

**Addressing the Potential for Conflict Between Present Proposals for a Convention
on the Protection of the Diversity of Cultural Contents and Artistic Expression, and
Other International Legal Instruments**

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We have been asked by the International Network on Cultural Diversity to comment on present proposals concerning the relationship of the proposed Convention on Cultural Diversity (the “Convention”)¹ with other instruments, notably those established under the auspices of the World Trade Organization (the “WTO”). This opinion considers the relative merits of these proposals and related issues.

For this purpose, it is important to recall, and stress, that the key impetus for establishing a new instrument for cultural diversity arose from concern about the threats posed by globalization, technology and trade liberalization. Of these, the challenges engendered by the trade in goods and services agreements of the WTO are certainly the most formal, and are arguably the most formidable.

This is true for two reasons. First, unless reserved or otherwise exempt from the application of these trade disciplines, most of the measures contemplated by the Convention would simply not be permitted. Thus preferential subsidies, foreign investment restrictions, public sector monopolies, domestic content regulations and other performance requirements will predictably offend the broad constraints imposed by the trade in goods, investment and services disciplines where these fully apply.

Moreover, dispute resolution under the WTO has already demonstrated a propensity for disregarding the non-commercial dimension of cultural measures when these are challenged as offending trade disciplines. Two WTO disputes relating to cultural measures illustrate that publications, artistic works, and other forms of cultural expression are likely to be treated as mere commodities.² As these cases illustrate, WTO dispute bodies are likely to disregard competing governmental policy goals, such as those intended to foster cultural diversity or balance proprietary and public interests, when

¹ United Nations Educational, Scientific and Cultural Organization *Preliminary draft of a convention on the protection of the diversity of cultural contents and artistic expressions*, Paris, July 2004. CLT-2004/CONF.201/CLD.2

² Canada - Certain Measures Concerning Periodicals, Report of the Appellate Body June 30, 1997 - WT/DS31/AB/R. Also see United States – Section 110(5) of US Copyright Act, (WT/DS160/5 OF 16 APRIL (1999)).

called upon to judge cultural measures for their compatibility with trade liberalization rules.

The second reason for concern about the impacts of trade law on cultural diversity measures arises from the difficulty of amending or withdrawing from commitments made under international trade agreements. Where amendments are permitted, the *quid pro quo* will often require further commitments to liberalization in related or other sectors, or the payment of compensation to foreign investors and service providers – possibly both. This price will often be so high as to put any realistic opportunity for such reform entirely out of reach for most nations.³

It is also important to appreciate that negotiations to expand the scope of current trade disciplines are actively underway, most notably under the auspices of the WTO *General Agreement on Trade in Services* (the “GATS”). In this context, several proposals have been tabled to extend the application of GATS disciplines to new spheres of domestic cultural policy, including audio-visual services and music.⁴

If the Convention is to provide a meaningful buffer for cultural policy goals in the face of globalization and trade liberalization, it must preserve, to the extent possible, the sovereign prerogatives of governments to protect and promote cultural diversity.

Mindful of this imperative, it is important to appreciate the limits on what the Convention can accomplish given the normative rules for resolving conflicts between international agreements. This issue is of central importance because, as is now generally recognized, there is an inherent conflict between the goals of preserving the public policy and regulatory options of government with respect to cultural diversity on the one hand, and those of trade liberalization, on the other.

The Application of Successive Treaties Relating to the Same Subject Matter

The question of paramountcy among international treaties relating to the same subject matter is addressed by Article 30 of the *Vienna Convention on the Law of Treaties*. Article 30.3 of that Convention provides that where the parties to the first treaty are also parties to the later treaty,⁵ unless the earlier treaty has been terminated or suspended, it “applies only to the extent that its provisions are compatible with those of the later treaty.”

³ For example, when New Zealand attempted to reintroduce radio and television quotas, the US was quick to point out that this was no longer possible given commitments New Zealand had made under the GATS, unless it was willing to put something of equivalent value on the table.

⁴ Bernier and Ruiz Fabri, *Evaluation of the Legal Feasibility of an International Instrument Governing Cultural Diversity*, Groupe de travail franco-québécois sur la diversité culturelle All rights reserved Legal deposit: 4th quarter 2002 Bibliothèque nationale du Québec ISBN – 2-550-39854-8, at p. 42-43.

⁵ For present purposes we assume that the trade in goods and services agreements of the WTO would precede the Convention even with respect to GATS commitments that are taken at some future date.

