dynamic technological innovations, it is still a powerful political reminder of a clear contact point between culture and trade.³⁹

Soon after the entry into force of the GATT in 1948, another important reminder of the close relationship between culture and trade was seen in the adoption of two agreements under the aegis of UNESCO, the 1948 Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character (Beirut Agreement)⁴⁰ and the 1950 Agreement on the Importation of Educational, Scientific and Cultural Materials (Florence Agreement).⁴¹ Both agreements aimed at removing economic obstacles to the free circulation of ideas based on rapid technological progress. It is important to note that, as an interesting precedent of comity between international organisations, UNESCO submitted the draft Florence Agreement for comments and revision to a working group of the Contracting Parties of the GATT.⁴²

The confirmation of the ever continuing tension between dynamic technological innovations on the one hand, and culture and trade conflicts exemplified in Art. IV

³⁵ See J.H. Jackson, *World Trade and the Law of GATT*, Indianapolis 1969, at 293.

³⁶ See generally H. Mosler, *General Principles of Law*, in: R. Bernhardt, (ed.), *Encyclopaedia of Public International Law*, vol. 7, Amsterdam 1984, 89 mainly at 92-93.

³⁷ An early account of the dual nature of films is given in the statement "*par ailleurs, le cinéma est une industrie*"; see A. Malraux, *L'esquisse d'une psychologie du cinéma*, Paris 1939.

³⁸ See e.g. T. Cottier, *Die völkerrechtlichen Rahmenbedingungen der Filmförderung in der neuen Welthandelsorganisation WTO-GATT*, 38 *Z.U.M.* 749 (1994) at 751.

³⁹ See also R.J. Neuwirth, *The Cultural Industries and the Role of Article IV GATT: Reflections on Policy Options for Canada and the EU in the New WTO Round* (available online: <<http://www.carleton.ca/ces/papers/november02/Neuwirth.pdf>>).

⁴⁰ Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, adopted by the General Conference at its third session, Beirut, December 10, 1948, 197 *U.N.T.S.* 3.

⁴¹ Agreement on the Importation of Educational, Scientific and Cultural Materials, with Annexes A, B, C, D and E and Protocol annexed, 131 *U.N.T.S.* 25, signed November 22, 1950 [hereinafter *Florence Agreement*]; see also the Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials, signed at Nairobi on November 26, 1976, 1259 *U.N.T.S.* 3.

⁴² See UNESCO, *A Guide to the Operation of the Agreement on the Importation of Educational, Scientific and Cultural Material*, 4th ed., Paris 1969, at 5.

as the right regulatory response to reconcile culture and trade concerns on the other, occurred with the international rise of international television programmes through satellite broadcasting. The central question was whether television fell within the scope of Art. IV and thus whether it must be qualified as a good, or as a service, falling outside the scope of the GATT regime. For this purpose, a working group was established in which the United States, advocating the applicability of the GATT to television programmes, faced resistance from France and other Contracting Parties.⁴³ In the end, no agreement was reached and the problem was merely left for a later date in the history of culture and trade conflicts.

The conflict over the treatment of television programmes and audiovisual services arose again during the final phase of the Uruguay Round negotiations (1986-93) and was centred around the idea of an *exception culturelle*, advocated mainly by France, the European Union and Canada and radically opposed by the United States. The controversy arose with regard to the former disagreement between the United States and Canada during the negotiations for the Canada-United States Free Trade Agreement (CUSFTA),⁴⁴ and the United States and the European Union with the adoption of the Television Without Frontiers Directive in 1989.⁴⁵ Altogether, the difference in the position of these countries almost prevented the successful creation of the World Trade Organization (WTO) in 1994, which, ultimately, was only made possible by a compromise, known as the “agreement to disagree”.⁴⁶ The compromise allowed WTO Members greater flexibility with regard to their sectoral commitments under the newly established General Agreement on Trade in Services (GATS).⁴⁷

The truce in the form of the so-called “agreement to disagree” only lasted for a few years and new fuel was added to the flames with the Panel Report rendered in the *Canada Periodicals Case*.⁴⁸ In its ruling, the Panel, which was later confirmed

⁴³ Application of GATT to International Trade in Television Programmes, L/1615 of November 16, 1961; Application of GATT to International Trade in Television Programmes, L/1646 of November 21, 1961; Working Party on Application of GATT to International Trade in Television Programmes, L/1686 of December 18, 1961; Application of GATT to International Trade in Television Programmes – Report of the Working Party, L/1741 of March 13, 1962; Application of GATT to International Trade in Television Programmes – Revised United States Draft Recommendation, L/1908 of November 10, 1962 and Application of GATT to International Trade in Television Programmes – Proposal by the Government of the United States, L/2120 of March 18, 1964.

⁴⁴ Canada-United States Free-Trade Agreement, done at Ottawa, December 22, 1987 and January 2, 1988, and done at Washington, D.C. and Palm Springs, December 23, 1987 and January 2, 1988, 27 I.L.M. 281 (1988).

⁴⁵ The Council Directive of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities (89/552/EEC), (1989) O.J. L 298/23.

⁴⁶ See e.g. J. Croom e, *Reshaping the World Trading System: A History of the Uruguay Round*, Geneva 1995, at 376 and I. Bernier, *Cultural Goods and Services in International Trade Law*, in: Browne (note 2), 108 at 127.

⁴⁷ General Agreement on Trade in Services, Annex 1B, 33 I.L.M. 1168 (1994).

⁴⁸ Canada – Certain Measures Concerning Periodicals (Complaint by the United States) (1997), WTO Doc. WT/DS31/R.

by the Appellate Body, held Canada responsible for an infringement of its trade obligations based on domestic measures aimed at supporting Canada's magazine industry, with a view to safeguarding and promoting its cultural identity. *En passant*, the Panel also noted that "cultural identity was not at issue here".⁴⁹ Although the Panel's statement was widely consistent with trade rules established under the WTO, the ruling did very little to address the central problem of the present trading regime, namely its general incapability to address various trade-related concerns, such as cultural or other concerns raised under the so-called "trade linkage debate". The ruling in the *Canada Periodicals* Case is therefore crucial for culture and trade conflicts because it established a global precedent displaying the felt vulnerability of WTO Member's national measures aimed at cultural identity and cultural diversity. In this way, as later protests against a Multilateral Agreement on Investment (MAI) as well as ministerial meetings in Seattle and Cancun confirmed, it nurtured a growing resistance in the world against a form of globalisation which is perceived as predominantly focusing on trade liberalisation (negative integration) without introducing parallel measures in order to account for potential structural problems and financial losses (positive integration).⁵⁰

Following the ruling in the *Canada Periodicals* Case, various efforts advocating greater cultural diversity intensified around the globe. As a result, a series of documents addressing the issue were prepared which, by and large, advocated the adoption of a legally binding document for cultural diversity.⁵¹ An important matter regarding the feasibility of such an instrument was the question of finding a competent international organisation for its negotiation, adoption and administration. Proposals included UNESCO and the WTO as well as a possible third way, consisting either in a combined approach of mutual cooperation between the two, or the creation of an entirely new international body. Even within the WTO, in light of the imminent services negotiations, a background note and several communications dealt with this question.⁵² Their content and the better preparation of

⁴⁹ Ibid. at para. 5.45.

⁵⁰ See generally D.K. Das, *Debate at Seattle – The Way the Cookie Crumbled*, 34 J. World T. 181 (2000) and F. Roche, *Que reste-t-il de l'exception culturelle après Seattle?*, 258 *Regards sur l'actualité* 13 (2000) mainly at 13-5.

⁵¹ See e.g. International Network for Cultural Diversity (INCD), *Draft Convention on Cultural Diversity*, available at <<http://www.incd.net/draft.html>>; *Universal Declaration on Cultural Diversity*, adopted by the 31st session of the General Conference of UNESCO, Paris, November 2, 2001, UNESCO Doc. CLT.2002/WS/09, Paris 2002; and The Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), *An International Agreement on Cultural Diversity – A Model for Discussion*, September 2002.

⁵² See *Audiovisual Services (Background Note by the Secretariat)*, S/C/W/40 (June 15, 1998), *Communication from the United States (Audiovisual Services)*, S/C/W/78 (December 8, 1998), *Communication from Israel (Review of Article II Exemptions/Replies to Questions Posed on Israel's MFN Exemptions in the Area of Audiovisual Services in the Course of the Review of MFN Exemptions)*, S/C/W/158 (July 10, 2000), *Communication from the United States (Audiovisual and Related Services)*, S/CSS/W/21 (December 18, 2000), *Communication from Japan (The Negotiations on Trade in Services)*, S/CSS/W/42 (December 22, 2000), *Communication from Canada (Canadian Initial GATS Sectoral/Modal/Horizontal Negotiating Proposals)*, S/CSS/W/46 (March 14, 2001), *Communication*

the complex issue of cultural goods and services raised expectations that – in contrast to the Uruguay Round – the next round would lead to a fruitful and mutually acceptable solution of the conflict. Nonetheless, despite the debate within the WTO and good reasons for the involvement of the WTO, arguments tipped in favour of UNESCO, as the competent organisation to address the problem. Hence, following the adoption of a non-legally binding Declaration on Cultural Diversity in 2001, the General Conference of UNESCO decided in October 2003 based on a preliminary study⁵³ that “the question of cultural diversity as regards the protection of the diversity of contents and artistic expressions shall be the subject of an international convention”.⁵⁴

After two years of negotiations the Convention was adopted by the General Conference of UNESCO on October 20, 2005 in Paris.⁵⁵ On December 9, 2005 the Director-General of UNESCO, Koïchiro Matsuura, and the President of the General Conference, Ambassador Musa Bin Jaafar Bin Hassan, signed the text of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions which certifies the six language versions of the Convention, thus opening the path for its ratification by Member States.

III. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions

1. Preliminary Remarks

Based on the foregoing remarks on the nature of culture and trade conflicts as well as their principal precedents, it becomes clear that the drafters of the Convention were confronted with a difficult task. At the same time, they were also given a great opportunity to critically analyse and rethink the principal foundations on which human life rests and on which the international legal order is built. The following pages review the 35 articles of the Convention and aim at assessing their impact on the issue of cultural diversity as well as possible implications for the area of international trade.

from Switzerland (GATS 2000), (Audio-visual services), S/CSS/W/74 (May 4, 2001), and Communication from Brazil (Audiovisual Services), S/CSS/W/99 (July 9, 2001).

⁵³ UNESCO, Executive Board, Preliminary Study on the Technical and Legal Aspects Relating to the Desirability of a Standard-Setting Instrument on Cultural Diversity, 166th session, Appendix 1, 32 C/52, UNESCO Doc. AX EX/28 (March 12, 2003).

⁵⁴ See UNESCO Resolution 32 C/34, Desirability of Drawing Up an International Standard-Setting Instrument on Cultural Diversity, 32nd Session, Paris, September 19 to October 17, 2003; see also UNESCO General Conference, Opportunité de l'élaboration d'un instrument normatif international concernant la diversité culturelle, 32^e session, Paris 2003, 32 C/52 (July 18, 2003).

⁵⁵ The various stages in the negotiation history of the Convention is well documented in the Report of the Director-General on the Progress Achieved During the Third Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, 172 EX/20 (August 11, 2005).

