

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?*

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The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions was adopted in October 2005. This article explores the Convention's objectives and the contribution that the Convention is likely to make to their realisation in the future. In its final form the Convention is considerably less ambitious than many of its promoters had wished: key provisions are expressed in aspirational terms, the Convention's dispute resolution procedures are consensual and the Convention explicitly states that it does not modify the rights or obligations of its Parties under pre-existing international agreements. The extensive support that the Convention received from the international community at the time of its adoption, with one hundred and forty eight countries voting in its favour, nevertheless affords it considerable political weight. The Convention may consequently play a role in the interpretation of existing international agreements, including the WTO agreements, and in negotiations over their future development. The article also suggests that there may be more scope than is initially apparent for the Convention to be used as a basis for evaluating state measures, not only in relation to international trade, but also regarding the domestic treatment of cultural minorities. For such review to become meaningful, however, active support will be necessary not only from civil society organisations, which played a key role in the Convention's initial development, but also from contracting states and the various Convention organs.

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During the '70s and early '80s, a number of developing, non-aligned countries promoted within UNESCO the idea of a 'New World Information and Communication Order' (NWICO), entailing a more equitable exchange of information between rich and poor nations.¹ The debates which raged over the NWICO revealed not only fundamental disagreements concerning the legitimacy of state intervention in media markets to promote objectives such as cultural diversity, but also the power and influence wielded by certain communications industries, particularly the print and audiovisual media industries in the United States. Dissatisfaction by the U.S. with the general thrust and outcome of the NWICO debates was instrumental in its decision to leave UNESCO in 1984, shortly followed by the UK. The subsequent growth in global communications, spurred on by digitisation and convergence among previously distinct sectors, has not resolved, and in some cases has exacerbated, these tensions. The Internet, for example, though greatly enhancing opportunities for the exchange of information and ideas is currently dominated by a handful of languages. In consequence, many states, comprising both developed and developing countries such as Canada and Senegal, continue to argue that the system of global mass communications threatens the survival of particular languages and cultures. They also argue that international trade rules, in particular those agreed within the WTO, could in the future constrain their ability to respond to such threats with measures such as quotas, subsidies and foreign ownership limits, designed to support their domestic industries.

With the new millennium the international community returned to these issues, launching two major initiatives to explore whether action should be taken to address these concerns and, if so, what form it should take. Firstly, UNESCO has acted as the forum for further consideration of the impact of international trade on cultural diversity. This led to the drafting of a Convention on the Protection and Promotion of the Diversity of Cultural Expressions (the 'Convention'), which was adopted in October 2005.² Secondly, the World Summit on the Information Society (WSIS), sponsored by the International Telecommunications Union (ITU), met for its final session in Tunis in November 2005. Major objectives of the WSIS were to widen, and render more equitable, access to information and communication technologies and to evaluate the existing system of internet governance. The WSIS led to the agreement of the Geneva Declaration of Principles and Plan of Action and the Tunis Agenda for the Information Society.³

This paper focuses on the first of these initiatives, the UNESCO Convention, and considers what contribution it is likely to make to the promotion of cultural diversity in the future, particularly in the

¹ Their concern over 'cultural imperialism' was also shared by certain developed countries such as Canada, France and Finland. For a historical overview see Cate, F. H. (1989-1990) The First Amendment and the International "Free Flow" of Information. *Virginia Journal of International Law*. 30, 372-420 and International Commission for the Study of Communication Problems (1980). *Many Voices One World*. Paris: UNESCO, at 40-43.

² UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, CLT-2005/CONVENTION DIVERSITE-CULT REV (20 October 2005) available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=30855&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 28/08/06).

³ For information on WSIS, its documents and follow-up initiatives see the website at: <http://www.itu.int/wsis/index.html> (accessed 28/08/06).

communications sector. Before setting out the underlying aims and structure of the UNESCO Convention, a couple of general observations might be made. Firstly, although the Convention was primarily a response to concerns relating to the trade in media goods and services it does not single the media out for special attention. Its main focus is consequently hidden behind a more general ambition to protect cultural diversity. Media goods and services are just a distinct category within the wider field of 'cultural expressions,' which the Convention seeks to promote. On the other hand, recital 19 to the Convention notes that the flow of communications between countries also creates a 'challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries.' Communications media thus have a dual status within the Convention: seen as both distinct forms of expression deserving of protection in their own right and as powerful vectors of ideas and information, capable of destabilising the production of authentic cultural expressions, if not kept in check or subjected to countervailing measures.

Secondly, although centrally concerned with the mass media and communications, the Convention does not attempt to establish communication rights along the lines mapped out by the CRIS organization.⁴ Indeed, despite the European Commission's claim that the Convention introduces 'a series of rights and obligations, at both national and international levels, with a view to the protection and promotion of cultural diversity,' it establishes no rights at all for media organisations, journalists, or the communicating public at large.⁵ Rather, the Convention confirms the entitlement/rights of *states* to introduce culturally motivated measures and it is therefore through state action, if at all, that these interests are to be realised under the Convention.⁶ At first reading, therefore, the Convention appears both rather oblique and lacking in substance, though closer examination reveals that there is potential for the Convention to play a more significant role than this suggests in shaping the future communications environment.

The UNESCO Convention was adopted on the 20th October 2005.⁷ One hundred and forty eight countries voted for the Convention, four countries abstained - Australia, Honduras, Nicaragua and Liberia, and two countries opposed it - the U.S. and Israel. A commitment by UNESCO to take on board the drafting of such a convention dates back to October 2003,⁸ but experts working on the project for

⁴ See Communication Rights in the Information Society ('CRIS') (2005). Assessing Communication Rights: A Handbook, available at: <http://www.crisinfo.org/> (accessed 30/11/06).

⁵ 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), at 3. Recital 12 of the Convention does, however, emphasise the role which freedom of thought, expression and information, as well as media diversity, can play in fostering cultural expression.

⁶ UNESCO Convention, n. 2 above, Article 1(h).

⁷ For discussion on the negotiations see Mazzone, G. (2005). A Battle Worth Fighting. Diffusion online. 36, 2-5, available at: http://www.ebu.ch/en/union/diffusion_on_line/ (accessed 28/08/06).

⁸ Resolution 32 C/34, adopted on the report of Commission IV at the 21st plenary meeting of the UNESCO General Conference on 17 October 2003. The initial formal request for UNESCO to consider adoption of a cultural diversity convention was made by Canada, France, Germany, Greece, Morocco, Mexico, Monaco, and Senegal. A number of key NGOs, such as the International Network for Cultural Diversity ('INCD') and Campaign for Communication Rights in the Information Society ('CRIS'), played an extremely active role in shaping the Convention, and regular reports on their involvement were published in the Media Trade

UNESCO did not have to start from scratch in that three separate organisations had already drafted quite detailed proposals. These organisations - the Cultural Industries Sectoral Advisory Group (SAGIT), a committee composed of representatives from the culture industries that advises the Canadian Government;⁹ the International Network for Cultural Diversity (INCD), a network of artists and cultural groups founded in 2000;¹⁰ and the International Network on Cultural Policy (INCP), a group of over 40 culture ministers which has met regularly since 1998¹¹ - are all backed and supported by Canada, which has taken a leading role in promoting the Convention. In addition to the preparatory work carried out by these organisations, UNESCO itself has produced a wide variety of conventions and declarations in the cultural field, many concerned with very similar issues, on which the drafters could draw for inspiration.¹² The Convention will come into force three months after it has been ratified by thirty states.¹³

A. Why was the UNESCO Convention adopted?

Those countries which supported the UNESCO Convention had four main objectives: Firstly, an overarching objective, to promote and protect cultural diversity. Secondly, to identify those measures which states and public bodies may legitimately take to safeguard cultural diversity. Thirdly, to ensure, as far as possible, that international trade rules do not prevent such intervention. Fourthly, through a process of international cooperation, to assist developing countries, as well as smaller cultural and linguistic regions, to preserve and fully exploit their cultural heritage. These objectives are clearly interlinked and the containment of international trade rules and support for cultural initiatives in developing countries may be viewed as distinct means to achieve the convention's primary objective of promoting and preserving cultural diversity.

For some participants in the drafting process the Convention was seen as filling 'a legal vacuum in world governance' in the cultural sphere.¹⁴ Pascal Lamy, while European Commissioner for Trade in 2001, noted that the 'complete lack of standards relating to culture at international level is an untenable situation, just as it would be in relation to the environment, health, organized crime or finance.'¹⁵ It

Monitor at: <http://www.mediatrademonitor.org/> (accessed 30/11/06). The INCD website can be found at: <http://www.incd.net/> (accessed 30/11/06).

⁹ SAGIT, in its February 1999 Report entitled 'Canadian Culture in a Global World, New Strategies for Cultures and Trade,' was the first of the groups to propose a separate convention on cultural diversity. The report is available at: <http://www.dfait-maeci.gc.ca/tna-nac/canculture-en.asp>. For its subsequent draft proposal see: http://www.dfait-maeci.gc.ca/tna-nac/sagit_paper-en.asp.

¹⁰ INCD, *Proposed Convention on Cultural Diversity* (15 January 2003).

¹¹ INCP, *Draft International Convention on Cultural Diversity* (29 July 2003).

¹² See below at text accompanying n. 16.

¹³ The European Community has now put in place the necessary mechanisms to formally accede to the Convention and has called on its Member States to take measures to ratify the Convention, n. 5 above. If all 25 members of the EU comply then this, on its own, would bring the Convention close to being operational.

¹⁴ European Commission, n. 5 above, at 3.

¹⁵ Lamy, P. (2005). Strategy and Negotiating Position. Diffusion online. 36, 6-7, at 6, available at: http://www.ebu.ch/en/union/diffusion_on_line/ (accessed 28/08/06).

would, however, be wrong to see the Convention as breaking entirely new ground, in that there are already in force a number of international agreements on cultural matters, many adopted in the last five years. The particular focus of the present Convention on international trade in cultural goods and services and the role of culture in development is certainly distinctive, but it is not unique, and the Convention clearly draws on the various implementation techniques adopted in these earlier documents.

Firstly, it is possible to point to a number of documents which seek to establish cultural rights either in general or for particular groups. These include the 1948 *Universal Declaration of Human Rights*,¹⁶ the 1966 *International Covenant on Economic, Social and Cultural Rights*,¹⁷ the 1966 *International Covenant on Civil and Political Rights*,¹⁸ which in Article 27 provides for the rights of 'ethnic, religious or linguistic minorities...to enjoy their own culture, to profess and practise their own religion, or to use their own language' in common with other members of their group, and the 1995 *Council of Europe Framework Convention on National Minorities*,¹⁹ which sets out rights for national minorities to participate in public life, use their own language, and gain access to education and the media. Those drafting the UNESCO Convention clearly did not want to stray into the controversial field of specific cultural rights which could have alienated many of its ultimate supporters and such issues are consequently dealt with only indirectly.²⁰

Other agreements, such as the 1971 *Universal Copyright Convention*, deal with intellectual property rights, a controversial issue that is also avoided in the present Convention.²¹ The Convention is closer to large group of international treaties and declarations designed to protect cultural heritage, either generally or in specific fields. These agreements include the 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage*,²² the 2000 *European Landscape Convention*,²³ and the 2003

¹⁶ UN, *Universal Declaration of Human Rights*, 1948, at: <http://www.un.org/rights>.

