

The UNESCO convention on cultural diversity and the law of the World Trade Organisation: conflict or complementarity?

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- *Conflict, complementarity or both? This is the question about which this article is structured which, very briefly, explains the relations between the UNESCO Convention on the protection and promotion of the diversity of cultural expressions and the General Agreement on Trade in Services (GATS) of the World Trade Organisation. Adopting a legal perspective, the article presents the effects the UNESCO Convention has or could have on the law of the WTO. A brief analysis of the legal instruments in play also helps to clarify the difficult situation experienced at the intersection between commercial and cultural issues.*

Keywords

UNESCO Convention, World Trade Organisation, cultural diversity, audiovisual services, GATS.

The UNESCO Convention on the protection and promotion of the diversity of cultural expressions, better known as the UNESCO Convention on cultural diversity, came into force on 18 March 2007, less than a year and a half after it was passed. The ratification process for this legal instrument, which has been the fastest in UNESCO's history,¹ is indicative of how important this Convention has been since the start, when it still hadn't been decided what form it would adopt as a legal instrument nor its specific scope.

In this article, we will try to indicate the reasons why this legal text has moved beyond the frontiers of UNESCO and entered the area of international trade (more specifically, that of the World Trade Organisation or WTO) and even to what point legal instruments of a multilateral nature in the cultural sphere and the commercial sphere are contradictory or complementary.

The UNESCO Convention on the protection and promotion of the diversity of cultural expressions

Negotiations for the UNESCO Convention started in October 2003, when the UNESCO General Conference asked the Director General of the organisation to present a draft

¹ The 30 ratifications were achieved in little more than one year, this number being required by article 29 of the Convention for it to come into force. According to this article "This Convention shall enter into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States or regional economic integration organizations that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date. It shall enter into force with respect to any other Party three months after the deposit of its instrument of ratification, acceptance, approval or accession".

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convention to the general assembly of October 2005.² During the period of almost two years between the two dates, first there were meetings between groups of experts and then government representatives. As had been established, the Director General of UNESCO, Koichiro Matsuura, presented the report, which summarised the whole negotiation process and the draft of the convention, on the date planned.³ Negotiations continued up to the last minute in higher governmental spheres between those in favour of the Convention (led by the European Community and Francophone countries) and those against, who counted among their number countries such as the United States, which declared itself to be openly against the Convention because it believed its wording did not fit the objectives being pursued.⁴ Finally, on 20 October 2005, the UNESCO Convention on the protection and promotion of the diversity of

cultural expressions was passed, complementing the Universal Declaration on cultural diversity, also adopted by UNESCO on 2 November 2001.⁵

The Convention is made up of 35 articles and one annex (with 6 articles), which contains a conciliation procedure. The first part of the Convention (articles 1 and 2) establishes nine objectives and eight guiding principles that reflect the desire of those drawing up the text to strike a balance between protection and promotion.⁶

The scope of the Convention is quite broad because, as specified by article 3, "This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions".⁷ The rights and obligations of Parties are included in part IV of the Convention (articles 5 to 19). The key provision of the Convention is article 5, which recognises