2. The Title

The title of a convention, written in length or abbreviated, not only helps to identify its regulatory content or purpose but also serves as a first reference in different contexts such as public debate or the simple search for documents in catalogues or electronic databases. From this viewpoint, the present convention's title appears too long and, despite the plethora of words listed, not very revealing in terms of its content and regulatory scope. Instead, the direct juxtaposition in the title of "protection" and "promotion" in the context of the diversity of cultural expressions – even if it is capable of creating an interesting tension for further thoughts –⁵⁶ appears contradictory rather than informative. Considering earlier stages in the debate preceding the adoption of the convention, it is interesting to consider why the use of the predominant concept of "cultural diversity" was not retained for the present project.⁵⁷ Often the introduction of new terms or concepts proves problematic because it usually takes some time to anchor their meaning in general usage and create a web of common associations before a fruitful debate can take place. From this perspective, the term "cultural diversity" has not only already drawn the boundaries of the debate but has also gained greater acceptance in the global usage during the past years.⁵⁸ The sudden change of terminology may be harmful to the continuity of the debate because it is capable of dissociating the present convention from the achievements of the past. Finally, it may also be confusing when considering, for instance, the basic objectives of the convention as reflected in the Preamble which, at the beginning, frequently refers – in stark contrast to the title – to the concept of cultural diversity. This could create the impression that the objective and scope of the convention is considerably beyond the impression that derives from the title. Nevertheless, perhaps the drafters deliberately narrowed down the scope of the convention in order to give it more precision and more legal weight.

3. The Preamble

The preamble preceding the text of a treaty, as well as the annexes attached to it, form an integral part of the whole.⁵⁹ As such, the preamble firstly provides a useful

⁵⁶ On this tension, see the remarks to Articles 7 and 8 CDCE, *infra* Section III.7.

⁵⁷ UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st session of the General Conference of UNESCO, Paris, November 2, 2001, UNESCO Doc. CLT.2002/WS/09, Paris 2002; UNESCO, Executive Board, Preliminary Study on the Technical and Legal Aspects Relating to the Desirability of a Standard-Setting Instrument on Cultural Diversity, 166th session, Appendix 1, 32 C/52, UNESCO Doc. AX EX/28 (March 12, 2003).

⁵⁸ See also various references to the Convention by way of cultural diversity; see e.g. A. Riding, Next Lone U.S. Dissent: Cultural Diversity Pact, *The New York Times* (October 12, 2005), E3.

⁵⁹ Cf. Article 31 (2) United Nations Convention on the Law of Treaties, concluded at Vienna, May 23, 1969, 1155 U.N.T.S. 331.

source for the interpretation of the text of a treaty in the process of its application. Secondly, it is possible under certain circumstances that single passages contained in the preamble itself may formulate legal obligations for the Parties to it, making them fit for direct application.⁶⁰ Finally, and of greatest relevance in the present context, the preamble provides some useful information about the principal aim, underlying reasoning, envisaged field of application and scope of the treaty. A preamble is particularly useful for the evaluation of the data and the kind of reasoning admitted to and used in the drafting process. In short, its text provides a general impression of the rationale underlying the debate that preceded, or perhaps even triggered, the negotiations for the respective treaty.

With regard to new or recently adopted treaties, such as the present convention, the preamble is thus a useful device for drawing some general preliminary conclusions about the potential implications the new treaty may have for existing treaties or agreements. Ideally, a critical reader may also look at the preamble from the viewpoint of the international legal order as a whole and try to determine the implications the new treaty may have on its unity, stability and efficiency in the present state. With regard to old treaties adopted some time in the past, the preamble still contains important information about the context and scope of the past debate leading to its adoption, which can and should be critically weighed and balanced against the present state (principle of evolutionary treaty interpretation).⁶¹ Such critical comparison, carried out in the process of a historic-teleological interpretation, is gaining special significance in fast-evolving regulatory fields such as those of technology, trade and culture, which all form important elements of the so-called “culture and trade linkage debate” in pursuit of greater global cultural diversity.

a. Substantial Remarks

Condensed in 21 Recitals altogether, the Preamble isolates a number of topics related to the Convention’s scope, and summarises the basic considerations which resume not only past experiences but also the dominant reasoning at the time of the drafting, in addition to the expression of major aspirations for the future.⁶²

⁶⁰ See e.g. St. Schepers, *The Legal Force of the Preamble to the EEC Treaty*, 6 *European Law Review* 356 (1981), at 357-8.

⁶¹ In the *Shrimp* Case, the Appellate Body of the WTO DSB relied on the case law of the International Court of Justice when it stated that “where concepts embodied in a treaty are ‘by definition, evolutionary’, their ‘interpretation cannot remain unaffected by the subsequent development of law ... Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’”; see *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (October 12, 1998) at para. 130 (Fn 109).

⁶² See also the broad survey of cultural diversity in K. Stenou, *Unesco and the Issue of Cultural Diversity: Review and Strategy, 1946-2004 – A Study Based on Official Documents*, Paris 2004, at <http://portal.unesco.org/culture/es/file_download.php/47cc07ba56443cb277023a75b35b5786DivCult-BilanStrategies-ENG-sept04.pdf>.

First and foremost, the Preamble sets out some basic considerations linked to cultural diversity, namely that it is both a defining characteristic and common heritage of humanity, responsible for the rich and varied world that forms the basis for the sustainable development of communities, peoples and nations by increasing the range of choices and nurturing human capacities. Furthermore, Recital 4 and 5 of the Preamble recall the links between cultural diversity on the one hand, and democracy, tolerance, social justice, and human rights and fundamental freedoms on the other, as well as mutual respect between peoples and cultures as preconditions for national and international peace and security. These considerations clearly draw from painful experiences of world and civil wars in the past, partly transformed into the mandate given in the UNESCO Constitution itself.⁶³

The next topical issue, Recital 6 emphasises the strategic role of culture in development cooperation and the eradication of poverty.⁶⁴ Consequently, the Preamble recognises the highly elastic nature of the concept of culture which frequently changes across time and space making it hostile to definition and regulation.⁶⁵ This volatile quality of the concept of culture is essentially the precondition for the diversity that is embodied “in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity” (*discordia concors*). Recital 8 then moves on to another important aspect of cultural diversity; that found in the importance of traditional knowledge and its positive contribution to sustainable development, already legally recognised in a proper convention.⁶⁶

⁶³ Cf. Article I (1) (“Purposes and Functions”) of the Constitution of the United Nations Educational, Scientific and Cultural Organization, signed at London on November 16, 1945, 4 U.N.T.S. 275, which defines the purpose of UNESCO as to “contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations”.

⁶⁴ See e.g. UNCTAD, Report of the Expert Meeting on Audiovisual Services: Improving Participation of Developing Countries, TD/B/COM.1/56 (December 4, 2002) at 2 and Pagni et, *supra* note 26, characterising the role of the culture and cultural products in the field of development as follows: “*Phénomène social aux caractéristiques très diverses et aux multiples ramifications, les industries culturelles doivent être étudiées à travers les divers sous-secteurs qui les composent. Au fil du temps, une prise de conscience de plus en plus forte des enjeux liés aux ‘industries culturelles’ a abouti à l’idée que culture et développement sont intimement liés*”; see also Article 27 (“Cultural Development”) of the so-called “Cotonou Agreement”: Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, signed in Cotonou on June 23, 2000, (2000) O.J. L 317/3 (December 15, 2000).

⁶⁵ Theodor W. Adorno asserted the difficulties linked with the formulation of cultural policies by pinpointing that the essence of culture itself is negated when subjected to administration and planning because culture is particularly nurtured by concepts such as autonomy, spontaneity and criticism; see Th.W. Adorno, “Culture and Administration” in: *ibid.* (note 29), 107 at 123.

⁶⁶ See the Convention for the Safeguarding of Intangible Cultural Heritage, UNESCO Doc. MISC/2003/CLT/CH/14 (October 17, 2003); see also UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, adopted by the General Conference at its twenty fifth session (November 15, 1989), available online: UNESCO Homepage, <<http://unesdoc.unesco.org/images/0008/000846/084696e.pdf#page=242>>.

For the sake of greater coherence, the reference to traditional knowledge as a source of intangible and material wealth would ideally have been combined with the reference to intellectual property rights in Recital 17.

Continuing the narration and specification, the next paragraph stresses the need to take measures aimed at protecting the diversity of cultural expressions, especially where they are threatened by extinction. Recital 10 moves back to the more general level of culture and emphasises its importance for social cohesion and particularly the enhancement of the role of women in society. The subsequent three recitals are dedicated to the freedom of thought, expression and information in connection with the role of the media and cultural products as the transmitters for the free flow ideas and exchange between cultures. These three paragraphs can practically be read as a brief summary of an important aspect of UNESCO's efforts, namely the establishment of a new information order.⁶⁷

Most relevant for cultural diversity, Recital 14 expresses the underlying link between language and culture, or in other words, between linguistic and cultural diversity, provided by the intellect as the prime perceptive agent in the inspiration, creation and development of content and meaning.⁶⁸ It also pays tribute to the insoluble links between language and education on the one hand, and education and culture on the other.

In partial reference to Recitals 6, 8 and 9, Recitals 15 and 16 stress the importance of the vitality of cultures, manifested in the "freedom to create, disseminate and distribute their cultural expressions" and of cultural interaction and creativity for the benefit of progress of society at large.

The next set of Recitals contain various trade aspects on the issue of cultural diversity: First, Recital 17 emphasises the importance of intellectual property rights in sustaining those involved in cultural activity, by ensuring that they (especially artists) will receive revenues for their artistic and creative efforts. Second, Recital 18 enters the heart of the culture and trade debate by restating the dual, i.e. cultural and economic, nature of cultural activities, goods and services based on the reasoning that they not only form the basis for significant commercial transactions but also because they "convey identities, values and meaning". This statement merely restates the Declaration on Cultural Diversity, which calls cultural goods and services "commodities of a unique kind" and defines them as follows:

In the face of present-day economic and technological change, opening up vast prospects for creation and innovation, particular attention must be paid to the diversity of the supply of creative work, to due recognition of the rights of authors and artists and to the

⁶⁷ See generally C. Breunig, *Kommunikationspolitik der UNESCO: Dokumentation und Analyse der Jahre 1946 bis 1987*, Konstanz 1987.

⁶⁸ On the entwinement of the mind and culture, see generally Y.M. Lotman, *Universe of the Mind – A Semiotic Theory of Culture*, London 1990, mainly at 273.

specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods.⁶⁹

Third, Recital 19 then notes the challenges posed by the processes of globalisation and notably the rapid development of information and communication technologies. These challenges, on the one hand, afford unprecedented conditions for enhanced interaction between cultures, yet also threaten the world's cultural diversity, especially in view of the widening gap between rich and poor countries.