Putting aside the question of whether these treaties relate to the same “subject matter”⁶, if the Convention is silent concerning the respective priority of WTO agreements, Article 30.3 of the Vienna Convention would provide some protection for measures established in accordance with the Convention that might otherwise be incompatible with WTO disciplines.

However, under Article 30.4, where the parties to the first treaty are not all parties to the later treaty, “the treaty to which both States are parties governs their mutual rights and obligations.” Thus, if a country such as the United States fails to sign the Convention, it would be entitled to enforce its rights under the WTO to challenge a measure properly taken under the Convention.

As noted in the preamble to the INCD draft convention, in light of these constraints:

The best guarantee therefore that future trade commitments will not undermine the capacity of nations to protect and enhance cultural diversity, is for those commitments to be made only in respect of nations that are also Party to the Convention on Cultural Diversity, and which have explicitly acknowledged its primacy concerning matters of cultural diversity when conflicts arise with past or present trade obligations.

That strategy has been endorsed by informed commentators in this sphere and has been adopted by Canada, for one, which has taken the position that it will not undertake further commitments under the GATS that restrict its ability to achieve cultural policy objectives.

This is the context within which present proposals for addressing the relationship between the Convention and other instruments must be assessed. Present proposals have most recently been framed as Article 17 to the proposed Convention, which provides as follows:

ARTICLE 17 – RELATIONSHIP TO OTHER INSTRUMENTS

Option A

1. Nothing in this Convention may be interpreted as affecting the rights and obligations of the States Parties under any existing international instrument relating to intellectual property rights to which they are parties.

⁶ In a formal sense, international treaties such as the GATS, and the Convention, are about different subject matters. However it is clear that both regimes would often apply to the same measures, such as the domestic content requirement of a particular cultural product or service. Under international trade disciplines, such measures are often not permitted, yet they may be essential regulatory tools for accomplishing cultural diversity objectives. Hence the importance of addressing issues of characterization and conflict.

2. The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.

Option B

Nothing in this Convention shall affect the rights and obligations of the States Parties under any other existing international instruments.

Option C (proposal circulated in writing by the European Union and its member States)

1. Contracting Parties shall appropriately protect and promote diversity of cultural expressions in international instruments that could affect cultural diversity.

2. Bearing in mind the specificity of cultural goods and services, Contracting Parties shall respect, in interpreting and applying international instruments, the provisions of this Convention.

3. Contracting Parties shall foster mutual supportiveness between this Convention and other international instruments.

4. This Convention shall not be subordinated to other international instruments. Neither shall other international agreements be subordinated to this Convention.

To put it bluntly, both options “A” and “B” would subordinate the Convention to all existing international instruments and essentially defeat much of its purpose. While option “A” contemplates some moderation of pre-existing commitments, this qualification only comes into play where serious damage or threat to diversity can be demonstrated.⁷ Moreover, this qualification is unlikely to have much, if any, practical effect because it could not be raised in the context of a WTO dispute in any event.

This leaves option “C”, which we believe does, with some modification, present a credible basis for addressing this key issue. Each element of the proposed draft provision is important and worth noting.

1. Contracting Parties shall appropriately protect and promote diversity of cultural expressions in international instruments that could affect cultural diversity.

We note the similarity of this proposal to *the Council of Europe’s Declaration on Cultural Diversity* which calls upon members “to pay

⁷ The formulation of option A:2 is taken directly from the Convention on Biological Diversity, 5 June 1992. The relationship between the Convention and international trade agreements has been the subject of commentary by WTO bodies, see <http://www.biodiv.org/decisions/default.aspx?dec=IV/15>.

particular attention to the need to sustain and promote cultural diversity in other international fora where they might be called on to undertake commitments which might prejudice this instrument.”

This proposed provision also addresses the concern, noted above, that commitments not be made under international trade agreements that constrain the rights of parties to adopt appropriate measures to protect and promote cultural diversity.

Moreover, as noted in the preamble to the INCD's proposals, a Convention might also inform and qualify future commitments that may be made under such agreements as the GATS, or frame reservations under other trade agreements. This can be accomplished by making explicit reference to the Convention, and by incorporating its terminology and objectives as features of trade related commitments and proposals.

2. Bearing in mind the specificity of cultural goods and services, Contracting Parties shall respect, in interpreting and applying international instruments, the provisions of this Convention.

This proviso follows from, and we believe is necessary to give expression to, the *UNESCO Universal Declaration on Cultural Diversity*, Article 8 of which provides:

Cultural goods and services: commodities of a unique kind

In the face of present-day economic and technological change, opening up vast prospects for creation and innovation, particular attention must be paid to the diversity of the supply of creative work, to due recognition of the rights of authors and artists and to the specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods.