¹⁷ UN, *International Covenant on Economic, Social and Cultural Rights*, 1966, at: <http://untreaty.un.org/>.

¹⁸ UN, *International Covenant on Civil and Political Rights*, 1966, at: <http://untreaty.un.org/>.

¹⁹ *Council of Europe Framework Convention on National Minorities*, Strasbourg 1995, European Treaty Series no. 157.

²⁰ See also text accompanying n. 56 below.

²¹ UNESCO, *Universal Copyright Convention*, 1971 at: http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html (accessed 28/08/06). The US had attempted to introduce more than 15 clauses into the Convention with the objective of linking stronger intellectual property rights to cultural diversity. These were effectively opposed by Brazil, whose negotiators worked closely with NGOs, in particular the CRIS. As a result all explicit references to intellectual property were removed from the body of the Convention, though recital eight notes that traditional knowledge may be a 'source of intangible and material wealth,' Mazzone, n. 7 above.

²² UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, Paris 1972 at: http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html (accessed 28/08/06).

²³ Council of Europe, *European Landscape Convention*, 2000, European Treaty Series (ETS) no. 176.

*Convention for the Safeguarding of the Intangible Cultural Heritage*²⁴. The present Convention shares the central concern of these documents over the fragility of our cultural heritage, but goes beyond them to consider more generally not only how our cultural heritage can be preserved but also how cultural creation can be stimulated in the future.

The most direct international precursors of the Convention are, however, a small group of documents which deal explicitly with the relationship between trade and culture. These include the 1950 *Florence Agreement* and accompanying 1976 *Nairobi Protocol*²⁵ and two more recent declarations, the *Council of Europe Declaration on Cultural Diversity*, adopted in December 2000,²⁶ and the UNESCO *Universal Declaration on Cultural Diversity*, adopted in November 2001²⁷. The *Florence Agreement* and *Nairobi Protocol* seek to remove customs charges on the import of certain educational, scientific and cultural materials and prohibit the imposition, again in relation to specific cultural goods, of discriminatory internal charges. With regard to a limited category of cultural goods, therefore, the international community recognised early on the importance of free trade and the unacceptability of discriminatory charges. The Florence Agreement also contains an early example of a 'cultural preservation' clause. The reservation to the Agreement allows, solely in relation to trade between the US and another party, either side to suspend the operation of the Agreement where the scale of imports under the Agreement threatens 'serious injury to the domestic industry ... producing like or directly competitive products.'²⁸

Although the 2001 UNESCO *Universal Declaration on Cultural Diversity* places considerable emphasis on the importance of cultural rights, and thus has close links with the first category of agreements, it also focuses on the opportunities and threats which economic and technical development pose for cultural diversity and the importance of international co-operation in addressing the impact of world trade. These preoccupations underpin the 2000 Council of Europe Declaration and go to the heart of the present Convention.

The two UNESCO and Council of Europe declarations consequently intersect with the Convention in important respects, but have had relatively little impact in practice owing to their purely exhortatory status. The declarations were unlikely to be sufficient on their own to address a loss of cultural diversity, a fact explicitly acknowledged in the Action Plan accompanying the UNESCO Declaration, which noted the commitment of Member States to considering whether they should adopt a further international legal

²⁴ UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2003, available at: http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html (accessed 28/08/06).

²⁵ UN, *Agreement on the Importation of Educational, Scientific and Cultural Materials* ('Florence Agreement') 1950, and Nairobi Protocol, 1976, available at: http://www.unesco.org/culture/laws/florence/html_eng/page4.shtml.

²⁶ Council of Europe, *Declaration on Cultural Diversity*, 2000, available at: <http://cm.coe.int/ta/decl/2000/2000dec2.htm>.

²⁷ UNESCO *Universal Declaration on Cultural Diversity*, 2001, available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=2977&URL_DO=DO_TOPIC&URL_SECTION=201.html.

²⁸ Protocol annexed to the Florence Agreement, n. 25 above.

instrument in this field (para. 1). Introduction of a binding Convention was thus seen as ratcheting up the status of cultural diversity as a matter of international concern, just as international agreements on the environment and health have helped to underline the importance of these considerations in other international fora such as the WTO.²⁹

As a carefully constructed package, based round the four objectives indicated above and avoiding such controversial areas as cultural rights, the Convention ultimately gained support from an extensive coalition of developing and developed countries. Inevitably, however, those states which approved the Convention had different priorities and interests. The main driving force behind the Convention was Canada, which worked to build up support within the various culture industries and state departments. Canada's colonial past, high levels of immigration and the presence of a significant aboriginal population led to an early commitment to multicultural policies.³⁰ Its cultural and geographic proximity to the U.S., one of the world's major exporters of cultural goods and services, has sensitised Canada to concerns over the impact of foreign trade on domestic culture and national identity.³¹ But Canada not only produces for the domestic market, it is increasingly a major exporter of cultural products. It consequently promoted the Convention on two grounds, which at first sight appear to be in tension: firstly, it sought to clarify the legitimacy in international law of the extensive array of measures it has adopted to protect its domestic cultural industries; secondly, it sought to ensure continued access for its cultural goods and services to foreign markets.³²

Other developed states that supported the Convention had a different mix of preoccupations. France, for example, does not share Canada's overt multiculturalism but was equally committed to supporting the French language and resisting what it sees as American 'cultural imperialism,' particularly in the media sector.³³ The European Community, which joined the debate at a relatively late stage in the

²⁹ European Commission, n. 5 above, at 3. For discussion of the influence of environmental and human rights considerations on the interpretation of the WTO agreements see Marceau, G. (2001). *Conflicts of Norms and Conflicts of Jurisdiction: the Relationship between the WTO Agreement and MEAs and Other Treaties*. *Journal of World Trade*. 35/6, 1081-1131.

³⁰ Canada was the first developed democratic country to officially adopt a policy of multiculturalism in 1971, on which see Kymlicka, W. (2001). *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*. Oxford: Oxford University Press, at 154; and Acheson, K. and Maule, C. (2002). *Cultural Issues in Trade Agreements: Multiculturalism, Liberalism and the NICD Initiative*. Carleton Economic Paper, CEP 02-07, 1-33, at 16-24.

³¹ See the 1999 SAGIT Report, n. 9 above for details of Canadian measures designed to protect indigenous culture industries. Statistics on US trade in core cultural goods and services are contained in UNESCO (2005). *International Flows of Selected Cultural Goods and Services, 1994-2003*. Montreal: UNESCO Institute for Statistics.

³² The 1999 SAGIT Report, n. 9 above, notes that the Canadian government saw the purpose as setting out 'clear ground rules to enable Canada and other countries to maintain policies that promote their culture while respecting the rules of the international trading system and ensuring markets for cultural exports.'

³³ Although India makes more films annually than the USA, U.S. films dominate the international market and around eighty-five per cent of all films which have a world-wide screening are produced in Hollywood:

proceedings, not only sought to maintain its ability to promote Europe's cultural industries through quotas and subsidies but was also interested in underlining to its own Member States the competence that it now enjoys in the cultural field.³⁴

Developing countries share some of these concerns, though their participation in the trade in cultural goods and services is markedly less than that of high-income countries. The value of core cultural goods exported by 90% of low-income countries in 2002 was, for example, less than U.S. \$10 million. Notable exceptions were India, with U.S. \$284.4 million, and Indonesia, with U.S. \$112.3 million.³⁵ Clearly there are significant variations within this group, but the low and middle income countries broadly saw the Convention as a forum in which to argue for a more equitable balance in the flow of cultural goods and services between countries, and for greater freedom of movement for their artists and performers. They also sought a greater commitment from developed countries to provide technical and financial assistance to support their fledgling cultural industries.

On the question of 'cultural imperialism,' developing, just as developed, countries differ in their perception of how threatening imported goods and services are to their indigenous cultures. As the European Commission has noted '[t]he conditions for preserving and promoting cultural diversity in Europe and the world depend not only on economic conditions, but also on a multitude of other structural factors.'³⁶ In the media context, for example, some countries, particularly those with large domestic markets, have been able to develop relatively strong, integrated media companies such as the Televisa group in Mexico or TV Globo in Brazil. Though the field of high cost, high risk, film production and distribution is dominated internationally by the U.S., these companies show that it is possible for certain middle income countries to develop flourishing television production and distribution companies with significant foreign exports – in the case of Televisa to the Spanish speaking population in the U.S.³⁷

Countries with smaller populations and lower GDP cannot expect to mirror such developments and their demand for audiovisual goods and services are often met by high quality, comparatively cheap, US productions. But though the threat of 'cultural imperialism' may here seem more real, it is not inevitable that U.S. goods and services will dominate. In the Latin American context, for example, Hernán

figures taken from UNESCO, Culture, Trade and Globalisation: Questions and Answers, available at: http://www.unesco.org/culture/industries/trade/html_eng/question2.shtml (accessed 28/08/06).

³⁴ The European Community has exclusive responsibility for the common commercial policy and its policies in relation to development, the European internal market, competition and the protection of intellectual property have significant cultural implications. See European Commission, n. 5, at the commentary in Annex 1b, and Ferri, D., (2005). EU Participation in the UNESCO Convention on Protection and Promotion of the Diversity of Cultural Expressions: Some Constitutional Remarks. European Diversity and Autonomy Papers. 3, 5-34. For criticism of Community intervention see INCD, Statement on the Position of the European Union in the Negotiations on the Convention on the Protection of the Diversity of Cultural Contents and Artistic Expression, at: <http://www.incd.net/incden.html> (accessed 30/08/06).

³⁵ UNESCO, n. 31 above at 27.

³⁶ European Commission, n. 5 above, at 2.

³⁷ Galperin, H. (1999). Cultural Industries Policy in Regional Trade Agreements: the Cases of NAFTA, the European Union and MERCOSUR. Media Culture and Society. 21/5, 627-648.

Galperin notes that the inflow of American television programmes to Paraguay and Uruguay began to decrease steadily from the 1980s, with television stations gradually buying in programmes with a closer cultural connection to their audience from Argentina and Brazil.³⁸ Regional identities, language and historical ties all have an important impact on patterns of cultural exchange and interaction.

In order to assess whether the Convention is likely to transcend the preceding declarations on cultural diversity and meet the four main objectives of those countries which voted for it – to promote cultural diversity; to clarify which culturally motivated state measures are legitimate; to prevent international trade rules undermining domestic cultural policies; and to co-ordinate international support for developing countries and threatened cultures - it is necessary to take a closer look at the Convention's provisions in each of these areas. But before doing so, the paper briefly examines what the Convention understands by cultural diversity and why its preservation is thought to be important.