Finally, the last two recitals refer to the mandate of UNESCO and the provisions of international instruments related to cultural diversity and the exercise of cultural rights adopted by it, such as, notably, the 2001 Universal Declaration on Cultural Diversity.

b. The Preamble Revisited

The various provisions of the Convention will have to be interpreted in light of the considerations listed in the Preamble. In this way the Preamble can be seen to be preparing the background of the debate on cultural diversity while briefly outlining its principal elements in a condensed form. When read systematically, it also reflects relatively well the need for a holistic approach not only for the issue of cultural diversity but of global governance, which, in other words means that the overall goal of protecting and promoting the world's cultural diversity cannot be achieved without considering other valuable objectives of the international community, such as democracy, sustainable development, human rights, and trade to mention but a few. What appears to be missing or omitted is an explanatory reference to the Convention's institutional context, its relation to other agreements and the rule of law as the basic precondition for the successful achievement of the objectives it is designed to pursue. However, the Preamble's full scope and value can only be evaluated in conjunction with the provisions that ensue in the Convention's text.

4. Title I "Objectives and Guiding Principles"

Further clarifying the considerations laid down in the Preamble, Art. 1 lists the principal objectives of the Convention subdivided in nine *literae* altogether. First and foremost, Art. 1 makes it clear, perhaps in order to avoid basic misunderstanding, that the present convention is neither about the protection or promotion of culture, nor about cultural diversity but instead about the diversity of cultural expressions, which it defines below as "expressions that result from the creativity of

⁶⁹ Cf. Article 8 of the Universal Declaration on Cultural Diversity, adopted by the 31st session of the General Conference of UNESCO, Paris, November 2, 2001, UNESCO Doc. CLT.2002/WS/09 Paris 2002.

individuals, groups and societies and that have cultural content”.⁷⁰ Cultural content itself is defined as “the symbolic meaning, artistic dimension and cultural values that originate from express cultural identities”.⁷¹ The choice for the term “cultural expressions” appears thus as an attempt to narrow down the Convention’s scope and demarcate it from the concept of “culture” and even from the one of “cultural diversity” which broadly refers to the “many ways in which the cultures of groups and societies find expression”.⁷²

The list of the residual objectives can be qualified as mentioning flanking measures accessory to the overall objective of protecting and promoting the diversity of cultural expressions. These accessory objectives comprise the encouragement of dialogue between cultures, interculturality rejecting explicitly the theory of a clash of cultures. It also mentions the desire to promote respect and to raise awareness on the value of the diversity of cultural expressions at local, national and international levels. Art. 1 also reiterates the importance of the link between culture and development for all countries. At this point, following the terms “for all countries”, instead of emphasising the special relevance for so-called “developing countries”, it might have been helpful to introduce a new understanding relating to the ill-termed distinction in “developed” and “developing countries”. Already highly questionable in the economic field,⁷³ such a distinction is particularly problematic in the cultural field, especially in light of the dynamism inherent in the concept of culture as recognised also in the Preamble, which acknowledges the principle of the equality of all cultures and the fact that culture takes diverse forms across time and space.⁷⁴ The two final objectives mentioned only reaffirm the sovereign rights of States in the adoption of cultural policies and the spirit of international cooperation and solidarity.

It must be noted that under *litera g*) found hidden in between these residual flanking measures, is the objective “to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning”. Unlike the more programmatic flanking measures, this goal is at first sight suscep-

⁷⁰ Art. 4 para. 3 CDCE.

⁷¹ *Ibid.*, para. 2.

⁷² *Ibid.*, para. 1.

⁷³ See e.g. A. Sen, *Development as Freedom*, Oxford 1999 and B. Frey/A. Stutzer, *What Can Economists Learn From Happiness Research?*, 40 *Journal of Economic Literature* 402 (2002).

⁷⁴ The principle of equality of cultures is a concomitant of the principle of equality of all states (Art. 2.1. UN Charter) and is, for example, restated in Article 1 of the 1966 UNESCO Declaration of the Principles of International Cultural Co-operation, Resolution adopted on the report of the Programme Commission at the sixteenth plenary meeting, on November 4, 1966, reprinted in UNESCO Records of the General Conference, Fourteenth Session Paris, 1966, at 86, or para. 1 and 4 of the 1982 Mexico City Declaration on Cultural Policies, Mexico City, July 26 to August 6, 1982, as well as implicitly recognised in the Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its seventeenth session, Paris, November 16, 1972, 1037 U.N.T.S. 151; see generally L. Galenskaya, *International Co-Operation in Cultural Affairs*, 198 *Rec. des Cours* 265 (1986).

tible to a more precise and less programmatic interpretation. It does not, however, clarify what kind of recognition is referred to and whether or not the recognition implies legal obligations.

More general information concerning the objectives is provided by Art. 2 which lists the Guiding Principles of the Convention. These principles include the following: the principle for respect of human rights and fundamental freedoms, the principle of sovereignty, the principle of equal dignity of and respect for all cultures, the principle of international solidarity and cooperation, the principle of the complementarity of economic and cultural aspects of development, the principle of sustainable development, the principle of equitable access (to a rich and diversified range of cultural expressions from all over the world), and the principle of openness and balance.

The brief explanations added to each of the principles are highly general in nature and therefore somehow repeat the basic considerations mentioned in the Preamble. They therefore unfortunately fail to elucidate and specify the obligations that Parties to the Convention will have to comply with once it has entered into force.

5. Title II “Scope of Application”

Most vague and repetitive, as it is somewhat self-explanatory, is the explanation given in Art. 3 with regard to the Convention’s scope of application. It states that “this Convention shall apply to the policies and measures adopted by the Parties relating to the protection and promotion of the diversity of cultural expressions”. Art. 3 can be regarded as superfluous.

6. Title III “Definitions”

Art. 4 provides definitions of the central concepts used throughout the Convention, of which a few have been quoted above. They merely summarise definitions formulated in previous related documents, such as the Declaration on Cultural Diversity. Interesting to note, however, is the hierarchical order that can be read from the first five definitions (paras. 1-5), starting with “cultural diversity” as the principal concept of which “cultural content” and “cultural expressions” are important elements, and leading to “cultural activities, goods and services”.

At the other end towards greater precision, the cultural industries, which are defined as “industries producing cultural goods and services” are, at least in legal terms and from a trade perspective, the most concrete concept. In contrast to the Preamble in Recital 18, Art. 4 does not reiterate the dual nature underlying the cultural industries, which clearly marks their original *raison d’être* as a deliberate crea-

tion of an oxymoron.⁷⁵ The dual, both cultural and economic nature is also one of the defining characteristics of these industries, to which the United States fiercely resisted and formally objected during the third session of the intergovernmental meeting.⁷⁶ This objection of the US comes somewhat as a surprise given that in 1998 the United States implicitly recognised this characteristic in a Communication to the WTO writing that:

The United States wishes to join with the Secretariat in underscoring that audiovisual services reflect the social and cultural characteristics of a nation and its peoples, and in acknowledging the great social and political importance of these services – as a source of entertainment and education, as a means for helping to integrate a nation domestically, and in presenting to the rest of the world a nation’s unique identity.⁷⁷

Slightly further down the same Communication equally confirms that – fostered by technological innovation – the AV sector possesses a special economic characteristic of high initial production but comparably low reproduction and distribution costs bringing about the tendency to strive towards audience maximisation.⁷⁸

This resistance during the negotiations perhaps helps to explain why the scope and meaning of the cultural industries is further concretised as it is, for instance, the case in the 1988 Canada-United States Free Trade Agreement (CUSFTA). In Art. 2012 the CUSFTA broadly defines cultural industry as comprising any activity in the field of books, film, video and music recordings as well as broadcasting.⁷⁹ The advantage of not exhaustively defining the various sectors of goods and services is clearly its openness *vis-à-vis* new technological innovations and the resulting convergence between these sectors as well as the emergence of new ones, which cause new and difficult regulatory challenges to manifold legal regimes. For some guidance, the Convention could, however, have given a demonstrative list of some sectors belonging to the cultural industries.

The residual concepts defined are those of “cultural policies”, “protection” and “interculturality”, but do not give rise to further comments.

⁷⁵ See Adorno (note 29) at 98.

⁷⁶ Preliminary Report of 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, 33 C/23 (August 4, 2005) at 13.

⁷⁷ Communication from the United States (Audiovisual Services), S/C/W/78 (December 8, 1998), para. 2.

⁷⁸ Ibid. at para. 4.

⁷⁹ Canada-United States Free-Trade Agreement, 27 I.L.M. 281 (1988); see also Article 2106 of the North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States, December 17, 1992, 32 I.L.M. 605 (1993).

7. Title IV “Rights and Obligations of Parties”

Generally, but also more specifically from a trade perspective, the next set of Articles under Title IV contain some more significant provisions in terms of the application, implementation and possibly the overall success of the convention. Their content was subject to intense negotiations, especially given that they laid down the basic rights and obligations of the Parties to the Convention.⁸⁰

Firstly, Art. 5 para. 1 restates as a general rule the Parties’ rights and obligations, which reads as follows:

The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognised human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and to promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.

Especially the phrasing “sovereign right to formulate and implement cultural policies and to adopt measures” is interpreted by critics of the Convention as an open invitation to a violation of other agreements and particularly obligations deriving from trade agreements. Yet, at a closer look and a more systematic interpretation, which is undoubtedly required in a complex field as the one of cultural diversity, such a position cannot be seriously sustained. This is because Art. 5 para. 1 explicitly requires the Parties to conform to some of the most important rules of international law. Moreover, it must be read in connection with Art. 2 (1) which specifies that “no one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms”. Finally, the scope of Art. 5 is also limited by Art. 20 which stipulates the Convention’s relationship to other instruments.

In a more concrete way, Art. 6 lists the Parties’ rights and the measures they may adopt within the framework of cultural policies at a national level. By and large, these measures include regulatory means aimed at protecting and promoting diversity of cultural expressions. More specifically they equally include measures to provide opportunities for domestic activities, goods and services as well as those 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”. The mention not only of the production but also the dissemination and distribution of cultural products corresponds with the numerous problems linked to the marketing of cultural products once they have been produced. These problems appear in the form of “bottle-necks” where a few, mostly large companies control and dominate the access to an efficient distribution network. Such control often comes from tendencies of pro-

⁸⁰ UNESCO, 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, 33 C/23 (August 4, 2005) at 13.

duction and distribution companies to minimise risks through vertical and horizontal integration and through recourse to unfair or anti-competitive practices. Such practices usually hit the independent and small producers hard, and unavoidably lead to a decrease in the diversity of products. In this context, Art. 6 *lit. h*) names measures aimed at enhancing diversity of the media or, in other words, media pluralism, and explicitly emphasises the role of public service broadcasting (PSB). The emphasis on PSB, however, should not be interpreted as an inherent criticism of private broadcasting companies, but instead read as a pledge for the creation of a dual system, i.e. a system in which private broadcasters can operate alongside their public counterparts. Other measures mentioned include the provision of public financial assistance, assistance to non-profit organizations, the establishment of public institutions and last but not least, “measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions”.

A literal interpretation of Art. 6, without systematically taking into account other relevant Articles of the Convention, may create the unfounded and false impression that as a result, Parties are allowed to take any kind of regulatory and other measures to support cultural expressions, such as subsidies, quotas, tax credits or content requirements to mention but a few.⁸¹ This, however, is only “theoretical”, since in fact, Art. 20 para. 2 on the relationship to other instruments, specifies that the present convention does not modify the rights and obligations under any other treaties. This clearly has a restrictive effect on the scope of the rights enumerated in Art. 6 but more on this will be said below in the context of Art. 20.