As noted, the possibility of conflicts between WTO disciplines and the Convention cannot be eliminated. Accordingly, it is important to build bridges between the two regimes where possible. For example, the Parties can promote the inclusion of the terminology, concepts and objectives of the Convention as part of the WTO framework. In addition to framing future commitments to explicitly acknowledge the legitimacy of goals relating to the protection and promotion of cultural diversity, it may be possible to include in the preambles to WTO Agreements reference to the legitimacy of sustaining cultural diversity.

3. Contracting Parties shall foster mutual supportiveness between this Convention and other international instruments.

Notwithstanding the potential for conflict between the goals of the Convention and those of trade liberalization, it is important to recognize that, as proposed, the Convention acknowledges the importance of ensuring the international exchange of cultural goods and services, and it explicitly embraces the principle of openness and balance with regard to diverse cultural influences, both nationally and internationally.

As noted by one informed commentator:

Current international draft agreements on cultural diversity show from the outset that they are based on a concept of cultural diversity affirming both the right of each culture to its own cultural expression and a necessary openness to the expression of other cultures. This concept is translated into legal terms as a basic principle calling for a balance between the promotion of national cultural expression and openness to other cultural influences. Without explicitly referring to openness to markets, which is the concern of the WTO, this principle allows us to see that there is no absolute antinomy between the two perspectives on the international circulation of cultural products, and opens the way to searching for common grounds of understanding where the two agreements complement one another, thus ensuring the preservation of cultural diversity.⁸

4. This Convention shall not be subordinated to other international instruments. Neither shall other international agreements be subordinated to this Convention.

This proposal seeks to establish the requirements of the Convention as being legally equal to those of other instruments. Precedents for such an approach can be found in the *Cartagena Protocol on Biosafety*, and the *International Treaty on Plant Genetic Resources for Food and Agriculture*.⁹

⁸ Bernier, *On the Relation of a Future International Convention on Cultural Diversity to Other International Instruments*, unpublished monograph.

⁹ For example, this legal equivalency is formulated by the *Cartagena Protocol on Biosafety* as follows:

Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,
Understanding that the above recital is not intended to subordinate this Protocol to other international agreements.

However, in light of the breadth and influence of international trade law, we believe there is a strong case for promoting the priority of Convention goals where conflicts arise with other international obligations which relate to the commercial, as opposed to the human rights dimension of cultural measures.

There are numerous precedents for such an approach including Article 103 of the *Charter of the United Nations*:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Framed in terms appropriate to the present case, this approach might be formulated as a revised subparagraph 4 and an additional subparagraph 5 to option “C” above, as follows:

4. Nothing in this Convention may be interpreted as affecting the rights and obligations of the States Parties under international law relating to the protection of human rights:
5. Subject to the requirements of paragraphs 1 and 2, this Convention shall not be subordinated to other international instruments.

It is also important to note that the dispute resolution provisions of the Convention can reinforce the objective of establishing the priority of the Convention as between parties to it, by requiring that they seek recourse under the Convention before invoking dispute procedures under other instruments relating to the same measures. Unfortunately, current proposals engender no such proviso and therefore undercut the influence the Convention might otherwise have where conflicts arise with the requirements of international trade regimes.

Accordingly the INCD may wish to propose the following amendments to Article 24 of the Convention (note: Settlement of Disputes is Article 20 in the INCD proposed Convention):

24.1 In the event of a dispute between States Parties concerning the interpretation or application of this Convention, including the right of a State Party to undertake actions in a manner consistent with its obligations under this Convention, the parties concerned agree to seek resolution of that dispute exclusively through the dispute settlement provisions of this Convention. This provision shall not apply to disputes arising out of actions taken or measures adopted by a party prior to the entry into force of this Convention.

24.5 [new] In the event of a dispute between a State Party and a State which is not a Party to this Convention, concerning an action taken or measure adopted by that State Party pursuant to this Convention, the State Party may seek from the Intergovernmental Committee an opinion on the consistency of its actions with its obligations under this Convention.

If the Intergovernmental Committee is to be accorded such an advisory role, it would be appropriate to amend Article 18.3 accordingly to add;

(i) to offer an opinion on the consistency of the actions of a State Party with its obligations under this Convention, if requested to do so under Article 24.5.

Given the powerful sanctions available under the WTO, it would be important to strengthen the provisions of the Convention if a reasonable balance between the commercial goals of trade liberalization and those of the Convention is to be achieved.

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