- 2 UNESCO. *Desirability of drawing up an international standard-setting instrument on cultural diversity (17 October 2003)*, Resolution 32C/34, document UNESCO CLT/CPD/2004/CONF.201/5 [Online]. Paris: July 2004.
<http://portal0.unesco.org/culture/es/file_download.php/8bcd1880ce9b69485b00e7e9f3979de3Spa-Resolution32C34-conf201-5.pdf>
- 3 UNESCO. *Preliminary report by the Director-General setting out the situation to be regulated and the possible scope of the regulating action proposed, accompanied by the preliminary draft of a convention on the protection of the diversity of cultural contents and artistic expressions*, Resolution 33C/23, document UNESCO, [Online]. Paris: 4 August 2005.
<http://portal.unesco.org/culture/admin/file_download.php/33C23_Es.pdf?URL_ID=28182&filename=1124819722533C23_Es.pdf&filetype=application/pdf&filesize=177682&name=33C23_Es.pdf&location=user-S/>
- 4 The United States, when explaining their vote, strongly attacked the text of the Convention and classified it as "ill-defined" and the text as a whole as "deeply flawed, ambiguous and inconsistent". 33rd UNESCO General Conference October 17, 2005 - Statement by Ambassador Louise V. Oliver - Permanent Delegate of the United States of America - Explanation of Vote of the United States on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (As Delivered). [Online]
<http://unesco.usmission.gov/GC_09082006_Statement_10202005.cfm>
and Draft Resolution submitted by the United States of America to Item 8.3 – Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions and Report by the Director-General Thereon (As Delivered). [Online]
<http://unesco.usmission.gov/GC_09082006_Item83EX_10172005.cfm>
- 5 The Universal Declaration on cultural diversity contained guidelines on an action plan for applying this Declaration, among which was the evaluation of the desirability of drawing up an international standard-setting instrument on cultural diversity. This reflection is included in the UNESCO document *Preliminary Study on the Technical and Legal Aspects Relating to the Desirability of a Standard-Setting Instrument on Cultural Diversity*, Doc. 166EX/28, [Online]. Paris: 12 March 2003.
<<http://unesdoc.unesco.org/images/0012/001297/129718e.pdf>>
- 6 In this section we find principles such as the principle of international solidarity and cooperation (item 4 of article 2), the principle of the complementarity of economic and cultural aspects of development (item 5 of article 2), the principle of equitable access (item 7 of article 2) and the principle of openness and balance (item 8 of article 2). According to some authors, the Convention has managed to balance these two aspects. See BROUDE, T. "Comment: Cultural Diversity and the WTO: A Diverse Relationship". In: *ASIL Insight*, [Online], 21 November 2005. <http://www.asil.org/insights/2005/11/insightcomment051121_000.html>
- 7 Such a vague determination of the scope of application has been criticised. See HAHN, M. "A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law". In: *Journal of International Economic Law*, vol. 9, no. 3, September 2006. P. 24-25.

the “sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions [...]”.

The nature of the obligations has been debated at length. Most experts consider that, in the strict sense of the term, they are not obligations but undertakings or good intentions that may be difficult to put into practice.⁸ The very wording of the articles that go to make up the chapter dedicated to rights and obligations demonstrates this, as it uses expressions such as “each Party may adopt measures”, “Parties shall endeavour to create”, “Parties shall endeavour to strengthen”, “Parties shall endeavour to integrate”, “Parties shall endeavour to support”, “... shall facilitate”, etc.⁹

The provisions that cover the relations of the Convention with other legal instruments can be found towards the end of the articles, in articles 20 and 21. This point was the focus of the negotiations as it was one of the most delicate. The final wording of article 20 is proof of this, because it strikes a difficult balance of relations based on concepts such as mutual supportiveness, complementarity and non-subordination.

The main weak point of the Convention lies in its lack of executability. In other words, although it is a legally binding text, its obligations are difficult to carry out.¹⁰ Moreover, there is no mechanism to resolve differences. The only mechanism provided is a conciliation procedure that not only is not binding but is also optional.¹¹

Audiovisual services and the General Agreement on trade in services of the World Trade Organisation

At the same time as the negotiations for the UNESCO Convention, negotiations were also being carried out at the WTO within the context of the round of negotiations called the Doha round. Unlike the previous round of negotiations (the Uruguay round), the audiovisual sector has not been observed in the current round. This is not an issue exclusive to the audiovisual sector but to the services sector. The WTO negotiations are carried out en bloc, and an agreement is only reached when agreements have been reached in all the fields.¹² In the current round, suspended since July 2006, there is a negotiation blockade in the areas of agriculture and access to industrial product markets that has paralysed negotiations in the rest of the sectors, including the services sector.

The degree of commitment in the audiovisual sector was very low at the Uruguay round,¹³ a trend that has been reversed in the case of later members joining. Of the 23 states joining the WTO after the Uruguay round, 11 established commitments in the audiovisual sector and 17 of these 23 included measures in the annex of exemptions to the principle of most favoured nation. This principle means that all foreigners must be treated in the same way, thereby avoiding discrimination among foreigners. This principle is

8 BERNIER, I.; RUIZ-FABRI, H. “Synthèse résumée des analyses et commentaires sur l’avant projet de Convention sur la protection de la diversité des contenus culturels et des expressions artistiques”. [Online] <http://www.francophonie.org/diversiteculturelle/fichiers/aif_synthese_ruiz_bernier_septembre2004.pdf>

9 Articles 6, 7, 12, 13, 14 and 16 of the Convention on the protection and promotion of the diversity of cultural expressions.

