A CLASH OF CULTURES? THE UNESCO DIVERSITY CONVENTION AND INTERNATIONAL TRADE LAW

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ABSTRACT
The adoption, on 20 October 2005, of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Diversity Convention) has returned the limelight to the suitability of World Trade Organization (WTO) rules for cultural products. This article shows that the Diversity Convention, while an important step towards the recognition of cultural diversity as an internationally recognized public choice of states, does not affect the rights and obligations of WTO Members as such. The original purpose of the Convention was to create a safe haven for cultural policies and protect them from WTO disciplines. However, the central operative provision for bringing about the desired shielding effect for domestic policies safeguarding national cultural industries against foreign competition, its now-article 20, while making a general claim to non-subordination in paragraph 1, modifies this broad statement in paragraph 2 so as to only apply to treaties concluded at the same time or later. The article explores how to avoid or minimize an undesirable incongruence between liberal trade rules and the right of states to protect shelf-space for domestically produced cultural products.

INTRODUCTION
When the Uruguay Round came to a close, in late 1993, after a bitter and loud row over the cultural exception, both sides of the dispute claimed victory: France and Canada stressed the achievement that – with the exception of the United States and New Zealand – no developed country had entered into any serious commitments for cultural products under the General Agreement on Trade in Services (GATS) and had not listed extensive exemptions to the most-favoured-nation-principle (MFN).1 The United

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1 For an excellent overview, see WTO, Audiovisual Services Background Note by the Secretariat, WTO Doc. S/C/W/40, 1998, passim.
States emphasized that it had prevented the insertion of a cultural exception into the World Trade Organization (WTO) Agreement. Somehow, most commentators then subscribed to an optimistic version of the bicycle theory of international trade and assumed that things would move on: It was widely expected that ‘addressing the thorny issues raised by trade in cultural products will be a priority in the next round of WTO negotiations’ and that 10 years or so down the line the quarrels about l’exception culturelle would be a distant memory.

With the privilege of hindsight, we know by now that it has been a different story. The subject of trade and culture has not gone away. In particular, the question how to reconcile liberal trade rules and the wish of states to influence what is offered to its people in radio, television and cinemas have remained highly contentious. Thus, e.g., Canada declared in the early days of the Doha-Round that it would refrain from any offer for liberalising trade in audio-visual services until a new multilateral instrument would have brought security and predictability for Canada’s cultural policy.

On 20 October 2005, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Diversity Convention) was adopted by United Nations Educational, Scientific, and Cultural Organization’s (UNESCO) general conference: 148 members of UNESCO supported the final draft, with only Israel and the United States voting against and Australia, Honduras, Liberia and Nicaragua abstaining. While Canada claimed that its pertinent goals had been achieved (‘this instrument confirms the right of countries to protect and promote the diversity of cultural expression and thus to support the work of our stage and film artists, as well as our writers’), the United States castigated ‘ambiguities’ in the Diversity Convention which, it claimed, could be used by states to deny human rights and fundamental

4 Communication from Canada – Canadian Initial GATS Sectoral/Modal/Horizontal Negotiating Proposals, WTO Doc. S/CSS/W/46, 14.3. 2001: ‘Canada will also not make any commitment that restricts our ability to achieve our cultural policy objectives until a new international instrument, designed specifically to safeguard the right of countries to promote and preserve their cultural diversity, can be established’.
5 The adoption of the Convention entails no legal obligations, as it is subject to ratification.
6 The Australian Minister’s positions seem to have been influenced by the perception that not enough effort had been put into negotiat ing in good faith with the United States, cf. his address to the 33rd session of the UNESCO General Conference, Plenary Session, 5 October 2005, http://www.minister.dctia.gov.au/kemp/media/speeches.
freedoms. In particular though, the US ambassador saw potential for the Diversity Convention being used as an excuse for WTO-incompatible ‘barriers to trade in goods, services or agricultural products’.

Both statements seem less than precise reflections of the status quo (post-universal ratification of the Diversity Convention). This article shows that the Diversity Convention, while an important step towards the recognition of cultural diversity as an internationally recognized public choice of states, does not affect their rights and obligations as such under WTO law. Because this does not follow from a desirable parallelism of policies but, rather, from a WTO-favouring conflict clause, this article will address whether and how the interpretation of WTO rules could in the future be informed by the Diversity Convention.