B. What Kind of Cultural Expressions are Covered by the Convention and Why is Cultural Diversity Important?

The overarching objective of the Convention is 'to protect and promote the diversity of cultural expressions' (Art. 1(a)) and although the Convention also lists a further eight objectives and eight principles, these primarily offer guidance as to how this diversity might be realised and what it might look like in practice. Cultural expressions are defined as 'those expressions that result from the creativity of individuals, groups and societies, and that have cultural content' (Art. 4.3). 'Cultural content' is said to refer 'to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities' (Art. 4.2). This is in line with a number of international declarations and resolutions, in particular the 2001 *Universal Declaration on Cultural Diversity*, which reaffirms that 'culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.'³⁹

It is clear, therefore, that the Convention adopts a broad approach to its subject matter, encompassing not just artistic expressions but all expressions that reflect distinct cultures. It consequently covers film and television programmes, classic cinema and tacky game shows, web logs and websites, as well as man-made landscapes, food and culinary practices, sport and other forms of recreation. Although the Convention does not attempt to define 'culture,' it does not limit its field of operation to 'high' culture, to those cultural goods and practices which are thought to have an 'improving' or 'civilising' nature, or which can be identified according to their refinement or other aesthetic qualities. A 'narrow' approach of this latter kind often exhibits a backward-looking perspective, with a focus on those buildings, literary and

³⁸ *Ibid.*, at 641.

³⁹ UNESCO *Universal Declaration*, n. 27 above, at recital five. This draws on the Final Declaration of the World Conference on Cultural Policies held in Mexico in 1982 which defined culture to be 'the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.'

artistic works considered to be the high points of a particular society's past endeavours and to constitute its 'cultural heritage.'

The central objective of the Convention is to support state measures designed to prevent the loss, or extinction, of distinct cultural expressions and to foster environments in which different cultures can flourish. The concern over cultural extinction may at first sight seem relatively unproblematic. Parallels are sometimes drawn with biodiversity, with the implicit suggestion that when one distinctive cultural practice is lost there is the risk that a wide range of related and mutually dependent cultural forms, interwoven into larger cultural ecosystems will also be destroyed.⁴⁰ But what evidence is there for such claims? And should we be concerned when any cultural practice or artefact is consigned to the scrap heap, as the biodiversity parallel would suggest, or only when certain types of cultural goods or practices disappear and then only in specific circumstances? The case for state intervention to address a potential reduction in cultural diversity is explored in more detail below.

UNESCO has for some time now been highlighting various forms of cultural depletion, thought to be caused, in large part, by processes associated with 'globalisation.' These processes, according to Ulrich Beck, are those 'through which sovereign national states are criss-crossed and undermined by transnational actors with varying prospects of power, orientations, identities and networks.'⁴¹ Rapid transportation and communication systems now mean that capital, persons, goods and services can flow with relative ease and speed around the world. As Pascal Lamy notes there has been 'a simultaneous contraction of space and time': a century ago it would have taken twenty four hours for information to pass from London to Bombay, now it takes five seconds, and the pace of economic development in countries such as China is unprecedented.⁴²

As more states follow the path of economic development, the exposure of their citizens to imported cultural goods and services, together with the values embedded in them, inevitably increases. There is evidence that economic development and growing urbanisation leads to a certain convergence in values and outlook and it is hard to think of a developed country that has not lost many of its traditional customs, dialects or languages in the face of enhanced communications and intra as well as inter national trade.⁴³ UNESCO estimates that one language is lost on average every two weeks and that over 50 per

⁴⁰ European Commission, n. 5 above, at 3.

⁴¹ Beck, U. (2000). *What is Globalization?* Cambridge: Polity Press, at 11. For an early statement of concern over the potential impact of exposure to foreign media on domestic culture, see International Commission for the Study of Communication Problems in its *Many Voices One World* report, n. 1 above, at 30-31. For subsequent commentary see World Commission for Cultural Development (1997). *Our Creative Diversity*. New Delhi: Oxford and IBH, chapter 4, and the Human Development Report (2004). *Cultural Liberty in Today's Diverse World*. New York: United Nations Development Programme, at 10-11 and 97-99.

⁴² Lamy, P., 'The WTO in the Archipelago of Global Governance,' speech to the Institute of International Studies, Geneva, 14 March 2006 at: http://www.wto.org/English/news_e/sppl_e/sppl20_e.htm.

⁴³ Inglehart, R. and Baker, W. E. (2000). *Modernization, Cultural Change and the Persistence of Traditional Values*. *American Sociological Review*. 65, 19-51. See also DiMaggio, P., *Culture and Economy*, in

cent of the world's 6,000 languages are currently endangered.⁴⁴ Cultural practices or beliefs which have no tangible record are particularly vulnerable and even where a written record remains the culture may be impossible to recreate, once lost, in any authentic sense.⁴⁵ It is consequently possible to point to an objective loss of certain cultural expressions and this loss is likely to be most apparent in countries undergoing rapid urbanisation and economic development.

But although it is possible to chart in certain sectors and in certain countries processes of cultural depletion, the endpoint may not be cultural standardisation or homogenisation. The 'global homogenisation scenario' is just one of a number of potential outcomes of globalisation that can be envisaged. Ulf Hannerz, for example, posits a competing scenario of 'peripheral corruption' in which the periphery first adopts ideas and knowledge from the centre and then corrupts them,⁴⁶ while the term 'glocalization' has been coined to refer to the way in which global and local cultures interact and influence each other.⁴⁷ Core aspects, or 'deep structures,' of a culture may be difficult to shift and reconfiguration, when it occurs, is likely to be a gradual and negotiated process.⁴⁸ Within industrialised societies there remains considerable cultural variation, with religious traditions, in particular, still exerting a marked influence. Inglehart and Baker conclude, for example, that industrializing societies are not, in general, becoming like the U.S., which they categorise as something of a 'deviant case.'⁴⁹ Given that it is precisely the developed countries which have had most exposure to U.S. cultural goods and services, the thesis that this leads ineluctably to the adoption of American values and aspirations begins to look decidedly shaky. As Galperin's study of the South American media discussed above indicates, cultural depletion and development are influenced by a wide range of economic, social, geographic and historical factors.⁵⁰

Certain, mainly urban, areas are also becoming increasingly diverse and cosmopolitan. At a subjective level, therefore, more people may be experiencing more cultural diversity than ever before. But this subjective experience of increasing cultural diversity is no answer to the objective loss of certain cultures and their particular manifestations. The UNESCO Convention is not interested in balancing the

Smelser, N. J. and Swedberg, R. (eds.) (1994). *The Handbook of Economic Sociology*. Princeton: Princeton University Press. 27-49.

⁴⁴ UNESCO website on endangered languages at:
http://portal.unesco.org/culture/en/ev.php@URL_ID=8270&URL_DO=DO_TOPIC&URL_SECTION=201.html
I (accessed 28/08/06).

⁴⁵ The vulnerability of the intangible heritage was recognised in the 2003 UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage*, n. 24 above.

⁴⁶ Hannerz, U., *Scenarios for Peripheral Cultures*, in King, A. D. (1997). *Culture, Globalization and the World-System. Contemporary Conditions for the Representation of Identity*. Minneapolis: University of Minnesota Press. 107-128.

⁴⁷ Robertson, R., *Glocalization: Time-space and Homogeneity-Heterogeneity*, in Featherstone, M., Lash, S. and Robertson, R. (eds.) (1995). *Global Modernities*. London: Sage Publications, at 25-44; Beck, n. 41 above, at 45-50.

⁴⁸ Morris, N. (2002). *The Myth of Unadulterated Culture Meets the Threat of Imported Media*. *Media, Culture and Society*. 24/2, 278-289, at 283.

⁴⁹ Inglehart and Baker, n. 43 above, at 31.

⁵⁰ Galperin, n. 37 above.

concrete loss of a language or a distinct practice in country or region A with the experience of enhanced diversity for residents of cities X, Y, or Z.

If we accept that processes of cultural depletion are at work, albeit in a patchy and uneven fashion, is this ultimately problematic? On a liberal view, an increase or decrease in cultural diversity is not in and of itself something to be welcomed or deplored; what is relevant is the process of cultural change and, in particular, the degree of autonomy of the individuals who shape that process.⁵¹ Thus, a move to a more homogenous world culture, leading to the loss of distinct cultural communities and forms of expression, should not be seen as detrimental if consequent on free and informed decisions by those involved. Those adopting such a way of life do so because they consider such a move, on balance, to be beneficial to them. This is so, even though 'choice' may seem a rather esoteric concept when one is dealing with individuals on the poverty line who are offered the possibility of economic advancement. The situation is different where those who wish to maintain a particular culture are prevented from doing so by coercive state measures. Where, for example, the state prohibits a community from using traditional hunting techniques or speaking a particular language in schools.⁵²

The Convention engages with this argument on a number of fronts. Firstly, it holds that cultural diversity 'creates a rich and varied world, which increases the range of choices and nurtures human capacities and values' (3rd recital). Cultural diversity can thus make our lives more textured and interesting, opening up alternative perspectives and lifestyles. Those who employ the concept of individual choice to question the inherent value of cultural diversity, have to address the problem that cultural choices made by individuals at point A may limit the options open to others at point B. Thus, a majority of Canadians may prefer to watch U.S. over Canadian drama and entertainment television programmes, even though some still value the Canadian versions.⁵³ Left to market forces, Canadian production in such circumstances could dwindle to such a level that it becomes unsustainable. Once an industry and its infrastructure have folded, regeneration is extremely difficult. At this point Canadians will have lost the opportunity to choose whether to watch Canadian or U.S. programmes.

Because they convey values and reflect identities, cultural goods and services cannot simply be substituted in the way that a car from one country can be substituted for a car from another. If a country ceases to be able to produce its own films or television programmes as a result of competition from a neighbouring country that enjoys certain demographic, linguistic or first mover advantages, it loses the

⁵¹ For discussion of liberal views on diversity see Acheson, K. and Maule, C., n. 30 above, at 6-8; Kymlicka, W., *Liberal Theories of Multiculturalism*, in Meyer, L. H., Paulson, S. L. and Pogge, T. W. (eds.) (2003), *Rights, Culture, and Law; Themes from the Legal and Political Philosophy of Joseph Raz*. Oxford: OUP, 229-273, and Waldron, J., *Minority Cultures and the Cosmopolitan Alternative*, in Kymlicka, W. (ed.) (1995). *The Rights of Minority Cultures*. Oxford: OUP, 93-121.

⁵² Will Kymlicka (2003) notes that representations by states that they are 'ethnoculturally neutral' are often misleading. Such states may in fact pursue policies designed to promote the use of particular languages or cultural practices in a process of 'nation building,' thereby consolidating the position of certain dominant cultural groups, n. 51 above at 237-238.