Arts. 7 and 8 then map out the framework for measures which, on the one hand, promote and, on the other, protect cultural expressions. This distinction, which also catches one’s eye in the title of the Convention, does not necessarily mean a contradiction. Most importantly, protection is not identical to economic protectionism but instead is understood in the present context as the adoption of measures “aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions”. Protection is then the complementary precondition for measures promoting the diversity of cultural expressions which according to Art. 7 para. 1 means the endeavour of Parties to create within their territory an environment that enhances the conditions and possibilities for individuals and social groups to create, disseminate, distribute and have access to their own cultural expressions. Para. 2 then extends the right of access to cultural expressions from other countries. The protection of cultural expressions comes into play when these are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.

Thus what at a first glance appears contradictory simply underscores the special need of cultural diversity for continuity because past cultural expressions are a rich

⁸¹ See e.g. A. Castonguay, 151 Countries Support UNESCO’s Draft Convention on the Diversity of Cultural Expressions. Only the U.S. and Israel Voted Against It, *Le Devoir* (October 18, 2005), at <<http://www.ledevoir.com/2005/10/18/92872.html>>.

and fertile ground for the comprehension, refinement and creation of new cultural expressions in the future. This also applies to the emphasis on domestic and foreign cultural expressions in Art. 7 paras. 1 and 2, which – as history has proven a thousand fold – may engage in a mutually enriching interaction and inspiration. Hence, similar to Art. 6 earlier, this means that Arts. 7 and 8 should be read in combination because when read in isolation each of them may fall short of the requirements of the spirit and teleology of the Convention. To illustrate this, Art. 7 read in isolation fails to respond to the global realities of transport, information and communication technologies in present day multicultural societies. It also fails to underline an important element according to which the significance and value of the diversity of cultural expressions may at times be greater within one given society, culture or state than in the relationship between two or more States. Similarly, a literal reading of Art. 8 is capable of creating the impression that no new cultural expressions can or should be created because all the available space and resources are needed for the mere conservation of the existing ones. The two articles are thus best seen as complementary and should be interpreted accordingly.

Subsequently, Art. 9 deals with information sharing and transparency and calls on the Parties to exchange information, to provide relevant information in their reports to UNESCO every four years, and to establish contact points responsible for information sharing.⁸² Art. 10 contains provisions aimed at fostering education and public awareness about the importance of the protection and promotion of the diversity of cultural expressions. Art. 11 merely emphasises the fundamental role of civil society. In sum, these articles function as useful reminders but contain no legal obligations in a strict sense.

Arts. 12 to 19 then move the attention from the national level to cooperation at the international level which the Convention is set to promote. The various provisions oblige Parties to endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the diversity of cultural expressions. Such obligations, as referred to in Art. 12, include *inter alia* the facilitation of a dialogue among Parties on cultural policy, the sharing of best practices between cultural institutions, the reinforcement of partnerships between civil society, NGOs and the private sector, the promotion of new technologies and the conclusion of co-production and co-distribution agreements. Art. 13 explicitly calls on Parties:

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.

For this purpose, Art. 14 then gives a demonstrative list of ways on how the support of the cooperation for sustainable development and poverty reduction can materialise. At this point, an interesting change of levels occurs because, generally in the field of development cooperation, the goals are relatively easy to define but

⁸² See also Articles 19 on “Exchange, Analysis and Dissemination of Information” and 28 “Points of Contacts”.

extremely difficult to realise. The difficulty often stems from the lack of consensus on the means the goals may be best achieved. Thus what proves difficult is a smooth and sustainable transition from idea to reality, from theory to practice or from words to deeds. Art. 14 para. 1 therefore contains valuable information as it marks an attempt to carefully enter the “world of deeds” by defining that such co-operation means the strengthening of the cultural industries. Unfortunately, here again the strengthening of the cultural industries is limited to the ill-termed concept of “developing countries”, as if the cultural industries in so-called “developed countries” were already developed and need not be strengthened or protected from new threats.⁸³ Past and more recent experiences, however, show that especially the supply with a culturally diverse, educative and informative as well as entertaining programme of high quality is a difficult endeavour and battle which has to be won on a daily basis.⁸⁴ In the meantime we know that the mere increase in the number of television channels, publications and sound recordings, is no guarantee for a better and more diverse offer of content.

Observably here, contact with the new paradigm that the Convention tries to introduce is lost. It is lost because it not only contradicts the principle of equality of all cultures and forgets about the dynamic nature of the development of the human species regardless of being situated below or above the equator as emphasised in the Preamble, but it also violates an important premise of development understood as the freedom and capacity to lead “the kind of lives we have reason to value”.⁸⁵ In other words, especially from the perspective of the diversity of cultural expressions, someone having a plasma wide-screen connected to a satellite dish offering more than 300 channels is not in a superior position compared to someone being able to contemplate the last sunrays of a sunset projected over a green and cultivated valley.

Returning to the cultural industries mentioned in para. 1, Art. 14 continues the flawed perception by calling on Parties to create and strengthen cultural production and distribution capacities in developing countries; to facilitate wider access to the global market and international distribution networks for their cultural activities, goods and services; to enable the emergence of viable local and regional markets; to facilitate access of cultural activities, goods and services to the territory of developing countries; and to support creative work and facilitate the mobility of artists from the developing world (*lit.* a) to e). The last objective is repeated under Art. 16, which obliges developed Parties to grant their developing counterparts preferential treatment with regard to artists and cultural goods and services. Only the last *lit.* f), which calls on the Parties to foster cooperation between developed

⁸³ See e.g. European Parliament Resolution on the Risks of Violation, in the EU and especially in Italy, of Freedom of Expression and Information (Article 11(2) of the Charter of Fundamental Rights), P5_TA(2004)0373 (April 22, 2004).

⁸⁴ See e.g. A.E. Varona, Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation, 6 Minn. J.L. Sci. & Tech. 1 (2004).

⁸⁵ See Sen, *supra* note 73 at 18.

and developing countries in the relevant areas, such as music and film, is formulated neutrally in a sense that it does not start from the premise of a unilinear flow of benefits from the so-called “developed” to the “developing world”. Finally, paras. 2 to 4 mention capacity building, transfer of technology and know-how, as well as financial support through mainly the International Fund for Cultural Diversity established by Art. 18.

In sum, Art. 14 as a whole as well as Art. 16 can be characterised as carrying a number of trade aspects with particular relevance to the present multilateral trading regime, such as the degree of liberalisation of trade in goods (GATT) and services (GATS), the treatment of infant industries or facilitating the participation of developing countries (Art. XVIII and XXXVI to XXXVIII GATT, Enabling Clause,⁸⁶ and Art. IV GATS) the presence of natural persons of a (WTO) Member in the territory of another (WTO) Member (Mode 4; Art. 1:2 *lit. d* GATS) and regionalism (Art. XXIV GATT and Art. V and V^{bis} GATS). References to “capacity building” and “technical assistance” also relate to technical assistance in the service sector (Art. IV in connection with Art. XXV GATS). Similarly, the envisaged support for the transfer of technology and know-how bears great relevance for the objective of the TRIPS Agreement.⁸⁷ The last paragraph on financial support, especially in combination with Art. 18 establishing the International Fund for Cultural Diversity, raises rather general questions pertaining to the “trade and development” problem, such as the coherence of economic policy making through the WTO, UNCTAD, the IMF and the World Bank.⁸⁸

Art. 15 contains obligations concerning the so-called “collaborative arrangements” and Art. 17, which refers back to Art. 8 (1) calls for cooperation between the Parties in situations of “serious threat to cultural expressions”. Unfortunately, Art. 17 does not specify what a serious threat embodies and what measures Parties can or should take under such circumstances. In light of the significance of the cultural industries mentioned in Art. 14 as well as their dual, i.e. economic and cultural nature, this provision could not only have similarities but also implications for various safeguard or emergency actions described and authorised under the

⁸⁶ Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, November 28, 1979, GATT Doc. L/4903, B.I.S.D. 26S/203-205.

⁸⁷ Cf. Article 7 TRIPS, which defines the objective of the TRIPS Agreement as follows:

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.

⁸⁸ Cf. Memorandum of Understanding between the World Trade Organization and the United Nations Conference on Trade and Development, signed in Geneva on April 16, 2003 and the Agreement between the WTO and the IMF and the World Bank, Decision adopted by the General Council at its meeting on 7, 8 and 13 November 1996, WTO Doc. WT/L/194 of November 18, 1996 and its Addendum, WT/L/194/Add.1 of November 18, 1996; see also D. A h n, Linkages Between International Financial and Trade Institutions – IMF, World Bank and WTO, 34 J. World T. 1 (2000).

GATT (e.g. Art. VI, XII, XIX, XX and the SCM and AD Agreement)⁸⁹ and the GATS (e.g. Art. XII, XIV:a).⁹⁰

8. Title V “Relationship to Other Instruments”

The previous comments on some specific articles of the Convention suggest the existence of direct or indirect consequences for other areas of international law and, in particular, of international trade law. This impression, however, is ephemeral because it only exists as long as the text of the relevant article is interpreted literally and in strict isolation of the provisions laid down in Arts. 20 and 21 under Title V of the Convention. Title V, called “Relationship to Other Instruments”, however, is crucial for the scope and objective of the Convention since it draws the boundaries between obligations and rights deriving from the present Convention and those deriving from other international agreements. Ultimately, it must be emphasised that this means that each of the articles of the Convention, which are more than merely programmatic in character and, hence, contain more concrete rights and obligations, can only have their full effect within the boundaries drawn by Art. 20 and, to a lesser extent by Art. 21 of the Convention. Together, Arts. 20 and 21 must therefore be considered the central provisions of the Convention because they either provide a point of contact for, or cut like a sharp razor blade through, the respective areas of culture and trade. The content of Arts. 20 and 21 decides on the success or failure of the Convention in creating an appropriate regulatory setting for the cultural industries and, eventually, the diversity of cultural expressions with a view to greater global cultural diversity.

The centrality of the said articles is also reflected not only by the difficulty in the drafting of their text but also by the fierce battle that accompanied it. Both the difficulty and the battle signified a continuation of the primordial “agreement to disagree” over the treatment of cultural goods and services, reached during the Uruguay Round negotiations. This time, the divergent views concerned not the legal treatment of this special category of goods and services but the initial intent and considerations that led to the decision to adopt a legally binding international instrument on cultural diversity. The divergence arose regarding the question of whether the Convention was aimed at clarifying the main aspects of the diversity of cultural expressions as an important aspect of cultural diversity, or whether it was designed to indirectly, and in disguise, change the trade rules established by the WTO, by securing a special treatment for cultural goods and services under the aegis of UNESCO. On this last point it can be estimated that the main initiators of

⁸⁹ Cf. Article 3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex 1A (AD Agreement) and Articles 5 and 6 of the Agreement on Subsidies and Countervailing Measures, Annex 1A, (SCM Agreement).