I. FACTUAL BACKGROUND

Almost all states expressing support for the UNESCO Convention are members of the WTO. They have subscribed to the idea that free trade, on balance, benefits them. While the social costs of free trade are often considerable, WTO members understand that liberal trade rules allow consumers’ choice and will increase overall welfare. However, with regard to cultural goods, in particular music recordings of any kind and audio-visual products, the (sometimes quite fragile) consensus that rule-based free trade is overall beneficial does not exist. The Canadian position on these matters – everything but culture – is only the most vocal expression of this view shared by most nations, including states which, like Canada, are otherwise on record as solid ‘free traders’. It seems fair to say that the reasons for this reluctance are mostly non-economic in nature. Rather, governments and elites perceive a

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9 See sources above n 8 and the rather faith-based analysis, co-authored by a Special Assistant to the present Vice-President of the United States, J. Smith and H. Dale, ‘Cultural Diversity and Freedom at Risk at UNESCO’, http://www.heritage.org/Research/InternationalOrganizations/wm885.cfm. For statements of the same calibre, but with a different twist, see the many Websites proclaiming a victory against the evil handmaiden of capitalism, the WTO, for the benefit of safeguarding valuable domestic cultures against the onslaught of American trash culture, e.g. http://www.incd.net and http://www.cdc-ccd.org.

10 Several exceptions in GATT and other WTO Agreements deal specifically with these societal costs, in particular because of domestic industries closing down and workers made redundant due to increased foreign competition; see e.g. Art. XIX GATT and the Safeguards Agreement.


12 Which does not exclude that domestic industries will try to exploit this situation for their benefit. For a comprehensive overview, see Chr.–B. Graber, Handel und Kultur im Audiovisionsrecht der WTO: Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Mediennordung (Berne: Stämpfli-Verlag, 2003), passim; T. Voon, Cultural Products and the World Trade Organization (forthcoming).
danger of cultural impoverishment through loss of home-grown cultural offerings and, consequently, cultural hegemony by the most successful producer of cultural goods, the United States. The ubiquity of American pictures and sounds is widely believed to have negative impact on the host society’s ability to produce and market its own popular expressions of culture. This fuels the fear that a populace growing up on American moving pictures and music videos will lose touch with its cultural roots, as a possible extinction of domestically produced cultural products would go hand in hand with a replacement by voices, stories and pictures that do not reflect the societal environment of their viewers. The fact that the heaviest consumers of television tend to be either very young or socially disadvantaged adds another concern to the analysis of this situation. Even the Motion Picture Association of America (MPAA) has by now accepted that sovereign states have a legitimate interest to ensure ‘that their citizens can see films and TV programs that reflect their history, their cultures and their languages’.13

At a fundamental level, this argument touches upon the sovereign right of states to maintain ‘effective government’ and thus protects their very existence: People who know little about their society and the state they are living in are not the perfect cast for a responsible role in any discourse-based form of state governance. Even liberal New Zealand – the only first-world country other than the United States to have entered into substantial GATS commitments with regard to audio-visual and broadcasting services – takes the view ‘that in a globalizing world, where CNN reports the news across the planet and internationally-sourced programming is cheaper than locally produced material’, the Government has the ‘responsibility to ensure our publicly owned channels reflect New Zealand interest, tell New Zealand stories and interpret foreign events through our eyes’.14 At stake are, according to this view, ‘the fostering of democracy and public debate, and the development of New Zealand’s cultural identity’.15 Pertinent statements by the European Communities (EC) or Canada reflect the same view of things: Cultural goods and particularly the ‘audiovisual media

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14 New Zealand Minister of Broadcasting, as quoted in NZ on Air (ed.), *Five Year Strategic Plan* (2003) 8.

15 New Zealand’s Broadcasting Policy, as quoted in NZ on Air, above n 14; see also COM(1999) 657 final, Principles and Guidelines for the Community’s audio-visual policy in the digital age, 7 ff:

> [t]he audiovisual media play a central role in the functioning of modern democratic societies. Without the free flow of information, such societies cannot function. Moreover, the audiovisual media play a fundamental role in the development and transmission of social values, this is not simply because they influence to a large degree which facts about and which images of the world we encounter, but also because they provide concepts and categories – political, social, ethnic geographical, psychological and so on – which we use to render these facts and images intelligible. They therefore help to determine not only what we see of the world but also how we see it. The audiovisual industry is therefore not an industry like any other and does not simply produce goods to be sold on the market like other goods. It is in fact a cultural industry par excellence. It has a major influence on what citizens know, believe and feel and plays a crucial role in the transmission, development and even construction of cultural identities. This is true above all with regard to children.
play a central role in the functioning of modern democratic societies and in the development and transmission of social values. They have major influence on what citizens know, believe or feel.\textsuperscript{16} Scepticism about the application of general trade rules to cultural policy is not the least reflected by the (perfectly legal\textsuperscript{17}) quasi-universal non-application of GATS rules to cultural services and the ‘efforts by some key participants in the [Doha Round] negotiations to create an \textit{a priori} exclusion for such an important sector’ from the negotiations.\textsuperscript{18}

There is no question that audio-visual products reach most people more directly than other media and thus have a higher potential to influence behaviour. This specific quality is further enhanced by the extremely high consumption rate: Average Europeans watch television some three hours per day, and the pertinent numbers in other OECD countries do not deviate much.\textsuperscript{19} The popular French description of a Parisian working person’s life – ‘metro, boulo, dodo’\textsuperscript{20} – obviously fails to capture the full picture of an average French life, of which ‘telé’ is a very significant part.\textsuperscript{21}

The reasons for the pertinent dominance of the U.S. audio-visual industry go beyond the scope of this article.\textsuperscript{22} Suffice to say that the size of its market, its marketing strength and the fact that English is today’s \textit{lingua franca} allow significant economies of scale. Also, ‘Hollywood’ has not just cheap but also very

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\textsuperscript{17} See Article II:2 GATS.


\textsuperscript{19} The European figures range form slightly over 2.5 hours per day (Austria: 153 minutes) to over 4 hours (Spain: 262 minutes); see Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, ‘The Future of European Regulatory Audiovisual Policy’, 15 December 2003; COM(2003) 784 final, 4.

\textsuperscript{20} I.e. commuting with the subway from and to work, work and sleep.

\textsuperscript{21} According to the statistics cited supra, French viewers will on average spend more than 3 hours per day before their television set.

\textsuperscript{22} The reasons of the American dominance in that field are various and well explored in the literature: They are, \textit{inter alia}, a consequence of Europe’s inability to keep the peace in the first half of the 20th century, of the United States remaining the world’s preferred destination for immigrants, of the American industry’s ability to attract talent from all over the world, of the size and wealth of the US market and last not least of the long-standing reciprocal support the US film industry and the US government extend to each other. The huge successes of US literary productions indicate that the US cultural appeal is not limited to sounds and pictures.
\end{footnotesize}
attractive products. Finally, the US audio-visual industry has always enjoyed strong support by various branches of the US Government.

The tension between ‘free trade’ and ‘protection of access to local cultural products’ has been discussed since more than 10 years. The new instrument on cultural diversity could have been a bridging exercise between those two policy goals. And when reading pertinent documents published by those promoting the Diversity Convention, it seems to deliver insofar, because it allegedly represents a ‘consensus on . . . recognizing the role and legitimacy of public policies in protecting and promoting cultural diversity, to recognizing the importance of international cooperation’. One does not need a law degree to realize that the term consensus is loosely employed here, describing just the (partial) consensus among those who voted for the adoption and not the consensus of all UNESCO (or, for that matter, WTO) members: In particular, the US absence directly affects the standing and persuasive force of the Diversity Convention, given that the United States is one of the world’s three leading economies and home of its most successful entertainment industry.

While it is thus clear that the consensus proclaimed is wishful thinking at best, the exact impact of the Diversity Convention and its ‘ambiguities’ require further analysis.

II. ‘FREE TRADE’ AND ‘CULTURAL GOODS’

A. Trade as a precondition for cultural diversity

Trade and cultural diversity are not natural enemies, to the contrary. Historically and even as of today, they typically are two sides of a coin: Books, recorded music, films and artwork are locally produced and will be consumed locally – unless they are traded. Cultural diversity only happens if people, goods and services move across borders. Foreign books, international art fairs, film festivals or the performances of foreign orchestras and theatre companies might provide unique, sensational or, yes, life-changing experiences. But for the purposes of WTO legal analysis, these activities wear the labels ‘trade in goods’ and ‘trade in services’.