⁵³ Hitchens, L. (1997/8). *Preparing for the Information Society: Lessons from Canada*. *Yearbook of Media and Entertainment Law*. III, 98-146, at 125.

ability to explore, through these particular media, its own values, idiosyncrasies and pre-occupations.⁵⁴ And though foreign and domestic films and television programmes may raise many similar issues, foreign products are less likely to engage with these issues in as relevant or resonant a way as those directly addressing the home population. They can provide valuable alternative viewpoints and perspectives but are unlikely to be simple substitutes. The Convention explicitly recognises this distinctive quality of cultural activities, goods and services, which constitute 'vehicles of identity, values and meaning' (Art.1(g)).⁵⁵

On this view, measures taken by states to ensure the continuing viability of their domestic cultural industries in the face of international competition should be accommodated within the international trading system as legitimate restraints on trade. In providing support for Canadian film and television production, Canada is not mandating that its citizens adopt certain lifestyles or values, but is seeking to ensure that Canadians are informed about and can engage critically with their own cultures. The Convention consequently does not reject the importance of individual choice, rather it affords it central importance and seeks to maintain it over both the short and long term.

Other arguments for the preservation of cultural diversity can be identified in the Convention. Recital four, for example, ambitiously suggests that those practices of toleration and respect which foster cultural diversity will also facilitate 'peace and security at the local, national and international levels.' Cultural diversity may also provide rather more direct and immediate benefits. On the one hand, cultural goods and services constitute an increasingly important component of world trade, but it is a trade dominated by a handful of developed countries. The Convention thus seeks to assist all countries in fully exploiting their cultural heritage. In particular, recital eight notes that traditional knowledge may be a 'source of intangible and material wealth,' of benefit to indigenous communities through its contribution to sustainable development. On the other, when a culture ceases to exist as a living practice we lose with it specific human insights and skills, often developed over centuries. These could provide unique answers to present or future problems, problems that we currently may not even envisage. Cultural diversity is consequently regarded by the Convention as offering material benefits not only to specific countries but also to mankind in general (recital two).

⁵⁴ See Morris, N., n. 48 above, at 286, and Baker, C. E. (2002). *Media, Markets and Democracy*. Cambridge: Cambridge University Press. Baker argues that domestic communications industries are important not only on democratic grounds, as more likely to provide essential information about ones own country, its internal policies and external relations, but also on 'dialogic' grounds, because they enable citizens to discuss and engage actively with their own cultures.

⁵⁵ A central concern of those countries that pushed for adoption of the UNESCO Convention was that the existing WTO trade agreements fail to recognise the distinctive nature of cultural goods and services. The US in its 2000 *Communication on Audiovisual and Related Services* to the WTO Council for Trade in Services did not deny that audiovisual services had unique characteristics because of their cultural content, but rather concluded that this should not automatically take them outwith the ambit of the trade agreements. Other goods and services, it observed, have distinct qualities and these can be adequately accommodated within the framework of the GATS. Paper S/CSS/W/21 of the 18 December 2000, available from the WTO website at: http://www.wto.org/english/docs_e/docs_e.htm (accessed 28/08/06).

C. What Measures, If Any, Does The Convention Require States To Take To Promote Cultural Diversity?

What obligations do states undertake when they sign up to the Cultural Diversity Convention? Initial examination of the Convention suggests that it is essentially permissive and imposes relatively few positive obligations on Contracting Parties to promote or maintain cultural diversity. Although the Convention states that 'cultural diversity can be protected and promoted only if human rights and fundamental freedoms, *such as...the ability of individuals to choose cultural expressions*, are guaranteed' (Art. 2.1, emphasis added) and recognises the 'equal dignity of...all cultures, including the cultures of persons belonging to minorities and indigenous peoples' (Principle 3 and see also Art. 7), it does not, unlike the 2001 *UNESCO Declaration on Cultural Diversity* or the *European Framework Convention on National Minorities*, list specific cultural rights regarding, for example, language use or access to education, which states must respect.⁵⁶

Instead, the Convention reaffirms 'the *sovereign rights of States* to maintain, adopt and implement policies and measures *that they deem appropriate*' in order to preserve cultural diversity (Art. 1(h) italics added). State sovereignty in the cultural field is included as one of the eight guiding principles which underpin the Convention (Art. 2(2) and see also Art. 5). Key figures in the drafting process saw the Convention as an essentially declaratory instrument and although the Convention in Article 6 sets out a list of measures which Parties may take to promote cultural diversity, they are not obliged to do so.⁵⁷

The Convention is at its most directional in relation to education, co-operation with civil society organisations, support for developing countries (considered in more detail in section G below) and reporting requirements. Thus, Article 10 provides that 'Parties shall encourage and promote' understanding of cultural diversity 'through educational and greater public awareness campaigns,' while Article 11 requires them to 'encourage the active participation of civil society' in their efforts to achieve the objectives of the Convention. These provisions are not at all constraining, given the open-ended way in which they have been phrased ('encourage,' 'promote' etc.), and it would seem enough for a Party merely to undertake some initiatives in these general areas, however ineffective. Parties are also required to provide, every four years, 'appropriate information' to UNESCO, detailing the measures they have taken to promote cultural diversity at the domestic and international levels, and to generally share and exchange information in this regard (Arts. 9 and 19).

Reporting requirements can perform a number of useful functions and have been widely used in international agreements in the cultural field.⁵⁸ They enable compliance with specific obligations to be evaluated; impose political pressure on states to improve their performance in a given area, even when there are no formal sanctions; and enable comparisons to be drawn between different regulatory techniques, good practice to be identified, and guidance for future action developed. When combined with clear obligations, effective external monitoring and sufficient publicity, reporting requirements can

⁵⁶ See text accompanying note 20 above.

⁵⁷ See the 31 May report from Garry Neil, INCD Executive Director, in the INCD (2005) Newsletter 6/1at: <http://www.incd.net/docs/NewsletterMay2005.htm> (accessed 14/02/06).

⁵⁸ See, for example, the *Council of Europe Framework Convention on National Minorities*, n. 19 above.

influence state behaviour, particularly where the state accepts the underlying objectives of the regulation in question.⁵⁹

Where, however, important competing interests are at play it is unlikely that reporting requirements will have much of an effect. Thus, the requirement in Article 4.3 of the EU 'Television Without Frontiers Directive' that Member States report to the European Commission the percentage of European programmes broadcast by television stations under their jurisdiction has undoubtedly encouraged Member States to monitor whether their broadcasters comply with the European content quota.⁶⁰ This, however, is in a context in which they could potentially be fined if they fail to return reports and, even here, states continue to omit inconvenient information. Italy, for example, has regularly refused to provide data concerning the percentage of European programmes on its domestic satellite channels.⁶¹

As previously noted, Article 9 of the Convention merely requires Parties to report every four years on those measures they *have taken* 'to protect and promote the diversity of cultural expressions within their territory and at the international level.' There is thus no obligation to report generally on their countries' state of cultural diversity and, if a state does nothing to protect or enhance diversity, there will simply be nothing to report. In particular, Parties are not obliged to report any measures which decrease cultural diversity and are unlikely to wish to publicise such measures where they have been adopted. The Convention does not provide for sanctions where states fail to file reports.

Without effective follow up and investigation from an independent body, there is a real risk that the reporting process in the Convention will result in partial or misleading information. If adopted as originally drafted, the Convention would have set up a world cultural observatory and a permanent group of experts to oversee and support the implementation of the Convention, but these provisions were removed from the text at an early stage of deliberations on the basis that they were 'overly ambitious.'⁶² In terms of collating information on good practice and analysing developments in the cultural field, UNESCO now undertakes to use 'existing mechanisms within the Secretariat' for this purpose and to develop a data bank in order to complement information collected through the formal reporting process (Art. 19). Absent additional resources, however, this does not appear to be much of an advance on the existing position.⁶³

⁵⁹ For discussion of the effectiveness of reporting requirements see Sunstein, C. (1999). Public Broadcasting and the Public Interest: Notes Towards a "Third Way". Chicago Law and Economics Working Papers. 65, 1-71, available at: <http://www.law.uchicago.edu/Lawecon/workingpapers.html> (accessed 28/08/06).

⁶⁰ Directive 89/552/EEC (1989) OJ L298, as amended by Directive 97/36/EC (1997) OJ L202.

⁶¹ See, for example, European Commission, *Sixth Communication on the application of Articles 4 and 5 of Directive 89/552/EEC, as amended by Directive 97/36/EC, for the period 2001-2002*, COM (2004) 524 final, at 10.

⁶² Mazzone, n. 7 above.

⁶³ The Fund for Cultural Diversity, which could be used for this purpose, has no guaranteed source of finance, on which see text accompanying n. 111 below.

With regard to review of the country reports, these are to be sent to the Intergovernmental Committee, a body to be composed, at least initially, of representatives of 18 Parties, elected for four year terms (Art. 23). The Committee is required to summarize and comment on the reports before passing them on to the Conference of Parties, the Convention's supreme regulatory organ (Art. 23.6(c)). The Intergovernmental Committee has power to invite public and private organisations, or individuals, to participate in its meetings in order to consult on specific issues (Art. 23.7) so that there is some scope for the Committee, given sufficient drive and adequate administrative backing, to inject a degree of political bite into the reporting procedure.

Even less constraining are those articles in the Convention which require Parties simply to 'endeavour' to achieve certain things. Article 7, for example, provides that parties 'shall endeavour to create in their territory an environment that encourages individuals and social groups ... to create, disseminate, distribute and have access to their own cultural expressions,' and to 'diverse cultural expressions from within their territory as well as from other countries of the world.' A similar formulation can be found in Article 12, which seeks to promote 'bilateral, regional and international cooperation,' and in a number of articles relating to support for developing countries.⁶⁴

Even an autocratic state that does nothing to support cultural diversity might consequently consider signing up to the Convention a relatively unproblematic exercise. It requires Parties to do very little in terms of concrete action and, at worst, could result in a state being criticised by the Intergovernmental Committee or Conference of Parties for failure to take sufficient measures to promote or protect cultural diversity, on the basis of the state's own four yearly reports. It is not impossible that such a state might find itself involved in a dispute with another Party regarding the interpretation or application of the Convention under Article 25. This might, for example, relate to whether the state had complied with its 'duty' under Article 7 to 'endeavour to' create an environment in which social groups have access to their own and each others' cultures. But State Parties are unlikely to challenge other Parties concerning their compliance with the Convention unless their own nationals or an emigrant community are affected and the Convention's dispute settlement procedures are not open to individuals or non-governmental organisations.

Moreover, the Convention's dispute settlement procedures, though potentially administratively irksome for a state, are not legally constraining. If negotiation fails and the Parties cannot agree to refer the matter to mediation, or mediation does not resolve the issue, a Party can then set in motion a process of conciliation. But Parties can opt out of conciliation altogether by virtue of Article 25.4, and those that do accept the procedure know that this will not expose them to binding rulings. Rather, the five member Conciliation Commission is empowered simply to make 'proposals' for the resolution of a dispute and Parties are required to 'consider' the terms of these proposals 'in good faith.'⁶⁵ Perhaps most importantly, there is no provision for formal sanction in circumstances where a Party ignores the Conciliation Commission's recommendations and retains the contested measures.

⁶⁴ See further section G below.

⁶⁵ Convention, Annex, Article 5.