10 See GERMANN, C. “Towards a Global Cultural Contract to counter trade related cultural discrimination”. In: OBULJEN, N.; SMIERS, J. (ed.) *UNESCO’s Convention on the Protection and the Promotion of the Diversity of Cultural Expressions: Making it Work*. Zagreb: Institute for International Relations, 2006 and HAHN M., V. note 5 and GRABER, C. B. “The New UNESCO Convention on Cultural Diversity: In Counter-balance to the WTO?”. A: *Journal of International Economic Law*, vol. 9, no. 3, September 2006. P. 553-574.

11 Item 4 of article 25 provides that states, when ratifying, accepting, approving or accessing the Convention, can declare that they do not recognise the conciliation procedure provided for in the annex. To date, only Chile and Vietnam have not recognised this procedure.

12 This is what is called a *single undertaking*.

13 Only 18 states agreed undertakings. On the other hand, with regard to exemptions to the principle of most favoured nation, which are those allowing film or television co-production agreements a place in the multilateral trade system, a lot of states recorded such exemptions (35 states). This gives an idea of the high level of protection granted by the states to the audiovisual sector.

very important in the audiovisual sector as, according to this principle and as an example, co-production agreements would not be possible. The annex of exemptions to the principle of most favoured nation has meant that co-production agreements are considered legitimate within the WTO framework, provided the states have made the corresponding exemptions.

In the current round, the negotiating mandate given by the Council of the European Union to the European Commission has continued to exclude the audiovisual sector from the topics the Commission can negotiate.¹⁴ Canada has maintained a similar position. On the other hand we find the Friends of Broadcasting. This group is made up of countries that wish to advance in the processing of liberalising the audiovisual sector.¹⁵ There are groups in different sectors, among them the audiovisual sector. Some of the demands are: more liberalisation of production and distribution services for films and videos, as well as within the sector of promotion and of advertising services and film projection services, the elimination of quotas and restrictions to foreign investment and the elimination of discriminatory behaviour with regard to tax treatment and the granting of licences.

It is worth noting the strategy adopted by the United States in the initial offers, where some specific audiovisual sectors were reclassified, such as the production and broadcasting of radio and television programmes within the section of telecommunications services. Also of note is the introduction of the word “entertainment” linked to the audiovisual sector. In this respect, projection services had to be transferred to the section of “other recreational services”. These manoeuvres illustrate the United States’ desire to obtain a greater degree of liberalisation, transferring audiovisual sectors to other more liberalised categories such as telecommunications and cultural and recreational services.

Another factor to bear in mind when talking about the audiovisual sector and the WTO is the degree of liberalisation obtained in the sector through other means, more specifically bilateral and regional trade agreements. Given the stagnation experienced by the multilateral sphere, bilateral initiatives have turned out to be the exit for all those wishing to see liberalisation advanced in certain sectors where advances in scarce at the WTO, such as broadcasting.¹⁶

Relationship between the UNESCO Convention and the GATS: conflict or complementarity?

Throughout the whole negotiation process for the UNESCO Convention a lot has been spoken about what the effect would be on WTO law. There are opinions, principally from the cultural sector, that want to give it a role that it cannot assume: that of an instrument to modify WTO law. They forget that this Convention is not applied in a vacuum but in a prior context within which states have assumed other commitments at an international level. It is within this scenario, characterised by a mesh of international obligations, where it must be determined whether the UNESCO Convention and the WTO agreements, and more specifically the GATS, co-exist in conflict or complementarity.

To determine whether the relations between the UNESCO Convention and the GATS are conflictive, first we must define the term “conflict” within the context of international law. Doctrine has dealt with this issue extensively and has revealed differing opinions concerning the understanding of “conflict of norms”. In an article of these characteristics, we cannot pursue this point but we should mention, albeit briefly, the options proposed by doctrine. In the strict meaning of the term, it is understood that there is “conflict”

14 LAMY, P. *L'Europe en première ligne*. Paris: Seuil, 2002. P.135

15 The Friends of Broadcasting group is made up of the United States, Chinese Taipei, Hong Kong, China, Taiwan, Japan, Mexico and Singapore.