Trade is supposed to lead to more choice for consumers. Nowhere is the increased choice provided by international commerce more visible than in the

24 Communication from Canada – Canadian Initial GATS Sectoral/Modal/Horizontal Negotiating Proposals, WTO Doc. S/CSS/W/46, 14.3. 2001: ‘Canada will also not make any commitment that restricts our ability to achieve our cultural policy objectives until a new international instrument, designed specifically to safeguard the right of countries to promote and preserve their cultural diversity, can be established’.
25 EC Commission MEMO/05/387 (Adoption of a UNESCO Convention on Cultural Diversity), 20 October 2005.
‘art capitals’ of the world, with their diverse offerings of cultural goods and services from all over the world. The trade policies of many states – and certainly of the main protagonists in the trade vs. culture debate – reflect the view that cultural exchange is beneficial. This fundamental consensus is reflected in the commitments entered into as WTO member: Low, if not zero, tariff rates for books and music recordings but also preferential policies for temporary sojourns of foreign artists are obvious examples. Modern trade rules, such as the ones contained in the WTO Agreements or in the Hague Convention, have, not the least, significantly strengthened the intellectual property rights of artists and publishing house, both in terms of substantive law and in terms of enforceability.\textsuperscript{26}

It is only with regard to certain products of the so-called popular culture – in particular audio-visual goods and, to a lesser extent, music recordings – that the protagonists of free trade and cultural diversity seem at odds. In this respect, the most controversial issue is whether states have a right to preserve ‘shelf-space’ for both national producers and international co-productions through quotas. The various subsidies for films and other products are to no small extent already now subject of rather strict rules under the WTO Agreement on Subsidies and Countervailing Measures, but do not cause too many real-world worries given the very limited effect they have had on American trade interests.\textsuperscript{27}

It is worth mentioning that ‘free trade’ and ‘culture’ are, in this context, shorthand for the two sides of a debate in which arguments are advanced with an unusual degree of high-handed self-righteousness. Suffice to mention that the ‘free traders’ of this debate are not necessarily interested in creating more choice for consumers but rather tend to promote monopolization. The ‘culture’ side, on the contrary, might have strong profit motivations of their own for creating red tape for its successful American competitors. Both sides have, in their respective countries, superior access to decision-makers: Politicians do not want to be on the blacklist of their country’s cultural industry. Also, cultural industries are not just political well connected but also very important in economic terms: American producers of popular culture are by far their country’s biggest exporters; in Europe and elsewhere, cultural industries are earmarked as growth areas of strategic economic relevance.\textsuperscript{28}

\textsuperscript{26} With a view to both private entities (e.g. Hague Convention) and states (e.g. WIPO, TRIPS, DSU).

\textsuperscript{27} The Agreement on Subsidies and Countervailing Measures (SCMA) outlaws subsidies only and to the extent that they infringe upon the trade interests of other trading partner in a noticeable fashion. Given the worldwide success of the American film industry, in particular in the OECD countries, such an infringement might be hard to prove. For a state of the art overview, see M. Matsushita, T. Schoenbaum and P. Mavroidis, The World Trade Organization: Law, Practice, and Policy (2006) 331 ff.

B. Trade agreements and exceptions for cultural goods and services

The overwhelming dominance of the US audio-visual industry has been perceived, since the late 1920s of the past century, as a vital threat to non-American producers of cultural goods and to a politically desired access to locally produced and flavoured cultural products.\(^{29}\) While *Cultural Diversity* is a new term, states’ desire to safeguard their domestic consumers’ access to cultural goods of national origin without closing the door to cultural goods from other countries is as old as the multilateral trading system, and is reflected in many international agreements.

Since 1947, the General Agreement on Tariffs and Trade (GATT) recognizes the right of contracting parties to deviate from the central obligation to treat foreign and domestic goods even-handedly with regard to cinematographic films\(^{30}\); According to art. IV GATT, films are subject to a particular regime, which allows internal quantitative measures, provided these *screen quotas* do not distinguish formally or in effect between foreign sources of supply. The OECD liberalization codes of 1961 reaffirmed this special status of cultural goods, allowing to maintain subsidies (abolished with respect to other industries) and screen quotas.\(^{31}\) The United States, of course, was and is party to the aforementioned agreements, which has not prevented it – with limited success, but with considerable political and economic costs – to coerce Korea to give up its art. IV GATT-based protectionist regime\(^{32}\) according to which domestic cinemas had to show domestically produced films on 146 days per year.\(^{33}\) Quite obviously, the Korean film industry has been served well by this policy: Its products are sought after in Asia and have turned it into a desirable partner for the US film industry.\(^{34}\) While in 2000, the Korean National Assembly proclaimed a benchmark of 40% market-share as precondition for Korea to enter into pertinent negotiations with the United


\(^{30}\) J. H. Jackson, *World Trade and the Law of GATT* (Charlottesville: The Michie Company, 1969), 293 reports on the view of many Contracting Parties to GATT that domestic regulations on cinematographic films were ‘more related to domestic cultural policies than to economics and trade’. See also the review ‘Matters Relating to Trade in Audiovisual Services’ that examines the drafting history of GATT Article IV, the applicability to this sector of concepts and principles such as market access and national treatment and the content of relevant international agreements, MTN.GNS/ AUD/W/1.