Ultimately, the effectiveness of the Convention is likely to depend on how the UNESCO Secretariat, civil society organisations, and the Intergovernmental Committee set up by the Convention use the political leverage afforded them, for example through comments on the country reports, to put pressure on State Parties to modify their behaviour.⁶⁶

D. Does the Convention Clarify Those Measures That States Are Permitted To Take Under International Law To Promote and Protect Cultural Diversity?

A key objective of those who pressed for adoption of the Convention was to obtain clarification as to the type of domestic measures that states may legitimately adopt in order to enhance cultural diversity. How successful is the Convention likely to be in meeting this objective?

Though the Convention imposes only the most limited obligations on Parties to take action to promote cultural diversity, it confers extensive rights on states to introduce measures with this end in view. The Convention adopts here an 'all inclusive' approach: its object is to endorse forms of market intervention rather than preclude them. Thus, Article 6, headed 'rights of parties at the national level,' contains a non-exhaustive list of measures that Parties 'may adopt' and this list is framed in such open ended terms that it is difficult to envisage a form of state support that would not be covered. The first sub-paragraph of Article 6.2 is particularly broad, in that it refers to all regulatory measures which have as their underlying *objective* the protection of cultural diversity. Given this provision it is questionable whether further specification was needed, but the Convention goes on to list, *inter alia*, measures 'that provide opportunities for domestic cultural activities, goods and services ... including provisions relating to the language used'; that assist independent cultural industries gain access to the means of production, dissemination and distribution; that provide public finance; and that support public institutions and 'artists and others involved in the creation of cultural expression.'⁶⁷ The Convention also explicitly mentions measures designed to enhance media diversity, in particular through support for public service broadcasting.⁶⁸

The Convention consequently endorses assistance for both public and private bodies and can be read as covering the whole gamut of often controversial support measures which states employ in the audiovisual context, such as transmission quotas, financial subsidies, tax relief, preferential access to distribution facilities or advertising resources, and investment or ownership restrictions. What is immediately striking is that there is no attempt in Article 6 to provide guidance as to the respective merits of the measures it enumerates or how states might reduce the trade distorting effects of such measures. In particular, the Convention makes no express reference to principles such as proportionality or effectiveness, which could guide the application of these measures and serve to prevent more blatant

⁶⁶ For further discussion see Bernier, I., in collaboration with Ruiz Fabri, H. (2006). *La Mise en Oeuvre et le Suivi de la Convention de l'Unesco sur la Protection et la Promotion de la Diversité des Expressions Culturelles*. Quebec: Government of Quebec, available online at: <http://mcc.quebec.tel.qc.ca/sites/mcc/ClinStat.nsf/ce5e08c8e9d9f012852570c8001493ee/49a54fb3750f3a418525713b00714b1e!OpenDocument> (accessed 28/09/2006).

⁶⁷ Convention, Article 6.2 (a)-(g).

⁶⁸ Convention, Article 6.2 (h).

forms of protectionism. The closest Article 6.2 comes to this is in the requirement that measures adopted under sub paragraphs (b) and (f) be 'appropriate.' It is thus hardly surprising that a key concern voiced by the U.S. over the Convention was that it could be used to justify protectionism: Louise Oliver, the U.S. ambassador to UNESCO, stated that it was 'too open to misinterpretation and too prone to abuse for us to support it.'⁶⁹ The ability to generate effective guidance over time as to the appropriate exercise by Parties of their rights under Article 6 will thus be essential if the Convention is to have any credibility.

In relation to 'ranking,' the U.S. has, for example, taken the view that subsidies are a preferable form of intervention to, say, quotas, which constitute a more direct restriction on foreign goods and services. In its 2000 *Communication on Audiovisual and Related Services* to the WTO Council for Trade in Services the U.S. stated that '[t]here is a precedent in the WTO for devising rules which recognize the use of carefully circumscribed subsidies for specifically defined purposes, all the while ensuring that the potential for trade distortive effects is effectively contained or significantly neutralized.'⁷⁰ It suggested that a specific understanding on subsidies might be developed which would take into account cultural considerations.⁷¹ The U.S. has also adopted a more tolerant attitude to subsidy regimes in its recent Free Trade Agreements with countries such as Singapore and Australia than it has to other access restrictions in the audiovisual sector.⁷²

One might conclude that this is merely a cynical assessment on the part of the U.S. of the actual impact on its own communications industry of foreign subsidies. Although the scale of public subsidies can be substantial, and in Europe up to sixty per cent of cinema funding comes from the public sector,⁷³ they are unlikely to compensate for major structural disadvantages, such as a restricted linguistic market. Indeed, film production within Europe remains fragmented and fragile, with very few European films distributed outside their country of production.⁷⁴ Subsidies may consequently not be sufficient to shore up a failing industry and states vary in their ability to provide financial assistance for their cultural industries. Moreover, public subsidies can stifle innovation and result in poor quality products. Given these complexities it is not surprising that there is no attempt in the Convention to rank the various measures

⁶⁹ Cited in Diderich, J. (2005). U.S. Isolated as UNESCO Approves Pact Aimed at Protecting Cultural Diversity. Associated Press. October 20. Available in the online version of the New Mexican at <http://www.freewmexican.com/news/33993.html> (accessed 10/25/2005).

⁷⁰ See n. 55 above at para. 10(iii).

⁷¹ *Ibid.*

⁷² Wunsch-Vincent, S. (2006). *The WTO, the Internet and Trade in Digital Products*. Oxford: Hart Publishing, at 212-213 and 230; and Wunsch-Vincent, S. (2003), *The Digital Trade Agenda of the U.S.: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization*. *Aussenwirtschaft*. 58. Jahrgang (2003), Heft I, Zurich:Ruegger, 7-46 at 11.

⁷³ IMCA (2003). *Identification and Evaluation of Financial Flows within the European Cinema Industry by Comparison with the American Model*. Study no. DG EAC/34/01.

⁷⁴ For a recent evaluation of the impact of EU support programmes see Henning, V. and Alpar, A. (2005). *Public Mechanisms in Feature Film Production: the EU MEDIA Plus Programme*. *Media, Culture and Society*. 27/2, 229-250. The new Community MEDIA 2007 programme was agreed in *Decision no.*

1718/2006/EC...concerning the implementation of a programme of support for the audiovisual sector [2006] OJ L 327/12. See also the IMCA study at n. 73 above.

that states can introduce to support their cultural industries, and the adoption of a range of different initiatives may be the most effective way to stimulate domestic production. Further study in this area is, however, clearly needed. With the demise of proposals for a world observatory and standing body of experts, guidance is most likely to be provided by the UNESCO Secretariat under Article 19, or the Intergovernmental Committee when acting on a request from the Conference of Parties to prepare operational guidelines for the implementation and application of the Convention' provisions under Article 23.6(b).

Another area which requires clarification is whether states can adopt measures under Article 6 which directly discriminate against foreign goods, services or persons on grounds of nationality. Although it is unlikely that the Parties to the Convention would accept a reading of Article 6 which entirely excludes such measures - many states, for example, restrict foreign ownership of their media on diversity grounds - restrictions of this type may go beyond what is necessary to protect the cultural interests at stake. In the context of the EU, Member States are not permitted to justify directly discriminatory trade barriers on cultural grounds, though such a justification may be put forward to support a measure that, on its face, is non-discriminatory but which renders it difficult for foreign goods or services to access the domestic market.⁷⁵ In principle, therefore, the imposition by a Member State of the EU of a broadcast quota framed in terms of domestic production would be illegal, whereas a quota for programmes that reflect domestic culture or language might well be justifiable because such a quota does not automatically exclude foreign companies from the domestic market. It is striking, however, that at the pan-European level, the European Community mandates European programme quotas based precisely on the participation of European producers and artists.⁷⁶ For the EU, therefore, films and television programmes made outside the EU are not cultural substitutes for programmes made within it, even when they focus on European issues.⁷⁷

Finally, there is no mention in Article 6, or indeed more generally in the Convention, of the principle of proportionality. The principle has been incorporated into a wide range of international agreements on, among other things, human rights and trade.⁷⁸ At its most exacting it can be used to ensure that state measures pursue legitimate objectives and do not go beyond what is strictly necessary to attain those objectives. Less intensively, it can be used to test the 'reasonableness' or appropriateness of a measure, affording the state greater latitude.

⁷⁵ See Katsirea, I. (2003). Why the European Broadcasting Quota Should be Abolished. *European Law Review*. 28/2, 190-209. Some scope for direct discrimination is, however, accepted in the context of domestic aid for the cinema industry in the light of Article 87.3(d) of the European Community Treaty.

⁷⁶ Articles 5 and 6 of the EC Television Without Frontiers Directive, n. 60, above.

⁷⁷ For helpful discussion of industrial and cultural objectives underlying the quota and its practical impact see Katsirea, I., n. 75 above. For consideration of similar issues in the context of an Australian/New Zealand dispute see *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, particularly Brennan CJ at para.12.

⁷⁸ Consider, for example, the requirement in Articles 8, 9, 10 and 11 of the European Convention on Human Rights that limitations on certain freedoms be 'necessary in a democratic society' and the requirement in Article XX of GATT and XIV GATS that restrictions on trade covered by those Articles should not constitute 'a means of arbitrary or unjustifiable discrimination.'

A good example of a rigorous application of the principle in the cultural sphere is provided by the ruling of the European Court of Justice in the *Familiapress* case.⁷⁹ *Familiapress* concerned an Austrian prohibition on the sale of newspapers and periodicals that included puzzles, such as crosswords, for which there were money prizes. The objective behind this prohibition was to prevent powerful newspaper groups winning over readers for their papers by means of financial incentives, rather than through the quality of their reporting. Austria feared that smaller independent newspapers would be unable to offer similar inducements and could be squeezed out of the market. The European Court of Justice held that it was legitimate for Austria to seek to protect media pluralism but carefully considered whether there were other less restrictive measures that might have been adopted, capable of achieving a similar result. Rather than prohibit the sale of foreign newspapers, published in countries where such prizes are allowed, Austria could have required foreign newspapers to 'black out' their promotions or indicate to purchasers that they were not available to people resident in Austria. In addition, the Court of Justice called on the domestic court to establish whether newspapers offering cash prizes were in fact in competition with publications produced by the smaller presses, and whether consumers were actually swayed in their purchasing decisions by the prospect of a prize.⁸⁰ The rigorous approach adopted by the Court in this case was undoubtedly influenced by the free speech issues at stake, in that the Austrian law prevented its citizens from obtaining information from other countries.

It is probable that those drafting the Convention decided to avoid express mention of any concept such as proportionality that could open up domestic cultural policies to potentially searching review of this type. Such review would undermine the 'sovereign rights of States to maintain ... policies and measures *that they deem appropriate* for the protection and promotion' of cultural diversity, affirmed in Article 1(h) of the Convention.⁸¹ Moreover, proportionality tends to be employed in international agreements to exert a brake on state action that could curtail key rights or freedoms that it is the object of the agreements to protect. Here, the object of the Convention is precisely to assert the rights of states to take measures to protect cultural diversity, so that the introduction of a proportionality requirement in this context could have appeared inappropriate. Yet the *Familiapress* case illustrates how proportionality can play a valuable role in encouraging states to research carefully the economic and behavioural assumptions on which their cultural policies are based and to consider the availability of alternative, less restrictive, measures. Though the existence of such alternatives should not necessarily invalidate state measures, and the exacting version of the proportionality test applied in *Familiapress* is arguably unduly restrictive in this context, states should nevertheless be able to show that their measures are capable of promoting or protecting domestic cultural expression, that there is a need for such intervention, and that the impact on the importation of foreign cultural goods and services is not excessive given the likely benefits to domestic competitors. Without such a principle, American concerns over the Convention's capacity to endorse

⁷⁹ Case C-368/95, *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.