⁹⁰ With regard to Article XIV:a GATS, please note Footnote 5 which specifies that “The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society”.

the Convention probably considered it politically unrealistic to pursue this goal within the framework of the WTO.

Before turning to the content of Arts. 20 and 21, their centrality indicates the necessity to look briefly at their drafting history.

a. The Evolution of Article 20 CDCE

The difficulties on how to enhance the mutual supportiveness between the domains of culture and trade mentioned above are best reflected in the last draft proposal for Art. 20 before the Convention's adoption, which reads as follows:

1. This Convention shall not affect the rights and obligations of Parties derived from other international agreements. Nor shall other international agreements affect the rights and obligations of Parties under this Convention.

2. When interpreting and applying other international instruments or when entering into other international obligations, Parties shall take into account the objectives and principles of the Convention.⁹¹

Obviously, the two sentences in para. 1 stand in clear opposition, not only contradicting each other but also creating a deadlock which means that – literally as well as legally – the rights and obligations set forth in the present Convention add nothing useful to the objective of protecting and promoting the diversity of cultural expression. This means that any right or obligation mentioned in the Convention is only authorised as long as it does not contradict a right or obligation deriving from any other international agreement. Considering the adage that “everything is allowed, unless it is prohibited” this right already exists, even without the new Convention. This explains why it adds little in legal terms not only for considerations of greater cultural diversity but also the entire area of international law, except perhaps for a further increase in the plethora of legal instruments (*embarras de richesse*).

During the second session of the intergovernmental meeting, discussions among the delegations revealed a preference for a third way over the two proposed alternatives. During the third intergovernmental meeting, the issue of the relationship to other agreements was the subject of long and intense debate during which a new wording of the article was found and submitted to the Plenary. The United States and Australia formally objected to the article and a few other delegations expressed reservations.

At the end, the final version of Art. 20, which was adopted on October 20, 2005, reads as follows:

⁹¹ See Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, 171 EX/INF.18 Appendix 2 (April 2005) at 15; for an even earlier version of Art. 20 (then 19) CDE, see also UNESCO, Preliminary Report of the Director-General Containing Two Preliminary Drafts of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, CLT/CPD/2005/CONF.203/6 (March 3, 2005) at 36.

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.

b. An Evaluation of Article 20 CDCE

The first sentence of the *chapeau* of Art. 20 (1) merely restates the universally recognised principle of *pacta sunt servanda* as enshrined in Art. 26 of the Vienna Convention on the Law of Treaties.⁹² This principle means that once a convention has entered into force it is binding upon the Parties to it and must be performed by them in good faith. The second sentence introduces the two subparagraphs by stating that Parties shall not subordinate the present Convention to any other treaty. Subpara. a) then calls on Parties to “foster mutual supportiveness between this convention and the other treaties to which they are parties”. This can be read as a highly useful and necessary reminder of the need for greater coherence in global governance and international law. Such need is widely established not only for regulatory problems related to the multifaceted concept of cultural diversity but also to those of “cultural expressions” and “cultural industries”, which have in common a demand for a more coherent relationship between the various existing and future legal instruments and their competent international organisations. Ideally, this means an obligation to always consider possible linkages and implications between the present Convention and any other treaty. Subpara. b) then specifies that in addition to the mutual supportiveness, Parties shall also bear in mind specific provisions of this convention when they are interpreting and applying other treaties, or in the process of entering into other international obligations. As such, subpara. b) extends this duty to existing as well as future treaties.

Para. 2 then narrows the meaning and scope of para. 1 by clarifying that the present Convention shall not be interpreted as modifying existing rights and obligations. This restriction again limits not only the principle of non-subordination but also the margin of Parties to read greater mutual supportiveness in the relationship of, at least, existing treaties to which they are Parties. The exact implication that para. 2 has for the first scenario mentioned in subpara. b) is also unclear because the modification of rights and obligations, which it sets out to prevent is opposite to the Parties’ duty to take into account the Conventions’ provisions when “inter-

⁹² United Nations Convention on the Law of Treaties, concluded at Vienna, May 23, 1969, 1155 U.N.T.S. 331.

preting and applying” other treaties. Art. 20, however, is clear in the sense that it leaves no doubt as regards the due consideration, interpretation and application of the Convention’s “spirit and letter” of the law to future obligations and treaties. It means that it will only unfold legal effect *pro futuro* and will by no means have retroactive effects. This future-oriented approach is also reflected in Art. 21, which commits Parties to “promote the objectives and principles of this Convention in other international forums”.

In sum, Arts. 20 and 21 take up the legacy left behind by Art. IV GATT as mentioned before, which has functioned as a political reminder of the actual link between culture and trade but equally of the strong need to rethink the mutual equilibrium between culture and trade in accordance with the respective societal and technological challenges posed at the time of consideration.

9. Title VI “Organs of the Convention”

The next title deals with the organs established by, and entrusted with the operation of the Convention: The organs include a Conference of Parties, as the plenary and supreme body of the Convention (Art. 22) and an Intergovernmental Committee, to be composed of representatives of 18 States’ Parties, elected by the Conference of Parties for a term of four years (Art. 23). Only a subsidiary role was attributed to the UNESCO Secretariat, to assist the Convention’s two principal organs. Earlier ideas of setting up a Cultural Diversity Observatory and an Advisory Group were dropped based on the desire to avoid the creation of new bodies and concerns to render the structures set up under the Convention too burdensome.

10. Title VII “Final Clauses and the Annex”

One of the central provisions of the final clauses is contained in Art. 25, which in accordance with the procedure laid down in the Annex of the Convention, regulates the *modus operandi* for the settlement of a conflict between Parties to the Convention. In the case of conflict, it first proposes a solution by negotiation. If this fails, the disputing Parties may seek good offices of, or request mediation by, a third Party. If those attempts still fail, a Party may have recourse to the procedure laid down in the Annex of the Convention. The Annex stipulates the creation of a so-called “Conciliation Commission”, which under normal circumstances would be composed of five members, one of which would be chosen to preside over the Commission. If the dispute involves more than two Parties, the Parties in the same interest can appoint their Commission members jointly. The Conciliation Commission shall then make its decision by a majority vote and render a proposal for the resolution of the dispute which the Parties shall consider in good faith. Given that there is no effective sanctioning mechanism, such as the one foreseen in the framework of the dispute settlement procedure of the Dispute Settlement Under-

standing (DSU) under the WTO, it is highly questionable whether “good faith” alone will suffice to secure compliance with the award in the event of a serious conflict. Furthermore, the general and programmatic character of the Convention leaves one wondering what kind of conflict may arise, particularly if one of the most ardent critics of the Convention is unlikely to ratify it.

The following clauses contain the usual provisions concerning the ratification, acceptance, or approval of, as well as accession to the Convention (Art. 26 and 27). It is important to note that according to Art. 27 para. 1, accession is open to all States that are Members of the United Nations, even those that are not Members of UNESCO, on the sole condition that they are invited by the General Conference of UNESCO. Para. 2 contains special provisions for the membership of regional economic integration organizations, such as the European Union. This specification was necessary since the Constitution of UNESCO does not foresee the Membership of Parties other than States.⁹³

Art. 28 merely relates to the establishment of contact points as referred to in Art. 9. Instead, the following Art. 29 is crucial since it states that the Convention shall enter into force three months after the date of deposit of the thirtieth instrument or ratification, acceptance, approval or accession but only with respect to those States or regional economic integration organizations that have deposited their instruments on or before that date. Any instrument deposited subsequently also enters into force with a delay of three months. Art. 29 is therefore crucial because it means that the Convention will have binding effect only between States Party to the Convention and not acquire the status of customary international law, at least for some time. This is an important aspect particularly with regard to the question of the relationship between the Convention and other agreements and also with regard to the question of its applicability to the relationships between two or more States in other international bodies, such as the WTO DSB.

Art. 30 deals with the obligations of Parties deriving from the Convention and distinguishes between federal or unitary constitutional systems. Art. 31 allows for the possibility of Parties to denounce the Convention through written notification.

Important from the perspective of the dynamic development in the area of cultural expressions through rapid technological innovations in the industries supporting cultural expressions is Art. 33, which foresees the possibility to amend the Convention by a qualified majority of the Parties present and voting at the Conference of Parties.

Finally, Art. 34 states that the authoritative languages of the Convention’s text be Arabic, Chinese, English, French, Russian and Spanish and Art. 35, which concludes the Convention, lays down the registration of the Convention with the Secretariat of the United Nations.

⁹³ See Art. II of the Constitution of the United Nations Educational, Scientific and Cultural Organization, signed at London on November 16, 1945, 4 U.N.T.S. 275.

IV. A Critical Evaluation of the Convention in Light of “Culture and Trade”

1. Elements of Criticism of the Convention

Already in the course of the negotiations, the strongest scepticism and fierce resistance came from the US Government. Such resistance even led some observers to the conclusion that the US only joined UNESCO again after almost two decades of absence in order to either water it down to a “non-paper” or to prevent its adoption from the outset.⁹⁴ Other Parties’ delegations also expressed some concerns and criticism but in the end only two countries, the US and Israel, voted against it while four countries abstained. With regard to Honduras, Nicaragua, Liberia and Israel, except for the latter’s delegation’s earlier reservations against information sharing and transparency (Art. 9 and Art. 19), no major criticism could be found on official sites or in the media.⁹⁵ In a speech before the plenary session of UNESCO the Australian Minister for the Arts and Sport stated that the (draft) Convention failed to meet the objective of “genuinely protecting and promoting the diversity of cultural expressions in a manner consistent with other international obligations”.⁹⁶ The obvious target of concern must therefore have been Art. 20, which determines the relationship to other agreements.

The United States, on the other hand, was more direct in its concerns and criticism. During the negotiations, criticism materialised in formal objections directed against the Preamble’s conviction that cultural activities, goods and services have both an economic and cultural nature (Recital 18), the objective of giving recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning (Art. 1 *lit. g*), the principle on international solidarity and cooperation (Art. 2 para. 4), the definitions of “cultural expressions”, “cultural activities, goods and services”, “cultural industries”, “cultural policies” and “protection” (Art. 4) as well as the right of Parties to provide opportunities for domestic cultural activities, goods and services as well as for domestic independent cultural industries (Art. 6 *lit. b* and *c*).⁹⁷ In addition to the resistance within

⁹⁴ See e.g. “A Madrid, une Convention réaffirme la spécificité des biens culturels”, *Le Monde* (June 12, 2005), writing that: “les Etats Unis crient au protectionnisme et ne manqueront pas, selon plusieurs représentants, de tenter d’amender la convention ou d’en atténuer les effets juridiques, réfutant sa non-subordination à l’Organisation mondiale du commerce (OMC)”, and J. Altwegg, *Artenschutz für Schönes: Die Unesco spricht: Kultureller Protektionismus soll erlaubt sein*, *Frankfurter Allgemeine Zeitung* (June 9, 2005) at 35, reporting: “Amerika war nach neunzehn Jahren Abwesenheit der Unesco wohl nur deshalb wieder beigetreten, weil es die Charta zu Fall bringen will”.

⁹⁵ See the Oral Report of the Rapporteur, Mr Artur Wilczynski at the Closing of the Third Session of the Intergovernmental Meeting of Experts on the Draft Convention on the Protection and Promotion of the Diversity of Cultural Expressions (June 3-25, 2005) at 6-7.