\(^{31}\) The two 1961 OECD liberalization codes (to be found, *inter alia*, at http://www.austlii.edu.au/au/other/dfat/treaties/1971/11.html) allowed for cultural reasons to maintain subsidies and screen quotas (i.e. mandatory showings of domestic films to be allowed to show foreign-produced films).

\(^{32}\) The Korean screen quota was identified by USTR as the biggest obstacle for the conclusion of a Free Trade Agreement with America’s seventh biggest trading partner: B. Demick, ‘U.S., South Korea in a Cinema War’, *Los Angeles Times*, 31 October 2005; see also Byung-il Choi, ‘When Culture Meets Trade: Screen Quota in Japan’, 31 Global Economic Review (2003) 75.

\(^{33}\) With the possibility of a discretionary reduction to 106 days.

\(^{34}\) Cf. above n 32.
States, the Korean film industry now controls a market share of nearly 60%. On 26 January 2006, the Korean government announced that it would reduce its screen quota requirement to 73 days of the year. A week later, on 2 February 2006, the United States Trade Representative (USTR) notified Congress of the Administration’s intent to initiate negotiations on a Free Trade Agreement (FTA) with the Republic of Korea.

*Cultural exceptions*, however, are not limited to multilateral agreements. When Canada and its southern neighbour undertook to liberalize ‘substantially all’ their trade, the United States was prepared to grant cultural goods a special treatment, recognizing that their relevance transcended the purely commercial sphere. This time, it was not just movies: According to art. 2021 Canada–United States Free Trade Agreement (CUSFTA), the term *cultural industry* comprises

(a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
(b) the production, distribution, sale or exhibition of film or video recordings;
(c) the production, distribution, sale or exhibition of audio or video music recordings;
(d) the publication, distribution or sale of music in print or machine readable form; or
(e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services.

According to Article 2005 CUSFTA, cultural industries are, in principle, exempt from the provisions of the Agreement, except as specifically provided for. Continuing this line of cultural exceptions, many of the recent FTAs

37 See the wording of art. XXIV GATT and the recent analysis by P. Mavroidis, ‘If I Don’t Do It, Somebody Else Will (Or Won’t)’, 40 Journal of World Trade (2006) 187–214.
40 See NAFTA Annex 2106 Cultural Industries: ‘Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access – Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada – United States Free Trade Agreement’.
41 As in Article 401 (Tariff Elimination), Article 1607:4 and Article 2006 ff CUFTA.
concluded by the United States contain provisions granting cultural goods a special status. Recent examples can be found in the Australia–US FTA and the US–Singapore FTA. Obviously, the United States is not alone in viewing culture as something special: The EC is certainly second to none to treat culture and cultural diversity as an important matter, both internally and externally.

The widespread reluctance to treat cultural products like other merchandise reflects not only a public choice preference of the world’s major trading nations, with the notable exception of the United States. Rather, the American position that cultural diversity is best achieved through largely unfettered market mechanisms seems to be not just contrary to what most states practice but also questionable from an economic point of view. Based on the understanding shared by all liberal democracies that cultural products are an indispensable elements for allowing societal self-reflection and intra-society discourse, Sauvé/Steinfatt have shown that economic theory expects free trade in cultural products to be ‘inefficient compared to an optimal system of trade restraints from the perspective of both American and importing country audiences’. According to these authors, the most efficient response to market inefficiencies would be to subsidize those cultural products most likely to be economically justified but which would not survive without such support.