⁸⁰ *Ibid.*, para. 28.

⁸¹ Italics added. In the WTO context Scott Sinclair has argued that application of the test of necessity 'has repeatedly failed to provide an adequate defence for challenged regulations': Sinclair, S. (2006, June). Crunch Time in Geneva. Canadian Centre for Policy Alternatives, 1-30, at 19: http://www.policyalternatives.ca/reports_studies/index.cfm (accessed 7/09/2006).

protectionism would appear to be well founded and all Parties may ultimately find themselves to be the losers.

The principle of proportionality, or some principle akin to it such as 'reasonableness' or 'appropriateness,' the latter of which finds a toe-hold in Article 6.2, may, however, be brought in through the back door by two of the three constraints which the Convention imposes on state discretion in the cultural field: compliance with fundamental rights and compliance with the principles and objectives set out in the Convention. The third constraint is that measures taken by Parties to promote cultural diversity must not contravene obligations that they have undertaken in other international agreements. Although the Convention at first sight appears to afford states considerable latitude in developing their cultural policies, this latitude is consequently not unbounded, and the potential impact of these limitations is discussed in more detail below.

E. Ultimate Constraints on State Action: Fundamental Rights and the Convention's Overarching Principles

The Convention requires that all measures taken by Parties to promote cultural diversity conform to 'universally recognized human rights instruments' (Articles 5.1 and 2.1). Just as the European Court of Justice took into account the importance of fundamental rights in the *Familiapress* case when assessing the Austrian press restrictions, so Parties must consider fundamental rights when framing their domestic regulations. Universally recognized human rights instruments, such as the Universal Declaration of Human Rights or the European Convention on Human Rights, do allow for derogations in specific circumstances which may be broad enough to cover cultural objectives. In order to justify these derogations states are required to establish that their restrictions are necessary and proportionate. Whenever a state restricts cultural expression it is likely also to restrict a fundamental right, such as the right to freedom of expression or information, and a proportionality test will consequently be brought into play. Thus, if country A, a Party to the Cultural Diversity Convention, decides to impose an 80 per cent domestic content quota on its radio and television broadcasters, country B, also a Party to the Convention, could seek to test out the legitimacy, and thus proportionality, of this restriction on freedom of expression or economic rights using the dispute settlement procedures in Article 25.

The second constraint on domestic cultural policy stems from Article 5.2, which requires that all measures adopted under the Convention should be consistent with the Convention's other provisions, including its overarching objectives and principles. The Convention sets out nine objectives and eight guiding principles in Articles 1 and 2, which primarily offer guidance on how cultural diversity might be realised and what it might look like in practice. Perhaps the most important principles in this regard are those which require 'equal dignity and respect for all cultures...including the cultures of...minorities and indigenous peoples'; 'equitable access,' which includes access to cultures from all over the world and 'access of cultures to the means of expression and dissemination'; and 'openness and balance,' which again calls on states to 'promote, in an appropriate manner, openness to other cultures of the world' (principles 3, 7 and 8). The first of these could be used to challenge state measures that repress or discriminate against particular cultures, while the latter principle precludes Parties from seeking to insulate their citizens from exposure to alternative cultures. The principle of 'equitable access' introduces a balancing criterion not entirely unlike the principle of proportionality and the requirement in Article 20 that

Parties should perform their obligations under the Convention in 'good faith' might also be interpreted as establishing a general principle of reasonableness.⁸² Although State Parties may prove unwilling to directly question other Parties for failure to respect these principles, the explicit recognition of these principles in the Convention provides a tool for interest groups and non governmental organisations to bring culturally destructive or unduly restrictive state measures to the attention of the Convention organs.

Whether the Convention can move beyond a mere endorsement of state practice and provide meaningful guidance as to how and when the various measures listed in Article 6 should be implemented, will, as noted above, depend very much on the dynamism of the UNESCO Secretariat and the Intergovernmental Committee as well as the integrity of the Conference of Parties. Key functions of the Intergovernmental Committee are to monitor the application of the Convention, to review the country reports, and, *at the request of the Conference of the Parties, to prepare and submit operational guidelines on the implementation and application of the Convention's provisions.*⁸³ More generally, it is empowered to make recommendations concerning situations which the Parties themselves bring to its attention.⁸⁴ Clarification on particular Convention provisions might also be obtained through Party recourse to the dispute resolution procedures in Article 25. There is thus scope for a range of different bodies to begin to flesh out the vague and over-general articles that make up the bulk of the Convention's text. In particular, specific guidance could be given as to the economic conditions which would warrant the introduction of subsidies or quotas, as well as the procedures which states should adopt to monitor and review such measures. This is guidance which the WTO has so far been unable to provide and constitutes one of the main rationales for a separate cultural convention. Whether or not such steps are taken will reveal whether the Parties to the Convention see it simply as a means to endorse their own cultural practices, or as a genuine attempt to further cultural diversity.

F. The Relationship Between The Convention And Other International Instruments

The third constraint which the Convention imposes on its Parties is that they should perform in good faith their obligations under all other treaties to which they are party (Art. 20). Although the Convention states that Parties may adopt measures to promote cultural diversity under Article 6, this apparent freedom is consequently limited by their other international obligations, not merely those in the field of human rights. For this reason also, the abstract list in Article 6 is misleading: the simple fact that a measure falls within the scope of Article 6 provides no guarantee that a state is entitled to adopt it. This will depend in every case on the measure's compliance with fundamental rights, the Convention's principles and objectives, and the state's other international commitments.

Article 20, which deals with the relationship between the Convention and other treaties, proved to be one of the most controversial provisions to draft. Some states wanted the Convention to modify pre-existing international agreements, at least where pressing cultural matters were at stake. A major

⁸² 'Good faith' is considered a general principle of international law that prohibits the abusive or unreasonable exercise by a state of its rights, see Van den Bossche, P. (2005). *The Law and Policy of the World Trade Organization: Text, Cases and Materials*. Cambridge: Cambridge University Press, at 58.

⁸³ Convention, Article 6(a), (b) and (c).

⁸⁴ Convention, Article 6(d).

criticism made by the EU and Canada of GATT and GATS is that they do not contain a general cultural derogation.⁸⁵ Although the 'positive list' approach adopted in GATS, which enables states to gradually make liberalising commitments, has so far allowed states to shield their cultural services from foreign competition, this is not an option in the context of GATT, which is considerably more prescriptive.⁸⁶ International trade rules are thus broad enough to cut down certain domestic cultural policies, as the *Canada Periodicals* case, discussed below, illustrates.

Article 30.4(b) of the 1969 *Vienna Convention on the Law of Treaties* (the 'Vienna Convention') addresses those situations where there are two treaties but not all members of the first treaty are members of the second. Article 30.4(b) provides that a treaty will only govern the mutual rights and obligations of states when they are both parties to it. Since the U.S. has indicated its fundamental opposition to the UNESCO Convention, and is unlikely to ratify it, its relations with Parties to the Convention under other international agreements, such as GATT and GATS, or bilateral free trade agreements, remain unaffected.

What about relations between two countries that have both ratified an earlier treaty and the UNESCO Convention? In this case, Article 30.3 of the Vienna Convention indicates that the UNESCO Convention should take precedence over any earlier agreements to which they are both parties. An earlier agreement will take effect only to the extent that its provisions 'are compatible' with the later agreement. This, however, is subject to any contrary provision in the later treaty, in that Article 30.2 of the Vienna Convention provides that '[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.' The UNESCO Convention does contain such a provision in Article 20.1, which states that Parties are to 'perform in good faith their obligations under this Convention and all other treaties to which they are Parties.' This is further confirmed in Article 20.2 which states that '[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.'

This was not an inevitable outcome and at one point the drafters of the UNESCO Convention put forward two distinct versions of what is now Article 20. The first of these provided simply that the Convention would not affect the rights and obligations of its Parties under other existing international instruments, while the second contained the proviso 'except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.'⁸⁷ It was the first of these that was ultimately adopted, without the restriction to 'existing' treaties. In consequence, there

⁸⁵ For a history of the dispute over the accommodation of cultural interests within the WTO see De Witte, B., *Trade in Culture: International Legal Regimes and EU Constitutional Values*, in de Búrca, G. and Scott, J. (eds.) (2001). *The EU and the WTO: Legal and Constitutional Issues*. Oxford: Hart; Pauwels, C. and Loisen, J. (2003). *The WTO and the Audiovisual Sector: Economic Free Trade vs Cultural Horse Trading?* *European Journal of Communication*. 18/2, 291-313, and Footer, M. E. and Graber, C. B. (2000). *Trade Liberalization and Cultural Policy*. *Journal of International Economic Law*. 3/1, 115-144.

⁸⁶ Luff, D. (2004). *Telecommunications and Audio-visual Services: Considerations for a Convergence Policy at the World Trade Organization Level*. *Journal of World Trade*. 38/6, 1059-1086, at 1071-1072.

⁸⁷ See the preliminary draft of the UNESCO Convention detailed at document CLT/CPD/2005/CONF.203/6, at 36.

would appear to be little, if any, scope for a Party to rely on its 'right' to adopt measures to protect cultural diversity under the UNESCO Convention in defence to a claim that it is in breach of obligations under a prior agreement such as GATT or GATS.⁸⁸

Joost Pauwelyn has argued that most of the obligations undertaken by parties to the WTO agreements are of a 'reciprocal' rather than 'integral' nature.⁸⁹ Their reciprocal nature means that it is possible for them to be modified by the parties among themselves, provided this does not lead to the rights of third parties being infringed. This is not to say that the new agreement can form the basis of a claim before a WTO panel or that such a panel must judicially enforce its terms, but the new agreement may be considered part of the applicable law before a WTO panel, and thus provide, according to Pauwelyn, a legal defence to a claim of a WTO breach.⁹⁰ On this, admittedly controversial, view, the Convention might be able to modify the Parties' existing obligations under the WTO obligations. But the Convention does appear to have expressly excluded any such eventuality and it is doubtful whether a Party could be said to be 'performing in good faith' its obligations under the WTO agreements, according to Article 20.1 of the UNESCO Convention, if it were to try to use the Convention to avoid them.