⁹⁶ See the Address of Senator Rod Kemp to the 33rd session of the UNESCO General Conference, Plenary session, (October 5, 2005), available online at: <<http://www.minister.dcita.gov.au/speeches>>.

⁹⁷ See the Oral Report of the Rapporteur, Mr Artur Wilczynski (note 95), at 4-8.

UNESCO, the US Secretary of State, Condoleezza Rice, circulated a letter to member governments expressing her “deep concern” with the draft convention, denouncing its “ambiguous language”, and urging other Parties to postpone its adoption because it will, in her eyes, allow Parties to block further progress towards the global liberalisation of trade and can be used by certain governments to restrict the free flow of information and suppress minority viewpoints.⁹⁸

The US Government’s main criticism was made publicly accessible in an Analytical Sheet of the State Department, which recommended the revision of the draft text because it argued that it was hastily drafted, bearing the potential for an abusive interpretation with regard to the creation of new obstacles for the free exchange of goods, services and even agricultural products, which are susceptible of being considered linked to cultural expressions.⁹⁹ As the principal causes for such misinterpretation, it explicitly mentions the vagueness of the Convention’s scope, the radical potential of the provisions for the adoption of measures that Parties can adopt in order to defend cultural objectives, which are badly defined, and an ambiguous provision governing the relationship of the Convention to other international instruments. The sheet equally calls the Convention ambiguous and contradictory with regard to the respect for human rights and the free circulation of ideas.

Shortly before the adoption of the Convention, the US also proposed a list of proposals for amendments, which reflects similar concerns principally regarding the relationship to other agreements.¹⁰⁰

The US Ambassador to UNESCO, Louise V. Oliver, explaining the negative vote cast by the US, regarded the Convention as “hastily drafted”, “deeply flawed” and expressed concern that it could be “misinterpreted, hindering the free flow of ideas by word and image and also affecting other areas, notably trade”.¹⁰¹ The Convention, the statement specifies, could be used to justify policies that “could also be used or abused to control the cultural lives of their citizens – policies that a State might use to control what its citizens can see; what they can read; what they can listen to; and what they can do”. Opposed to that the statement underlines the US’ belief that in keeping with existing obligations “the world must affirm the right of all people to make these decisions for themselves”. This belief is complemented by the US’ readiness to continue “to work for individual liberty and the

⁹⁸ See Riding (note 58).

⁹⁹ See the Fiche analytique du département d’État sur le projet de convention de l’UNESCO, Les É.-U. souhaitent la révision du projet de convention sur la diversité culturelle, (October 12, 2005), at <<http://usinfo.state.gov/xarchives/display.html?p=washfile-french&y=2005&m=October&x=20051012165201AKllennoccM0.3783991&t=livefeeds/wffr-latest.html>>.

¹⁰⁰ See Projét de Résolution (présenté par les États-Unis d’Amérique), 33C/COM.IV/DR.4 (October 13, 2005).

¹⁰¹ See the Explanation of Vote of the United States on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions – Statement by the US Ambassador to UNESCO, Louise V. Oliver, in U.S. Embassy Ottawa, Information Resource Center, Washington File (October 20, 2005), available online: <<http://www.usembassycanada.gob/outrech/c1021.htm>>.

ability of people around the world to receive and impart diverse cultural influences, including the right to enjoy cultural expressions of their own choosing, not those prescribed by their own governments”.

2. The Criticism Revisited

From a democratic viewpoint and the diversity of cultural expressions itself, the fact that the US stands (almost entirely) alone in criticising the Convention is no reason for it to dismiss the arguments altogether, despite the fact that some aspects of it seem not only farfetched and exaggerated but hastily drafted as well in order to support the main line of criticism. From the various sources of criticism, the main line of condemnation focuses merely on negative implications for the realm of international trade, i.e. the free circulation of goods and services. Once more, this aspect underlines the continuity of the “culture and trade” conflict that dominated the final phase of the Uruguay Round.

To underscore these assertions, it is useful to consider why other lines of criticism, such as the lack of respect for human rights and the fear for the control of cultural life by governments appear absurd and accessory to the one for negative implications for free trade. The possible legal implications for the realm of international trade will then be looked at, as will the question of whether the fears and the negative reactions are out of proportion, or whether they must be interpreted as a strong sign in favour of the present need for a Convention protecting and promoting the diversity of cultural expressions.

a. Respect for Human Rights and Abuse of Governmental Control Over Cultural Life

The first line of US criticism of the Convention according to which the vagueness and ambiguity of the text literally invites governments to neglect due respect for human rights through the restriction of the free flow of information, the suppression of minority viewpoints and to freedom of expression must be dismissed as lacking substance. To view the Convention as an invitation to such abusive practices requires indeed, as one journalist observed, a considerable dose of “bad faith”.¹⁰² Moreover, it must be remembered here that in bad faith most laws and international legal texts can be misinterpreted and applied in a way to deprive them from their intended meaning and purpose.

With regard to the deep concerns raised by the US Government, numerous provisions in the Convention make clear that it shall not hinder the conditions for cultures to flourish and to freely interact (Recital 3, 5, 11, 12, 13, 15, 16, 19, Art. 1 b)-

¹⁰² See J. Boileau, Baroud d'honneur, *Le Devoir* (October 12, 2005), at <<http://www.ledevoir.com/2005/10/12/92377.html>>.

e)), and explicitly states that the Convention cannot be invoked to infringe human rights and fundamental freedoms (Art. 2 para. 1 and Art. 5 para. 1).

In view of the numerous provisions that explicitly meet the concerns raised by the US Secretary of State, the criticism must be dismissed as unfounded and is probably used to support the main line of criticism found in the potential negative impact on international trade. Before turning to trade, however, it is necessary to look at the second element of US criticism, namely that of a possible abuse of governmental control over cultural life.

The US rightly expresses concern over the possibility of a cultural intrusion by governments into the lives of citizens. In general, it is true that past experiences support the claim that “culture” should be free from regulation because, as Adorno noted, culture is particularly nurtured by the concepts of autonomy, spontaneity and criticism.¹⁰³ The possible dangers for collusion between culture and government are real and must be duly respected at all places and at all times. When the US Ambassador to UNESCO fears an abuse by a government of the Convention to control the lives of its citizens by limiting their choices as to what they can see, read, listen to or simply do, she is generally right, but misses three important elements: Firstly, no country in this world, including the US, can claim to be entirely free from trying in one way or the other to control the lives of its citizens in terms of their access to cultural activities, goods and services. Only recently American Treasury regulations came under attack for restricting the publication, especially editing and marketing, of works by authors in countries subject to US trade sanctions, such as Iran, Cuba and Sudan.¹⁰⁴ Equally, the percentage of films of foreign origin shown in the US is extremely low.¹⁰⁵ The second element that US criticism passes over is that when it emphasises the people’s right to “enjoy cultural expressions of their own choosing, not those prescribed by their governments”, it forgets that people might want to chose not necessarily those cultural expressions of their own governments but equally not always those prescribed by the US Government. Here the average global penetration of national film markets with around 80 % US products speaks a clear language and might help to explain the actual voting in the UNESCO General Conference. The third element the criticism fails to address is the control of the cultural lives of citizens not exclusively by national public or governmental institutions but instead by nationally and globally acting private

¹⁰³ Adorno (note 65), 107 at 123.

¹⁰⁴ See US Urged to Lift Restrictions on Publications from “Hostile” States, *The Irish Times* (October 1, 2004) 12 and Ch. Hoag, *Suit’s Topic: Ban on Cuban Books; A group of U.S. publishers has sued in an effort to overturn publication rules for works from Cuba and other embargoed nations*, *The Miami Herald* (September 28, 2004) 1; E. Wyatt, *Treasury Being Sued For Curbs On Editing*, *The New York Times* (September 28, 2004) E1, and A. Liptak, *The Crime of Editing: U.S. Tells Publishers Not to Touch a Comma in Manuscripts From Iran*, *The New York Times* (February 28, 2004) A1.

¹⁰⁵ Only 6.7 % of the films shown in the US are of foreign origin, 9.8 % are US-EU coproductions and 83.5 % are of US origin; see *Focus 2005: Tendances du Marché Mondial du Film* at 10, available online <http://www.obs.coe.int/online_publication/reports/focus2005.pdf>.

companies and the respective economic market prerogatives. Overly preoccupied by the Orwellian scenario, such a view forgets that in many countries, following the technological communication revolution introduced by satellite broadcasting and the privatisation of public service broadcasters, the public or governments no longer have the means to effectively control the flow of information, whereas often private, especially media, companies do. Various records of such dangers for freedom of expression, the diversity of choice and media pluralism also exist in the US.¹⁰⁶ In this respect, the US Government's criticism of possible attempts to regulate "culture" or "cultural expressions" must be taken seriously. However, it misses the important point that, at the present state, there is no antitrust law, nor do any competition rules exist at the multilateral level that effectively guarantee fair competition and sanction unfair trade practices as well as abuses of dominant positions.¹⁰⁷ Additionally, by pointing the finger at the UNESCO Convention, it also fails to hit the right target, because – unless interpreted by bad faith – there is little in the text that suggests such an abuse of control.

Ultimately, the US opposition against the Convention seems to be consistent only in the sense that it is motivated by the fear for its implications for international trade in various goods and services. This brings us back to the main conflict, which is the one between culture and trade.

b. The Convention's Possible Implications for International Trade Law

Indeed, there are a few provisions in the Convention that at a first reading suggest clear implications for the realm of international trade agreements administered by the WTO. This is, however, only at first sight, because most of the provisions are programmatic in character, expressing good intentions which are not legally binding in a strict sense. Nonetheless, in general, considering the definition of cultural expressions, also including cultural activities, goods and services as well as cultural industries there is little doubt that there is a potential contact point between the Convention and the three main agreements (GATT, GATS, and TRIPS) administered by the WTO, which already, although to a varying extent, cover these categories of goods and services.

More concretely, there is Art. 5, which enshrines the Parties' right to implement policies and to take measures aimed at protecting and promoting the diversity of

¹⁰⁶ Cf. *United States v. Paramount Pictures, Inc. et al.*, (Supreme Court of the United States, 1948), 334 U.S. 131 and K.G. Fox, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 Hofstra L. Rev. 505 (1992); see generally C.E. Baker, *Media, Markets, and Democracy*, Cambridge 2002 and E.S. Herman/N. Chomsky, *Manufacturing Consent – The Political Economy of the Mass Media*, New York 2002.

¹⁰⁷ See A.D. Mitchell, *Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO*, 24 World Competition 343 (2001) at 347, writing: "Despite the common objective of trade liberalisation and competition law, trade liberalisation is achieved on the whole through multilateral international agreements, while competition law remains largely the domain of individual States."

cultural expressions. The kind of measures and policies these may be is specified in Art. 6, which lists in a very general way the kind of measures that can be taken. Such measures could, for instance, include subsidies, (screen) quotas, tax credits or content requirements, all bearing relevance for relevant trade rules in one way or another. Arts. 14 and 16 address the special needs of developing countries, which are relevant for several trade topics, such as access to the global market as well as markets of developed countries, regional integration, technical assistance, technology transfer and preferential treatment.