16 The case of the United States is a perfect example of resorting to bilateral means to achieve liberalisation, which cannot be achieved multilaterally. See BERNIER, I. “The recent free trade agreements of the United States as illustration of their new strategy regarding the audiovisual sector”, 2004. [Online]
<http://www.mcc.gouv.qc.ca/diversite-culturelle/eng/pdf/conf_seoul_ang_2004.pdf>

when the obligations that come from a rule impede the compliance of obligations coming from another rule to which the state is also a party. It is therefore impossible to comply with both obligations simultaneously. In a broader sense, conflict occurs when the obligations coming from one rule prevent a right from being exercised that comes from another rule to which the state is also a party. In this article, the option chosen has been that of conflict in its broader sense, i.e. two rules are in conflict when one constitutes, has caused or could cause a violation of the other.¹⁷

In the case in point there is, on the one hand, a text that includes rights and obligations, such as the GATS and, on the other hand, a UNESCO Convention composed basically of rights. What remains at the heart of the UNESCO Convention is precisely the sovereign right of states to formulate and apply their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions. Consequently, we should disregard conflict in its strict sense, given that there are not two obligations (one in the GATS and the other in the UNESCO Convention) whose simultaneous compliance is incompatible. With regard to “conflict” in the broader sense of the term, we should note that this does not necessarily occur. The definition of this kind of conflict takes into account those cases in which exercising the right provided by a rule necessarily involves the violation of an obligation provided by another rule. The only possibility to avoid the conflict would therefore be to stop exercising the right.¹⁸ But in the case of the UNESCO Convention and the GATS, exercising the rights contained in the Convention does not unfaithfully lead to the violation of the obligations contained in the GATS. Whether there is conflict or not will depend on how the right is exercised (i.e. on the cultural policy measure that is to be adopted) and on the situation of the state in particular in the GATS.¹⁹

Having examined the “conflictive” aspect of the relationship, we should not forget the side of “complementarity”. Does this potentially conflictive relationship annul the possible complementarity of the two texts? In no way. Firstly, because article 20 of the UNESCO Convention recognises complementarity as one of the concepts that must govern the relationship with the other instruments (together with mutual supportiveness and non-subordination). No-one doubts that audiovisual services have a dual component, cultural and commercial. The applicable regulation must therefore take into account this dual component and must come from the two spheres in which audiovisual services are located: the commercial and the cultural sphere. The greater or lesser degree of success in how complementarity is achieved does not eliminate the need for coordination between the two regulatory sources. In fact, this aspect does not form part of the Convention’s success. Although there were consultations between UNESCO and the WTO, the World Intellectual Property Organisation (WIPO) and the United Nations Conference on Trade and Development and there was an exchange of ideas, in reality these contacts were reduced to mere formalities, where there was no true exchange but rather a defence of the spheres of powers of each organisation, especially in the case of the WTO. We might say that instead of “sharing” they dedicated themselves more to “competing”. This “struggle” was not limited to just the organisations but was reproduced in the states themselves, between the departments in charge of culture and trade, respectively.

What we have explained so far allows us to state, therefore, that conflict between the UNESCO Convention and the GATS is not inevitable.

Firstly, because the rights provided in the UNESCO Convention can be exercised in a way so that the obligations

17 PAUWELYN, J. *Conflict of laws in public international law: How WTO law relates to other rules of international law*, Cambridge: Cambridge University Press, 2003. P.175.

18 Waiving the exercising of a right (with the consequent non-violation of an obligation provided by another rule) is seen by those in favour of a strict definition of conflict as a “non-conflict”.

19 We should remember that the GATS is a flexible agreement that has basic rules of general application and lists of undertakings where the states determine for which sectors and to what extent the principles of access to markets and national treatment are applied, and an annex where measures can be included that are not compatible with the principle of most favoured nation. Each state therefore has a particular situation according to its annotations in the corresponding lists and annexes.

contained in the WTO agreements are not violated. Obviously, this won't always be the case (all will depend on the cultural policy measure to be applied and the undertakings with the WTO of the state in question) but, in principle, there is no inherent conflict between the two international instruments in legal terms.²⁰

Secondly, many countries have not listed undertakings in the audiovisual sector within the framework of the GATS and, therefore, are not bound by the obligations of access to the market and national treatment. If we add the exemptions to the principle of most favoured nation we obtain a highly favourable situation, because these states develop their cultural policies with a very significant margin of freedom regarding their obligations at a commercial level. We must remember, however, that part IV of the GATS agreement establishes the principle of progressive liberalisation as a guiding principle for negotiations. According to this principle, in each round the negotiations should produce advances in liberalisation, and audiovisual services would be no exception.²¹

Thirdly, we should note that even those states that have adopted undertakings in the GATS in the audiovisual sector can have significant room to manoeuvre. All will depend on the depth and scope of the undertakings. The GATS system allows a highly varied level of commitment once a sector has been added to the list.