Parties to both the WTO agreements and the Convention may, however, prefer to resolve their disputes using the less confrontational and constraining dispute resolution procedures in the Convention. In particular, the Convention might be thought to offer a more conducive forum than the WTO for the articulation and working through of disputes concerning cultural matters. It is arguable that recourse to the Convention rather than WTO dispute resolution procedures by WTO Members could constitute an infringement of their obligation under Article 23.1 of the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).⁹¹ This requires Members, when they seek 'the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements,' to have recourse to the rules and procedures of the DSU. Similar questions concerning the appropriate forum could also arise where a dispute calls into question the compatibility of Party's measures with international human rights instruments under Articles 2.1 and 5. Article 62 of the European Convention on Human Rights, for example, provides that Parties, 'except by special agreement...will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting...a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.'

Whether recourse by a Party to dispute settlement under the Convention is held to constitute an infringement of its obligations under existing treaties not to use alternative fora could well depend on the way in which its complaint is framed. A Party is unlikely to expose itself to a challenge of this kind by arguing directly that measures adopted by another Party under the Convention infringe GATT or GATS or a

⁸⁸ Voon, T. (2006). UNESCO and the WTO: A Clash of Cultures? *International and Comparative Law Quarterly*. 55/3, 635-652 at 650.

⁸⁹ Pauwelyn, J. (2003). *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*. Cambridge: Cambridge University Press, particularly at 69-88.

⁹⁰ *Ibid.* Marceau, n. 29 above, at 1100-1108, suggests that in such circumstances it may be possible for the WTO panel to decline jurisdiction on the basis that the WTO provisions have been 'superseded.'

⁹¹ For helpful discussion on this point see Voon, n.88 above, at 642-644.

particular human rights treaty. Instead, it is more likely to complain that such measures have not been adopted 'in good faith,' as required by Article 20,⁹² or are not 'appropriate' or sufficiently 'aimed' at preserving cultural diversity within Article 6, because they are excessive or disproportionate. Such a question then turns on the fitness for purpose of the cultural measure rather than whether it accords with standards established in other treaties. As section E above indicates, however, this latter issue may well be at the root of a dispute and the line between those complaints that should or should not be resolved under the UNESCO Convention may be difficult to draw in a convincing fashion. Where a dispute is brought before a WTO panel, which raises issues that properly fall within the scope of a WTO agreement, it is unlikely that the panel would refuse to hear the complaint because cultural considerations are at play.⁹³

Tania Voon has also suggested that the Convention's dispute settlement procedures lack transparency, in that a party to another international agreement, such as GATT or GATS, could be unaware that a dispute has been mutually resolved in this way or its outcome.⁹⁴ Although Article 20 of the Convention calls on Parties 'to foster mutual supportiveness' between the Convention and other international agreements to which they are parties, it is not impossible that ultimate resolution of a dispute under the Convention could conflict with the provisions of other treaties.

Although Article 20 of the Convention provides that the Convention is not to override other international agreements to which its members are parties, it may have an indirect effect on their operation. Firstly, the Convention could influence the interpretation of existing agreements, and, secondly, it is likely to be deployed as a political tool to influence the content of future agreements. This latter point is particularly important, in that a number of countries which supported the Convention primarily saw it as a mechanism to forestall any evolution of the WTO rules that might restrict their ability to pursue cultural objectives in the future. They view with concern the recent free trade agreements entered into by the U.S. with Chile, Singapore, CAFTA, Morocco, the Dominican Republic and Bahrain.⁹⁵ These agreements adopt a 'negative list' approach in the field of services, requiring states to establish a definitive list of restrictions rather than enabling them to gradually make market opening concessions. The U.S. has throughout sought to ensure minimal restrictions are maintained or can be imposed in relation to electronically delivered services and 'digital products.'

This approach is not acceptable to a number of the Convention's core supporters. In the EU context, for example, the European Community is currently considering the adoption of an Audiovisual

⁹² See n. 82 above.

⁹³ See Marceau, 29 above, at 1117, and at 1108-1115 for a more general discussion on the principles which could be used to determine the appropriate forum when conventions overlap.

⁹⁴ Voon, n. 88 above, at 645.

⁹⁵ For detailed analysis see Wunsch-Vincent (2006), n. 72 above, chapter 7, and Bernier, I. (2004). The Recent Free Trade Agreements of the United States as Illustration of their New Strategy Regarding the Audiovisual Sector. 1-21. Available at: www.mcc.gouv.qc.ca/diversite-culturelle/eng/pdf/conf_seoul_ang_2004.pdf (accessed 28/09/06).

Media Services Directive.⁹⁶ The proposal is intended to respond to the new ways in which audiovisual material is transmitted and consumed, and includes measures which apply to audiovisual content, whatever its means of delivery (analogue or digital) and whether provided as part of a scheduled or on-demand service. The scope of the proposed directive is consequently wider than the existing Television Without Frontiers Directive, which applies solely to television broadcasting.⁹⁷ Although the proposal does not attempt to extend the existing European content quota across the whole spectrum of electronic media services, it does call on Member States 'to ensure that media service providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works.'⁹⁸ The EU thus clearly wishes to retain its competence to introduce culturally motivated measures across the electronic communications field – and does not accept the U.S. 'standstill' agenda.

For some states, therefore, the Convention will be seen to be a success if it strengthens their hand in fending off further liberalisation within the WTO.⁹⁹ This is particularly important in the context of GATS, which requires Members to enter into successive rounds of negotiations with a view to progressive liberalisation in the service sectors.¹⁰⁰ Article XIX.2 provides, however, that service liberalisation is to 'take place with due respect for national policy objectives' and the Convention will undoubtedly be deployed by states wishing to retain their ability to impose trade restrictive measures on cultural grounds. Although trade talks under the DOHA development agenda were suspended in July 2006, a final agreement, incorporating extensive liberalisation in the field of services, cannot be ruled out. The attempt to push forward liberalisation by establishing benchmarks for assessing state commitments, by introducing plurilateral alongside established bilateral negotiations, and by entering into negotiations over new rules governing non-discriminatory domestic regulations under Article VI:4 of GATS, could have significant implications for state competence in the cultural sphere.¹⁰¹

But despite Article 20.1(b) of the Convention, which states that Parties, when entering into other international obligations, 'shall take into account the relevant provisions of this Convention,' it is unlikely that the Convention will have much of an impact on the existence or nature of future bilateral agreements. Although developed countries with established cultural industries, such as Canada or France, may be unwilling to restrict their competence in the cultural field, and the Convention provides an additional

⁹⁶ European Commission, *Proposal for a Directive...amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, COM(2005) 646 final.

⁹⁷ Directive 89/552/EEC, as amended by Directive 97/36/EC, n. 60 above.

⁹⁸ European Commission, *Proposal for a Directive...amending Council Directive 89/552/EEC*, n. 96 above, at Article 1(6), introducing a new Article 3f(1).

⁹⁹ Leaving Members such as the EU free to concentrate in trade negotiations on other intractable issues such as agricultural subsidies, see Mazzone, G., n. 7 above at 5.

¹⁰⁰ GATS, Article XIX.

¹⁰¹ Sinclair, S., n. 81 above, who notes that plurilateral requests have been put forward in relation to audiovisual services, *ibid.* p. 15.

justification for such a stance, many states will consider the economic benefits of bilateral trade deals, particularly with the U.S., to outweigh any potential prejudice to their cultural industries in the future.¹⁰²

Turning to the Convention's potential influence on the way in which other treaties are interpreted or applied, Article 20.1(b) requires that Parties, when interpreting or applying other treaties to which they are parties, take into account relevant provisions of the Convention. But in the context of agreements such as GATT and GATS, which have their own dispute resolution organs, final determination of what the agreement ultimately requires rests not with the parties but with those organs. WTO panels and the Appellate Body are, however, required to interpret the provisions of the WTO agreements taking into account all relevant rules of international law.¹⁰³ Article 31.3 (c) of the Vienna Convention provides that, in interpreting treaties, '[t]here shall be taken into account together with the context: (c) any relevant rules of international law applicable in the relations between the parties.' Gabrielle Marceau has noted that 'in most cases the proper interpretation of the relevant WTO provisions...should lead to a reading of the WTO provisions so as to avoid conflict with other treaty provisions.'¹⁰⁴

Even if the Convention does not directly override provisions in the WTO agreements it could, therefore, potentially affect their interpretation. This could be important, for example, when determining the scope of the various exceptions provided for in the agreements, or whether certain goods should be considered 'like' goods for the purposes of paragraph 4 of Article III GATT, which requires that products be 'accorded treatment no less favourable than that accorded to like products of national origin.' The Convention might in such circumstances lead to greater weight being afforded to the cultural dimensions of a product.

That this may not always be possible, however, is illustrated by the *Canada Periodicals* case.¹⁰⁵ This concerned a Canadian excise tax that targeted U.S. magazines, or periodicals, transmitted into Canada in electronic form to avoid Canadian import duties and then printed in Canada prior to distribution. If the periodical was altered in its Canadian version to include Canadian advertising it potentially became classified as a 'split-run edition' and was subject to a swinging excise tax, amounting to 80 per cent of the value of all advertisements contained in the edition. The tax had been introduced to support magazine production in Canada in the face of strong U.S. competition. The provision in GATT that ultimately outlawed the Canadian tax was the second sentence of Article III.2. This precludes taxes on imported goods that are in competition with, or substitutable for, domestic goods, where this affords protection to domestic production. Although Canada argued before the Appellate Body that split run and domestic

¹⁰² That attitudes vary across both the developed and developing world is evidenced by the *Joint Statement on the Negotiations on Audiovisual Services of the 30 June 2005, made by Hong Kong China, Japan, Mexico, the separate customs territory of Taiwan, Penghu, Kinmen and Matsu, and the United States*, which emphasises the economic benefits to be gained from further liberalisation in the audiovisual sector: WTO TN/S/W/49. See also materials cited at n. 95 above.

¹⁰³ Marceau, n. 29 above; Pauwelyn, n. 89 at 251-256, Van den Bossche, n. 82 at 63-64, Voon, n. 88 at 645-647.

¹⁰⁴ Marceau, n. 29 above, at 1082.

¹⁰⁵ *Canada – Certain Measures Concerning Periodicals* (WT/DS31/AB/R) adopted 30 July 1997, available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds31_e.htm.

magazines were not comparable because they were created for different markets – they were not ‘substitutable information vehicles’ – the Appellate Body preferred the arguments of the U.S., which pointed out that advertisers were prepared to buy space in split run editions thereby indicating that such editions could command a domestic market and compete with domestic magazines.¹⁰⁶ The focus here on market competition and substitutability, on whether readers will buy a foreign product even if culturally distinct from a domestic one, provides no scope for cultural considerations to be taken into account. Certain GATT or GATS provisions may simply not be open, therefore, to interpretation in a Convention-friendly manner, and it will be sufficient for one such provision to be applicable to invalidate a culturally motivated trade restriction. Furthermore, even in areas where the Convention could come into play as an interpretative tool there is no guarantee that it will be applied in the way that a Party desires.