However, none of these measures is new and as a matter of fact there are numerous WTO Members that subsidise, levy duties or apply screen quotas or content requirements on their cultural industries but only in conformity with their obligations deriving from the trade agreements they have entered into, otherwise they will be sanctioned.¹⁰⁸ Their compatibility or incompatibility with trade rules depends on many aspects, such as *inter alia* on the form of the measure (e.g. tax credit or subsidy), whether the measure in question applies to goods or services, whether it is discriminatory or not, or whether it may be justified by an exception in the respective trade agreement. The distinction of goods and services is of special interest, because generally the rules for trade in goods are more elaborate, and the degree of liberalisation is more advanced than the relevant rules for services. For instance, in contrast to goods, there is no multilateral trade discipline for subsidies in the service sector.¹⁰⁹ Non-discrimination also only applies if a WTO Member has agreed to make specific commitment in the sector and has not asked for an exemption from the Most-Favoured-Nations (MFN) clause.

Most relevant for the possible impact of the Convention on the WTO rules is therefore Art. 20 because it draws the operational boundaries for the measures that Parties may adopt based on the specific Articles mentioned above. Since para. 2 makes clear that the Convention cannot be interpreted to modify existing rights and obligations, it results that none of the existing trade and other obligations of all countries in this world, whether Member of UNESCO or not, will change. The entire Convention will only start to reveal legal effects once it has entered into force, which means after thirty countries, have deposited their ratification. By that stage, however, the Convention will only produce legally binding effects among those countries for which it has entered into force but not in relation to third countries. Since the US is highly unlikely to ratify the Convention it will never be applicable to it in its relations with other countries. Even if it miraculously ratified the Convention, the dispute settlement system established under the Convention is too weak, “lacks teeth” and is practically only of symbolic value. Even if the US became Party to the Convention, the only difference would be that in the case of a

¹⁰⁸ See e.g. the case of a Turkish regime of taxation of revenues generated from the showing of foreign films; Turkey – Taxation of Foreign Film revenues (Request for the Establishment of a Panel by the United States), WT/DS43/2 (January 10, 1997).

¹⁰⁹ Article XV GATS stipulates that “[...] Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects [...]”.

trade dispute before the WTO DSB, a Panel or the Appellate Body (AB) might – through the application of Art. 31 (3) *lit. c* of the Vienna Convention on the Law of Treaties – arrive at a result where it would have to consider the possible implications of the Convention. Still this would leave the outcome unclear and lead the Panel or AB to state in analogy to the *Canada Periodicals* Case that the issue of “cultural diversity was not at issue here”.¹¹⁰

Another question, which cannot be answered at this point, is whether, or at what point, the Convention may resume the status of customary international law also capable of obligating other States not Party to the present Convention. The formation of customary international law is contentious and an answer depends on many factors, but especially on the acceptance and overall success of the Convention over the next years.¹¹¹

The fact that it will only have legal effect once it has entered into force also explains why some observe that the true battle is only beginning and that the US will try to pressure countries not to ratify the document.¹¹²

Deprived of any retroactive power, what is it then, one must ask, that explains the strong US resistance against the Convention? The answer can hardly be that the Convention *pro futuro* obliges Parties to foster mutual supportiveness between the Convention and other treaties, whether new or old (Art. 20 para. 1 *lit. a*). It can only be, then, the obligation to take into account the relevant provisions of the Convention when they enter into other international obligations (*lit. b*). In a strictly legal sense, this is the only valuable provision of the Convention because it will create an obligation to consider the “spirit and letter” of the Convention in future negotiations. This is of great significance for the ongoing Doha Round because in view of the “single package” approach of the WTO, it could theoretically reduce the number of sectors in which commitments can be traded off against commitments in other sectors. Theoretically this could enhance the possibility for a country to resist pressure to further liberalise the cultural sectors. This is only theoretical, however, since despite the lagging progress in the present Doha Round, which is yet to address the issue of audiovisual services, it is highly unlikely that the Convention will enter into force before a deal has been struck, especially in light of the fact that the authorisation of the US Congress expires in mid 2007.

Therefore, the Convention’s greatest value may be vested in the general tendency of big trading blocks in the situation of lacking progress in multilateral negotiations to switch over to the negotiation of bilateral or regional trade agreements. In such a situation, the US regularly uses its power to receive commitments

¹¹⁰ See the quote from the *Canada Periodicals* Case, *supra* note 49.

¹¹¹ On the formation of customary international law, see generally G.L. Scott/C.L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 *Denv. J. Int’l L. & Pol’y* 71 (1996).

¹¹² See I. Bernier, *La mise en œuvre et le suivi de la Convention de l’UNESCO sur la protection et la promotion de la diversité des expressions culturelles*, available online at <http://www.mcc.gouv.qc.ca/international/diversite-culturelle/mise_en_oeuvre_unesco.htm>.

from partners in sectors pertaining to the cultural industries in order to open up markets once multilateral negotiations resume. In bilateral negotiations, the Convention might enhance the smaller negotiation partner's power by giving it the chance to argue that it is obliged by the Convention to take the diversity of cultural expressions into account, as opposed to the trade obligations to "cover substantially all trade" (Art. XXIV GATT) or to achieve "substantial sectoral coverage" (Art. V GATS). To this end, the GATS specifies that "substantial coverage" is understood in terms of a number of sectors, volume of trade affected and modes of supply.¹¹³ One significant role of the Convention may therefore be that it creates a legal reference in international law which could make it more difficult that further commitments be made in the various cultural sectors both in multilateral as well as in bilateral or plurilateral (i.e. regional) negotiations. Nonetheless, even this significance is only rhetorical because there is no clue in the Convention to suggest that the free circulation of goods and services is detrimental to the diversity of cultural expressions and, therefore, should be restricted. Similarly, it is quite clear that such restriction would not automatically enhance the diversity of cultural expressions in this world. Instead, it is rather obvious that the free and fair circulation and distribution of cultural goods and services plays a crucial role in protecting and promoting the diversity of cultural expressions in the world. In short, culture needs trade as much as trade needs culture, especially in times of e-commerce, content and copyright industries that are characteristic of the emerging information society. Hence, it appears that most of the US criticism is either unfounded or exaggerated based on a bad faith interpretation of its text, which paradoxically may have increased the Convention's value but at the same time obstructed a better and sustainable legal settlement of the issue.¹¹⁴ A final test for the prospective value of the Convention remains thus to undertake a short evaluation of the added value it may or not bring to the culture and trade debate.

3. Complementarity Between Culture and Trade: What Role of the Convention?

George Bernard Shaw is said to have remarked that the American and English "are separated by a common language". This implies that although two interlocutors may speak the same language they still do not understand each other. Apparently the same adage, which applies to (some of) the protagonists of trade and (some of) those of culture in the sense that they use the same words but fail to understand that they are also talking about the same issues and are all too often striving for the same objectives. For instance, if Art. 1 of the Convention states that among its objectives is "to protect and to promote the diversity of cultural expres-

¹¹³ See Fn 1 Article V:1 (a) GATS.

¹¹⁴ See e.g. N. Nougayrède, *La bataille diplomatique et les efforts d'obstruction des Etats-Unis ont paradoxalement amplifié la résonance de la convention*, *Le Monde* (October 19, 2005) 4.

sions” this does not automatically authorise the adoption of protectionist and unfair or other trade-distorting measures. It goes without saying that “to protect” is not the same as “protectionist”.¹¹⁵ Every country has been able to protect whatever it deems worth protecting but it usually depends on the measures applied, the way they are applied, and whether they are capable of violating obligations derived from international treaties. The present Convention, particularly Art. 6, remains silent on both the measures and the means of their application. Most significantly, the Convention does not call for a restriction on the free circulation of cultural goods and services.

Similarly, the “right of nations to set their own cultural policies” can hardly be called a “historic victory”.¹¹⁶ This is a right that exists at least since the Treaty of Westphalia in the form of the principle of sovereignty,¹¹⁷ which means that States are free to adopt any law or policy – at least within the limits of *ius cogens* and the respective international obligations they may have decided to enter. Instead, it would have been appropriate to talk of true success if it had brought an improvement to the combined consideration of cultural and trade policy objectives and not merely united divergent viewpoints in yet another single document.

Thus continuously adherents to both groups refuse to investigate the true nature of the paradox that underlies the cultural industries and the relationship between culture and trade.¹¹⁸ It is submitted here that the key to the paradox lies in their complementarity and the need for their combined consideration as a point of departure for the mutual supportiveness between the two fields of culture and trade. This claim can be substantiated by the following three examples:

First, it cannot be substantiated that further trade liberalisation is *per se* detrimental to cultural diversity. It depends rather on the way such liberalisation is

¹¹⁵ See e.g. J. P a u w e l y n, The UNESCO Convention on Cultural Diversity, and the WTO: Diversity in International Law Making?, ASIL Insight, available online <<http://www.asil.org/insights/2005/11/insights051115.html>>, writing that the new treaty is “explicitly permitting the protection of cultural industries” but no attempts have been made to find the most effective policy for different cultures to flourish.

¹¹⁶ See Adoption of the Convention of the Diversity of Cultural Expressions at UNESCO: A historic victory in the campaign to protect the right of nations to set their own cultural policies, <<http://www.mcc.gouv.qc.ca/international/diversite-culturelle/eng/events/events05-10-24.html#nouvelle2>>; see also E.K. S y m o n s, US Fumes Over Cultural Snub, The Australian (October 22, 2005) 27, writing that “in a great global clash of civilisations, it was a magnificent victory for the French and their beloved ‘cultural exception’”.

¹¹⁷ Cf. the principle of sovereign equality of states in Art. 2 (1) UN Charter.

¹¹⁸ See e.g. La France appelle l’OMC à rester hors du débat sur la diversité culturelle, Le Monde (September 9, 2005) 28, reporting French Minister of Culture Renaud Donnedieu de Vabres saying that “l’OMC n’a pas à imposer de règles particulières à la préparation de ce document élaboré par l’Unesco”; see also Michael J. F r i e d m a n, De la nécessité de maintenir la libre circulation des idées et de l’expression artistique: La convention sur la promotion et la protection de la diversité culturelle proposée par l’UNESCO pourrait avoir des effets délétères (September 30, 2005), at <<http://usinfo.state.gov/fr/Archive/2005/Sep/30-77040.html>>, writing that “Les États-Unis ont émis l’argument que l’UNESCO n’a pas l’autorité de décider d’une telle mesure et que la convention entraverait la libre circulation des idées”.

achieved. In this respect, the complementarity between trade and culture becomes best visible. In fact, consumers like artists, cultural workers, even shareholders of the companies producing and distributing the various cultural goods and services, share a common interest. Their common interest is best achieved through the maximisation of sales of the greatest variety possible of cultural goods and services. Thus, the free circulation of cultural goods and services helps to maximise the choice for consumers while also increasing the revenues for artists and producers alike. The main precondition remains a just distributive system for the revenues between artists and producers to the advantage of consumers who should form a fair and competitive market through lower prices and greater variety.¹¹⁹

Culture and trade are also complementary in a second sense, namely that their main threat is uncontrolled power. While for culture it is true that it should not be subject to regulation in a strict sense, it cannot flourish if the appropriate conditions, such as infrastructure, choice, education facilities and many more, are not in place. Trade too, it is argued, should not be excessively regulated, but the basic rules of the game must be also observed in order for a market to function properly.¹²⁰ Hence, what educational facilities and certain services of general interest may do for the cause of culture, competition rules and an efficient and law-based dispute settlement system may do for trade.