Lastly, the fact that many states have ratified the UNESCO Convention reduces the probability of conflict generated by adopting a restrictive trade measure accepted on the basis of the Convention. In other words, a state that has ratified the UNESCO Convention will not attack a cultural measure adopted by another state based on this Convention, as the mere fact that both have ratified the Convention implies that they agree with its principles and objectives.

So what is the role played by the UNESCO Convention concerning WTO law? In order to determine this we must take into account the provisions concerning relations between treaties, which have taken on a key role as international law has become more fragmented. In spite of the specialised powers of international organisations, their spheres of action are never completely isolated from the rest. This explains why, in such a globalised world as ours today, there are some policies that are within the sphere of action of more than one organisation. The trade of audiovisual products is a clear example of this, as it is at the intersection between the powers of the WTO and of UNESCO.

International treaties usually include provisions concerning possible overlaps with other legal instruments. If this were not the case, customary international law would apply in the form of article 30 of the 1969 Vienna Convention on the Law of Treaties (VCLT), concerning the application of successive treaties to the same subject matter. This article is applied even when the subject matter of the treaties is not identical. The treaties only have to deal partially with the same subject matter (as is the case of the WTO and UNESCO).

Article 30 of the VCLT provides for two situations:

- Relations between states that are parties to both treaties (e.g. relations between Canada and India, which are party to the UNESCO Convention and to the GATS): in this case, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.²² This is called the *lex posterior* principle (when later law prevails over earlier law in those areas where there is incompatibility).
- Relations between states that are only parties to one treaty and states that are party to both treaties (e.g. relations between the United States and India). In this case, the *lex posterior* principle does not apply and the treaty

20 This is probably a case of conflict of systems ruled by different objectives and values but not a conflict of rules per se.

21 The Recommendations of the Service Trade Council in its Extraordinary Session contained in the Decision adopted by the WTO General Council on 1 August 2004, known as the “July Package”, mention the desire to progressively achieve higher levels of liberalisation without excluding a priori any service sector or any means of supply. Annex C paragraph d). [Online]. Geneva: World Trade Organisation.
<http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm>

22 Vienna Convention on the Law of Treaties, document of the United Nations A/CONF.39/27 (1969), 1155 UNTS 331, 23 May 1969, Vienna, item 3 of article 30.

to which both states are parties governs (in this case the GATS).²³

In the case of UNESCO-WTO relations, these principles of customary international law would not solve the possible contradictions between the two treaties, given their different nature (the WTO agreements are commercial in nature while the UNESCO Convention is cultural) and the scope of application is different (WTO agreements are concerned with multilateral trade whereas the UNESCO Convention is concerned with protection and promoting the diversity of cultural expressions). Therefore, other principles of general law need to be used, such as the *lex specialis* principle, which establishes that the most specific provision has priority. What problem does the *lex specialis* principle present? Well, that the greater or lesser specificity of a rule depends on the specific case being dealt with. Consequently, no rule can be characterised *ex ante* as general or specific in abstract, without taking into account the situation in which it must be applied.²⁴

Before examining properly how relations are regulated between the UNESCO Convention and the GATS, it is worth establishing the difference between the states that have assumed undertakings in the audiovisual sector with the GATS and the states that have not done so, as the situation varies considerably.

On the one hand, those states that have not assumed

undertakings in the audiovisual sector maintain room to manoeuvre, as they are not subject either to the principle of market access²⁵ or to the principle of national treatment.²⁶ And if they have also established exemptions to the principle of most favoured nation, their degree of autonomy increases for determining cultural policies.²⁷

The situation is complicated in the case of states that have adopted undertakings in the audiovisual sector, as they would encounter difficulties when exercising the rights provided in the UNESCO Convention without violating any of the undertakings assumed within the framework of the WTO.

Point 1b of article 20 of the Convention must be taken into account when interpreting WTO law. What does “take into account” imply and what scope does it have? Is it truly relevant? Four possibilities can be proposed within this context: consider the UNESCO Convention as a criterion of international law (item 1 of article 31 VCLT), as an interpretative criterion (point 3c of article 31 VCLT) or as a fact that helps to determine the nature of a measure or as a legal autonomous defence.

a. *The Convention as a criterion of international law*

Item 1 of article 31 VCLT establishes that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty within its context and in the light of its object and purpose. According to this provision, the UNESCO Convention

23 *Ibid.*, item 4 of article 30.