The Convention could also influence how GATT and GATS are understood to interact. This is important because there may be cases where a culturally motivated regulation affects the provision of both goods and services. In the context of services, states can refrain from making national treatment commitments under article XVII of GATS, whereas there is no such scope under GATT. In *Canada Periodicals* the excise tax was analysed as a restriction on trade in goods and held to violate Article III.2 of GATT, even though it also had implications for the provision of advertising services. In this case the tax was specifically designed to protect domestic periodicals, so that the application of GATT appears justifiable, but it is also possible to envisage instances where a domestic regulation directly affects trade in services but also has a secondary, indirect, impact on the sale of goods. For example, a requirement that radio stations broadcast a certain percentage of songs in the national language, which restricts the provision of services, could also have a negative impact on the sale of foreign compact discs, classified as goods.¹⁰⁷ To invalidate the measure on the basis of GATT could undermine the freedom that states currently retain under GATS to pursue cultural objectives. In such instances the UNESCO Convention might lead a WTO panel or the Appellate Body to give precedence to GATS over the GATT.¹⁰⁸

More fundamentally, the Convention could influence whether a product is classified as a ‘good’ or ‘service.’ The U.S. has, for example, been pressing for electronic downloads of music and films over the internet to be considered goods, in effect online versions of compact or digital video discs, which are undoubtedly goods. If such a question were to be referred to a WTO dispute body, it would be open to a party to argue that the download should be classified as a service on the basis that this would afford

¹⁰⁶ *Ibid.*, 24-26.

¹⁰⁷ An example discussed by Weber, O. From Regional to Global Freedom of Trade in Audio-visual Goods and Services? A Comparison of the Impact on the Audio-visual Sector of the Preferential Trade Zones Established by the European Communities and the World Trade Organization, in Craufurd Smith, R., (ed.) (2004). Culture and EU Law. Oxford: OUP, at 353-381. Such a restriction could also affect the sale of electronic downloads of music over the internet, on which see text accompanying n.108 below.

¹⁰⁸ For helpful discussion of this issue see Pauwelyn, n. 89 above, at 403-405. In *Canada Periodicals*, n. 105 above, the Appellate Body (at IV) held, however, that GATT and GATS ‘do not override’ each other and concluded that it was not necessary, given the way in which the complaint had been framed, to consider whether there was any potential conflict between the two. See also *EC-Bananas III*, WT/DS27/R at para. 221.

greater scope for states to retain culturally motivated regulations recognised to be legitimate under the Convention.

In conclusion, although the UNESCO Convention, once in force, will not directly shield its Parties from actions for infringement of their obligations under other international agreements, most notably under GATT and GATS, it could influence in important respects the interpretation and operation of these agreements. The Convention's essentially co-operative dispute resolution procedures may also prove attractive for the resolution of culture-related disputes, leading to the development of principles to manage the trade-culture interface. More importantly, the extensive support displayed by the international community for the Convention at the time of its adoption strengthens the position of those states who wish to prevent any further encroachment by international trade rules into their competence in the cultural domain.

G. The Convention and Developing Countries

The UNESCO Convention gained support from developing countries, as well as smaller cultural and linguistic regions, through its commitment to assist them in their efforts to preserve and fully exploit their cultural heritage.¹⁰⁹ In particular, Article 13 of the Convention recognises the importance of culture for sustainable development and calls on Parties to integrate culture into their development policies at all levels. The Convention is uncharacteristically specific in listing a number of concrete ways in which Parties are required to 'endeavour' to support sustainable development. This includes strengthening developing countries' production and distribution capacities through facilitating access to domestic markets and international distribution networks for their cultural goods and services; facilitating the mobility of cultural workers from developing countries; and encouraging collaboration between developed and developing countries in areas such as music and film (Art.14). Developed countries are additionally called on to undertake exchanges with developing countries, offering preferential access to their cultural workers, goods and services (Art.16). The Convention could play a valuable role here in helping to re-orient domestic development policies. In the EU context, for example, a recent study for the European Commission indicated that EU Member States mainly seek to project and promote their own cultures through co-operation agreements with third countries, rather than sustain the cultures existing within those countries.¹¹⁰

A second strand of support is to take the form of 'capacity building' through the exchange of information and expertise in order to develop management capacities, policy development and implementation, use of technology, and skills development and transfer (Art.14.2). Parties are required to 'encourage' the formation of partnerships between the private and public sectors and non-profit organisations working in the cultural field (Art.15). The Convention also calls for the transfer of technology and know-how, especially with regard to cultural industries and enterprises (Art.14.3).

¹⁰⁹ See, in particular, Articles 1(a) and (b) and 2.6.

¹¹⁰ Ernst and Young (2004) Study of External Cooperation of the European Union and its Member States in the Culture and Audiovisual Sectors. See in particular p. 6.

Finally, Parties are to 'endeavour' to provide financial assistance through the establishment of an International Fund for Cultural Diversity, official development assistance and other forms of support, such as low interest loans and grants (Art. 14.4). An earlier draft of the Convention had envisaged that Parties to the Convention would be required to contribute to the Fund but, under the Convention as adopted, contributions are to be voluntary. These may be supplemented by funds appropriated by the General Conference of UNESCO and contributions or gifts from other states, organisations or individuals.¹¹¹ The precise use to which the Fund is to be put is to be determined by the Intergovernmental Committee, following guidelines determined by the Conference of Parties.

It is too early to say whether the Convention will have much, if any, impact in the development field once it enters into force. Although the provisions on development employ the undemanding 'shall endeavour/facilitate/encourage' terminology, there is greater specificity as to the type of action which is envisaged and this, coupled with the reporting requirement in Article 9, could encourage concrete action and a redirection of existing policies in this area. But, as with other aspects of the Convention, much is left to the good will and enthusiasm of the Parties. In the absence of any formal sanction for 'non-compliance,' and without assured funding or adequate administrative resources, this may simply not be enough to bring the Convention's development agenda to life.

H. Conclusion

Can the UNESCO Convention usher in a new world communications order and is it likely to realise the objectives of those who voted for it? With the Convention not yet in force it is risky to make predictions, but the answer to the first question is fairly clearly 'no,' and to the second, 'yes, in part.' Arguably, the Convention was never intended by its promoters to be an innovative measure; it was primarily designed to maintain the status quo in the field of trade and culture. In particular, developed countries such as Canada and France promoted the Convention on the basis that it would provide high level political endorsement for their culturally motivated trade restrictions. It serves to justify not only their existing measures but also their refusal to make commitments in new and developing communications sectors in the future. But for the Convention to be influential politically it needs to attract wide support from across the international community, from developed and developing countries. The result is a document that evades controversy, which establishes general objectives and frames them in purely exhortatory terms. As a political manifesto, with little legal substance, it is hardly an advance on the international declarations on cultural diversity which preceded it.

Even as a political tool the influence of the Convention may prove to be quite limited. The U.S. is unlikely to ratify the Convention in the foreseeable future, and with trade talks stalled at the WTO level, the U.S. is turning to bilateral agreements in order to liberalise international trade in goods and services. It is no coincidence that Korea halved its existing screen quota for domestic films, a continuing source of irritation for the U.S. despite its legality under GATT, days before the U.S. announced that it was launching trade talks with Korea early in 2006.¹¹² Nor does the Convention enable parties to 'clawback'

¹¹¹ Convention, Article 18.

¹¹² See the open letter of the 24 March 2006 to the US trade representative from INCD and the Free Press organisation calling for the US to 'propose an unrestricted and unlimited exemption for cultural goods and

their existing WTO or bilateral free trade commitments, though it may influence the interpretation and operation of such international agreements in the future. It is, however, far from clear what impact the Convention will have on the resolution of some of the fundamental uncertainties that currently exist in the context of GATT and GATS, notably whether electronic communications products should be classified as goods or services, and the approach to be adopted where both GATT and GATS apply to a particular measure.

For developing countries or minority groups the Convention offers nothing by way of concrete entitlement. Given that cultural diversity may be threatened as much, if not more, by forces operating internally within states, the underlying pre-occupation of the Convention with inter-state relations and international trade represents a clear limitation.¹¹³ Although Article 7 of the Convention recognizes that all peoples, including indigenous peoples and minority groups, should be able to create, disseminate and have access to their own cultures, it falls short of framing such interests in terms of rights and imposes merely an obligation of endeavour, rather than result, on State Parties to promote such interests. Its dispute resolution procedures are closed to individuals and interest groups, most likely to take up such cases, and its use of the term 'interculturality' rather than 'multiculturalism' appears designed to diffuse potential tensions with Parties over their internal policies of integration or assimilation. The Convention focuses, then, on affirming state rights and defines these rights in extremely open ended terms, giving real ground for concern that this, as the U.S. suggests, could turn into a protectionist's charter.

The Convention does, however, introduce a number of constraints which come into play once a state takes action to promote or protect cultural diversity, namely, respect for fundamental rights and the Convention's overarching principles and objectives. These principles could be used to challenge not only repressive or discriminatory measures but also to introduce a test of proportionality or reasonableness, thereby adding a much needed element of rigour to what is a highly permissive document. Although one of the criticisms that can be levelled at the Convention is that its dispute settlement procedures are extremely weak, the largely consensual processes of negotiation, mediation and conciliation which it maps out could ultimately encourage states to engage with one another and address cultural issues constructively. Though the appropriate relationship between the Convention and other fora when a dispute combines culture with trade or human rights issues has yet to be resolved, the Convention's dispute resolution procedures could, paradoxically, prove to be one of its more significant assets.

As to bringing about change on a more general level, the system of country reports, though far from perfect, could highlight difficulties being encountered by certain cultural groups, particularly if interest groups and non-governmental organisations co-ordinate effectively with the Convention bodies. The Convention emphasises the role of civil society organisations and calls on Parties to encourage their participation in realising the Convention's objectives. Given the active role played by non-governmental organisations, such as the INCD and CRIS, in shaping the Convention, their ongoing commitment to monitoring its ultimate implementation is not surprising.¹¹⁴ Indeed, the passage of the Convention itself

services from the terms of the free trade agreement with the Republic of Korea': <http://www.incd.net/> (accessed 28/09/06).

¹¹³ See the Human Development Report (2004), n. 41, above, at 73-84.

¹¹⁴ See n. 8 above.

stimulated the development of international networks of individuals and groups committed to the protection and promotion of cultural diversity. For the country reports to be meaningful, however, they must be subjected to informed and independent scrutiny. It is thus important that the Intergovernmental Committee and those involved with the operation of the Convention, such as the UNESCO Secretariat, have adequate funds and administrative resources to carry out their tasks, even with the support of civil society organisations. The inability of the Convention's promoters to reach agreement on mandatory contributions to the International Fund for Cultural Diversity, the introduction of a world cultural observatory and a standing committee of experts, could here prove a major impediment.

Finally, there is scope for the Intergovernmental Committee, at the request of the Conference of Parties, to draw up guidelines as to the application of the Convention's provisions and to make recommendations on situations brought to its attention. These guidelines, together with the statistics and information that the UNESCO Secretariat is committed to compiling under Article 19, could provide an invaluable basis for the evaluation of domestic measures in the cultural field in the future. In consequence, although the UNESCO Convention appears on its face singularly unambitious, there is scope for it to be influential at both international and domestic levels. But for this potential to be realised, states must not only ratify the Convention but also actively pursue its goals of preserving and promoting cultural diversity in the future.