Finally, culture and trade are also complementary in a third sense. The present Convention recognises, as the Convention on Biological Diversity has done before, the indispensable value of variety. Monocultures are less likely to resist external shocks than cultures that are based on a greater diversity of its components. Similarly, trade theory tells us that the unwritten *Grundnorm* of international trade is the theory of comparative advantage which, based on the specialisation of trade partners on what they can do best, provides the major incentive to engage in commerce, i.e. to exchange goods and services.

These few examples illustrate a few of the many commonalities that can be established between the respective spheres of culture and trade for the greater common good. They also help to explain that the major reason for the ongoing dispute over the treatment of the cultural industries is mainly due to the absence of serious dialogue, prevented sometimes by the lack of will to enter into a serious discussion as well as by the lack of appropriate international organisations to successfully address the issue. The separation of culture from trade is still deeply rooted in the international legal architecture. Hence, as long as the institutional setting for the cul-

¹¹⁹ European Parliament Resolution on a Community Framework for Collective Management Societies in the Field of Copyright and Neighbouring Rights, P5_TA(2004)0036 (January 15, 2004), noting *i.a.* that “in the area of copyright and neighbouring rights, the proper and fair participation of all concerned throughout the chain of exploitation and the rapid, fair and professional acquisition of rights are crucial for financial, as well as cultural, success” (Indent 6) and pointing out that “the protection and collective management of intellectual property rights are important factors in stimulating cultural creativity and influencing the growth of cultural and linguistic diversity” (Indent 22).

¹²⁰ See Williams, *supra* note 1 at 92, writing that “Peace and liberty are the very air that commerce breathes”.

ture and trade debate as a part of the broader trade linkage debate is not drastically changed and adapted to the political and economic realities of the 21st century, the discussion will bounce back and forth like a ball in a tennis match. To mark a truly qualitative step, it would instead require a drastic reform of the UN system. Such a reform should *inter alia* discuss the possibilities of integrating the WTO system into the UN system, find ways of improving the role of the ECOSOC and the General Assembly with regard to the task of the efficient supervision of coherence between international policies and laws with a view to greater unity of the international legal order complemented by a more efficient role of the International Court of Justice (ICJ) as a sort of Supreme Court on International Affairs, to give but a few examples. Sadly enough, such models are not yet even at the stage of debate and discussion. In the short term and more realistic, however, would be either the insertion of a few provisions on the cultural industries in the WTO agreements regardless of their legal form (e.g. Annex, separate agreement, general exception, or integration clause) or the creation of effective institutional ties between UNESCO and the WTO. Such efforts could also considerably enhance the situation of other “trade and ... problems” with a view to improving the WTO’s legitimacy overall.

Following the symbolic political mandate enshrined in Art. IV GATT, it is in the long-needed effort towards a mutual approach between culture and trade henceforward ensuring or improving their combined consideration that the Convention raised the greatest expectations. Without wanting to pre-empt the process of ratification and implementation of the Convention and especially the organisation of the work program for the organs created by the Convention,¹²¹ at this point, it seems that sadly enough the Convention does not add much legal value to the culture and trade debate, except for keeping the debate alive.

V. Conclusion

The new UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted on October 20, 2005 is hailed by a great majority of UNESCO Member States as a great success. In this tenor only one country, the US, has not only heavily criticised it but also tried its best first to prevent its adoption and now to derail the ratification process. Based on the analysis above, it can be comfortably argued that at the current state of affairs both sides miss the target and fail to acknowledge the true value of the Convention for the so-called “culture and trade debate”.

On the one side, those celebrating its success forget that for the moment it is only ink on paper and will only have legal effect three months after it has been rati-

¹²¹ On the process of ratification and the implementation of the Convention, see I. Bernier, Implementing the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, available online at <<http://www.mcc.gouv.qc.ca/diversite-culturelle/eng/pdf/UNESCO-anglais.pdf>>.

fied by 30 countries. This, however, does not really pose a serious problem if one considers that the EU alone has 25 votes plus 2 from Bulgaria and Romania awaiting accession in either 2007 or 2008.¹²² In the meantime, nine more countries have followed the example set by Canada and have either accepted, ratified or acceded to the Convention.¹²³ Realistically, under these circumstances the 20 missing states should be not too hard to find. A more serious problem they seem to miss is that even once it has legal effect, it will – by way of Art. 20 governing the relation to other international agreements – only be able to do so *pro futuro*. This means that even when entered into force it will leave the current *status quo* untouched and, at best, will be capable of influencing the future course of things. This ability appears, however, highly limited given the fact that in terms of substantive and operational provisions the Convention has little to offer.¹²⁴ Instead, it contains statements of a predominantly political and programmatic character and lists certain objectives and measures without specifically determining the means for their realisation and implementation.

On the other side, the US Government has failed to estimate the true value of the Convention and by its fierce and widely exaggerated resistance it probably even enhanced the role of the Convention beyond its actual significance. Moreover, the widely unsubstantiated criticism has rightly been denounced as “bad faith” and has unveiled the true intentions, which are also protectionist in economic terms in the sense that their major concern is to defend at any price their “dominant position” in the global market of cultural goods and services. Instead of the usual inward-looking protectionism against foreign exports, the US is protectionist on an outward-looking way fighting to maintain its dominant position in the global market. Indirectly and in a wider context, the US Government’s isolationist behaviour – already well known from many other areas of international law – can also be interpreted as revealing an urgent need for greater cultural diversity in their own country by way of enhanced access and dissemination of information and entertainment through foreign cultural goods and services in the domestic market.¹²⁵

¹²² See European Commission, Proposal for a Council Decision on the conclusion of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, COM(2005) 678 final (December 21, 2005).

¹²³ As of September 10, 2006, Canada (November 11, 2005), Mauritius (March 29, 2006), Mexico (July 5, 2006), Romania (July 20, 2006), Monaco (July 31, 2006), Bolivia (August 4, 2006), Djibouti (August 9, 2006), Croatia (August 31, 2006), Togo (September 5, 2006) and Belarus (September 6, 2006) have deposited their instruments with the Director-General of UNESCO, see the Homepage of UNESCO, online at <<http://portal.unesco.org/la/convention.asp?order=alpha&language=E&KO=31038>>.

¹²⁴ See also M. K r a j e w s k i, Auswirkungen des GATS auf Instrumente der Kulturpolitik und Kulturförderung in Deutschland: Rechtsgutachten erstellt im Auftrag der Deutschen UNESCO-Kommission, (February 2005), available online at <http://www.unesco.de/c_arbeitsgebiete/kkv_gutachten.pdf>.

¹²⁵ See generally A. K a u f m a n, Is Foreign Film the New Endangered Species?, The New York Times (January 22, 2006) 23.

Briefly revisited, the Convention is just another link in the long chain of conflicts between the spheres of culture and trade. By listing general principles and outlining broad political objectives for the field of cultural policy-making, the Convention can be expected only to prolong the conflict and to add another legal text without bringing greater legal clarity and certainty to the problem. The Convention widely maintains the ongoing legal and institutional bifurcation in the legal treatment of the cultural industries to the detriment of greater coherence between cultural and commercial considerations within the international community. In substantive terms, it falls extremely short of current regulatory needs related to the complexity of the cultural industry sectors, which generally call for a more holistic conceptual approach and its subsequent translation into mutually supportive policies and implementing measures based on a more coherent international institutional system than the current UN system offers. These needs certainly exist with regard to the cultural industries' combined cultural and economic nature, their sectors' increasing convergence due to an unprecedented pace of technological innovation, their role in development and in securing the foundations of modern democratic societies. Within this ambit also fall problems of copyright and the just distribution of revenues between creators and producers to the overall benefit of the consumers, the threat that unchecked merger activities and lax ownership rules may pose to media pluralism as well as the general legal protection of persons, both legal and natural, through their access to legal remedies. On a more general note, these needs equally extend to the formulation of reliable criteria for the kind of measures that can be undertaken, particularly the creation of an efficient dispute settlement system.

These deficiencies reveal that, by way of the highly programmatic character of the Convention's objectives and general principles, it is to be located at the level of cultural diversity; yet by its legal intention it should have been situated at the level of the cultural industries. Based on this contradiction between content and intent, it fails to significantly improve the institutional and legal framework needed for the regulatory challenge that was created by the emergence of the cultural industries as a new category of cultural goods and services a century ago. Instead of choosing UNESCO as a host organisation for a legally binding document on cultural diversity, it would have been preferable to adopt a few provisions specifically addressing the special, i.e. dual nature, of the cultural industries within the WTO. Ideally and following the precedent established by the drafting of the Florence Agreement, this could have been achieved by an institutional dialogue or a joint working group involving representatives of both the WTO and UNESCO. This idea was already mentioned in the 2002 SAGIT Report, which stated that: "Given the mandate to develop a rules-based instrument, the first and most obvious option to consider was an instrument negotiated in the first instance within the WTO itself. Negotiations concerning the treatment of cultural goods and services within the WTO

might appear *a priori* as the most efficient way of addressing issues related to the trade and culture interface.”¹²⁶

A posteriori and most likely having missed the opportunity presented by the ongoing Doha Development Round, however, it is recommended that the new Convention be ratified and implemented as soon as possible. Subsequently, based on the organs to be established within the Convention’s framework, States Party to the Convention and the WTO should undertake the effort to develop better institutional ties with the WTO in order to increase the coherence between cultural and trade policies. The interest among WTO Members exists as does the awareness about the need for appropriate regulatory responses.¹²⁷ Particularly, with a view to the diversity of cultural expressions, they should try – at least with regard to the treatment of cultural goods and services – to address the regulatory challenges that derive from their specificity as well as their ephemeral and rapidly changing nature currently accelerated by the ongoing process of digitisation which in turn contributes to their growing convergence with other sectors, such as the telecommunications sector. So long as the WTO system remains incomplete with regard to competition rules and multilateral disciplines on subsidies adapted to the current and prospective needs of the global economy, the prospects for the global protection and promotion of the diversity of cultural expressions remain unclear.

¹²⁶ Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), An International Agreement on Cultural Diversity – A Model for Discussion, at 8, September 2002, available online: Homepage of the Department of Foreign Affairs and International Trade <http://www.dfait-maeci.gc.ca/tna-nac/SAGIT_eg.pdf>.

¹²⁷ See e.g. General Council, Minutes of the Meeting, WTO Doc. WT/GC/M/88 (November 11, 2004) and Council for Trade in Services WTO Doc. TN/S/M/14 (April 26, 2005) and see generally D. Freedman, Cultural Policy-Making in the Free Trade Era: An Evaluation of the Impact of Current World Trade Organisation Negotiations on Audio-visual Industries, 9 International Journal of Cultural Policy 285 (2005).