24 INTERNATIONAL LAW COMMISSION. *Fragmentation of International Law. Topic (a): The function and scope of the lex specialis rule and the question of 'self-contained regimes': An outline*, [Online] <http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf>

25 According to the market access principle, the limitations established in article XVI of the GATS can only be set if the state indicates this in the lists. The limitations provided are: limitations to the number of service providers (e.g. limiting the number of service providers for film distribution to three foreign firms), limitations to the total value of assets or service transactions (e.g. establishing a value of transactions above which foreign firms cannot continue operating), limitations to the total number of services or to the total amount of production of services, limitations to the total number of individuals that can work in a specific sector, measures that limit the kind of body corporate (e.g. require that TV production houses be limited companies) and limitations to the percentage of foreign capital (e.g. establish that companies providing film projection services cannot be made up of more than 30% foreign capital).

26 The national treatment principle means that national and foreign services and service providers must be treated equally.

27 It's worth remembering once again the principle of progressive liberalisation that governs these negotiations, which has been mentioned previously.

can be used to interpret the terms related to cultural diversity included in the WTO agreements (in the context of controversy). In this case, the UNESCO Convention would be similar in use to a dictionary.

b. The Convention as an interpretative criterion

According to point 3c of article 31 VCLT, a treaty must be interpreted taking into account, among other aspects, the international law applicable in the relations between the parties. This means that the UNESCO Convention should be taken into account when interpreting WTO law in those cases where the states involved are parties to both treaties. According to some authors, it's not necessary for the non-WTO rule to be ratified by all WTO members but that it should at least be implicitly tolerated or accepted by all and that it should express the intentions or common meaning given by all members. In the case of the UNESCO Convention, the fact that the United States has declared itself decisively to be against the Convention from the start makes it impossible for it to be considered as a common reference accepted by all WTO member states.²⁸

If this option is rejected, it is even more difficult to use the most common interpretation among authors and that supported by the WTO's Appellate Body, which would mean that all WTO members would have to ratify the UNESCO Convention in order for it to be used as an interpretative criterion.

c. The UNESCO Convention as a fact that determines the nature of a measure

The UNESCO Convention could be taken as a fact that would help to fix the nature of a measure examined by the decision-making bodies of the WTO.²⁹ For example, if there were a controversy where a measure of cultural policy of a WTO member state was considered to be in violation of the WTO agreements, the defendant could

use the UNESCO Convention to prove that the measure in question is cultural in nature.

d. The Convention as autonomous legal defence

This last possibility is the most controversial and is currently not accepted by the decision-making bodies of the WTO. According to the authors in favour of this possibility, the UNESCO Convention could be used as an autonomous legal defence in relations between the states party to it. In this way, the Convention would serve to justify the adoption of measures that violate WTO obligations.

Having examined the possibilities for the UNESCO Convention to be taken into account when interpreting WTO agreements, we need to see which WTO provisions could be interpreted using the UNESCO Convention. And it is at this point where we find one of the main obstacles: in principle, there is no term within the WTO agreements that could provide a link between the resolution of WTO controversies and the UNESCO Convention. Unlike the environment and health, culture does not have a general exception within the articles of the GATS. This exception would be the one that would give cause for the Convention to enter. It's difficult to find in the WTO agreements other terms that might serve as an entrance to the Convention. The expression "respect for national policy objectives" might give cause for the protection and promotion of the diversity of cultural expressions considered as a national policy objective, as has occurred in other texts, such as the UNESCO's Universal Declaration on cultural diversity and the Declaration on cultural diversity of the Council of Europe. Another concept is that of "sustainable development" which, according to the WTO's own Appellate Body, is a concept subject to an evolving interpretation and must be understood according to the contemporary concerns of the community of nations.³⁰ If we consider the large majority of

28 See above, note 4.

29 Comments by Gabrielle Marceau in ICTSD/RUIG-GIAN Meeting "The Mexico Soft Drinks Dispute: Implications for regionalism and for trade and sustainable development", [Online]. Geneva: World Meteorological Organisation, 30 May 2006. <http://www.ictsd.org/dlogue/2006-05-30/dialogue_materials/Gabrielle_Marceau_speaker_notes.pdf>

states that have adopted and ratified the UNESCO Convention, we might interpret that cultural diversity has become one of the “contemporary concerns of the community of nations”. Some declarations and international treaties have already considered cultural diversity as an essential element in sustainable development.³¹

Point 1b of article 20 of the UNESCO Convention stipulates that it must be taken into account in future WTO negotiations. What effects might the Convention have on these negotiations?

With regard to the Doha round, one effect already caused by the Convention is that of stopping negotiations in the audiovisual sector. As we have already mentioned, the pace was already slow but the negotiations of the UNESCO Convention have acted as a brake, awaiting the final text of the Convention.

In addition to acting as a brake to liberalisation, the Convention can also act as an incentive to redirect negotiations in horizontal disciplines, principally regarding subsidies, towards considerations of a more cultural nature.

It is currently difficult to determine whether the UNESCO Convention will have the force to produce changes in the articles of the WTO agreements so that cultural considerations might be introduced within the framework of the multilateral trade negotiations. Right now, these changes seem improbable but they should not be rejected. One option might be for states to introduce references to the Convention in their lists of undertakings in order to incorporate the text by reference. Another option might consist of making amendments to the text of the WTO agreements, such as the introduction of an exception concerning cultural diversity

or the introduction of certain requirements, such as the presence of cultural experts when resolving controversies related to cultural issues,³² or introduce a sector-based annex covering specific issues of the sector. Cultural considerations could also be introduced in the preamble to the Agreement establishing the WTO, as occurred with the mention of sustainable development. At the moment, however, these options do not seem probable in the short or medium term.³³

Conclusions

Potential conflict and natural complementarity. This is the diagnosis with regard to the relations between the UNESCO Convention and the GATS. In legal terms, conflict between the two legal instruments is not inevitable, although potentially it can arise depending on how the rights are exercised provided for in the Convention and according to the undertakings of the states at an individual level within the context of the GATS. On the other hand these are complementary texts, as they represent the two sides of the same coin. The task remaining is how to put this complementarity into practice through the appropriate channels of cooperation and coordination, without these channels being seen by organisations as gaps through which they might lose part of their powers. In the case of UNESCO and the WTO, these are organisations with clearly defined operations and powers, whose authority should not be seen as jeopardised by taking into account elements outside their framework of action. Until this is done, the treatment of audiovisual ser-

30 WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, report by the Appellate Body, Document WT/DS58/AB/R, 12 October 1998, paragraph 129, p. 48 and PAUWELYN, J., *The UNESCO Convention on Cultural Diversity and the WTO: Diversity in International Law-Making?*, [Online] ASIL Insight, 15 November 2005. <<http://www.asil.org/insights/2005/11/insights051115.html>>

31 UNESCO. Universal declaration on cultural diversity, article 11, and Convention on the protection and promotion of the diversity of cultural expressions, article 6; COUNCIL OF EUROPE. Declaration on cultural diversity; Implementation plan of the world summit on sustainable development.

32 This has already been carried out in the field of financial services.

33 The reason is the two thirds majority required to make these amendments. Article 10 of the Marrakech Agreement establishing the World Trade Organisation. [Online] <http://www.wto.org/spanish/docs_s/legal_s/04-wto_s.htm>

vices will be partial and therefore will not respond to the challenges provided by the reality in this field.

In spite of the numerous “grey areas” of the UNESCO Convention, its entry into force is very positive, as it has managed to focus attention on the existing problems between trade and culture and to promote the protection and promotion of cultural diversity. The UNESCO Convention has placed cultural aspects in the centre of debates in non-cultural forums, especially in the case of developing countries. The fact that the Convention was adopted by the vote in favour of 148 states, with only two votes against and four abstentions³⁴ and, furthermore, has entered into force in record time and whose pace of ratification is much faster than UNESCO’s average, gives an idea of the importance given by the states to the question of cultural diversity.³⁵

The greater or lesser relevance of the UNESCO Convention will be determined by its implementation and by the number of ratifications that may be achieved over the next few years. This last aspect will be key to the Convention gaining weight within the context of international law as a text that represents a common concern among the members of the international community.

For the moment, however, we will have to content ourselves with seeing how the Convention is implemented in practice and how it is applied at the different levels of government (national, regional and local) and in the relations between the states in order to assess its true force.

34 The votes against were from the United States and Israel, and Australia, Liberia, Honduras and Nicaragua abstained.

35 To date, 83 states have ratified the UNESCO Convention (most of which are developing countries) and one organisation of regional economic integration (the European Community).