Obviously, the position of Sauvé/Steinfatt is not undisputed. It is beyond the scope of this article to settle this matter. Rather, the appreciation of the vast differences between the United States and the rest of the world with

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43 http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Section_Index.html.
46 See also at http://www.oecd.org/dataoecd/46/40/1895712.pdf, 128. Canada’s proposal for a cultural exception in MAI: ‘Nothing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of these companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity’.
47 See the overview in the WTO Secretariat’s Audiovisual Services Background Note, WTO Doc. S/C/ W/40.
49 Ibid.
regard to both political desirability and economic evaluation of cultural policies protecting domestic cultural production allows a better understanding of both the legal issues at stake and the appropriateness of any suggestion for dealings with them in the future.

III. THE LEGAL STATUS QUO

Of course, neither the WTO Agreement nor the GATS contains a cultural exception: The United States prevented an inclusion of such a clause in the Marrakesh Agreement.  

A. GATT and other multilateral agreements on trade in goods

Some, if not most, cultural products are goods: CDs, books, paintings and films are obvious examples. Cultural goods, while often created through a service (writing a book, painting a picture and singing a song), incorporate these services and represent a distinct, visible and touchable product. GATT applies to all goods, including cultural goods. Exceptions apply if and to the extent determined by WTO law. Thus, e.g., weapons and fissionable materials are subjected to the special rule of art. XXI GATT, which makes unequivocally clear that these goods were not supposed to be traded freely. In the same sense, although not as far reaching, cinematographic films are subject to the special rule of art. IV GATT.

While GATT is – quite literally – the mother of all agreements regulating trade in goods, a number of the side agreements apply, of which the Agreement on Subsidies and Countervailing Measures is of particular relevance, given that most states subsidize heavily their audio-visual industries.

B. GATS

GATS covers services, i.e. invisible products without physical properties. While heavily influenced by its older and bigger sister GATT, it has a very

50 See supra, A and B.
51 None of the legal texts quoted in this article contains a definition of goods. It seems to be agreed that some material substance needs to be ascertained to speak of a good. Goods do not encompass services, which are characterized by lack of visibility as such and lack of material emanation; see for the ECJ’s attempts to distinguish goods from services case C-155/73, Sacchi, 1974 ECR 409 ff, para. 6 ff; Joint cases C-60/84, 61/84, Cinétèque, 1985 ECR 2606, para. 8 ff.
52 In addition, GATT Law will not be applicable if superior law orders so. This is, e.g., the case for ius cogens or for resolutions by the UN Security Council if acting under Chapter VII, cf. Art. XXI GATT and art. 103 UN Charta.
55 For definitions, see W. Zdouc, Legal Problems Arising Under the General Agreement on Trade in Services – Comparative Analysis of the GATS and GATT (2002).
different normative set-up. Market access and national treatment are only granted if and to the extent pertinent specific commitments have been entered into by members: Without such commitment, a member is free to not grant foreign services (and service providers), the treatment enjoyed by their domestic counterparts. Furthermore, WTO members may discriminate between other members (i.e. not grant most favoured nation treatment), provided they have listed such differential treatment in the Annex on Article II Exemptions (Art. II paragraph 2 GATS) upon their acceding the WTO.56

Very few Member States have entered commitments with regard to popular cultural service products, in particular audio-visual products. As of now, only Albania, the Central African Republic and the United States have entered commitments with regard to all six sectors of audio-visual services (‘Motion Picture and Video Tape Production and Distribution Services, Motion Picture Projection Service, Radio and Television Services, Radio and Television Transmission Services, Sound Recording, Other’). Twenty-one other states have entered some commitments, most notably the major film producers: India (Motion Picture and Video Tape Production and Distribution Services) and Hong Kong (Motion Picture and Video Tape Production and Distribution Services, Sound Recording, Other). New Zealand, the only other western democracy having entered substantial pertinent commitments, has bound itself with regard to five service sectors.57

C. Possible parallelisms between GATS and GATT

The applicability of GATT to a scenario involving the treatment of goods (e.g. magazines) does not exclude the applicability of GATS.58 The visit of an English star-author to the Manhattan flagship store of a US bookseller to read from his or her latest book to a paying audience would be a service but also closely related to the marketing of the new book. Thus, these activities might

56 Annex on Article 2 points at Article 9 para. 3 WTO.
57 All commitments can be accessed at http://www.wto.org.
58 See A. Herold, above n 54, 2 ff, and T. Voon, above n 13; see Canada – Certain Measures Concerning Periodicals, WT/DS31/R, para. 5.13 ff: Recalling the principle of effective treaty interpretation, the Panel found that ‘obligations under GATT 1994 and GATS can co-exist and that one does not over-ride the other’. The Appellate Body confirmed the approach of the Panel on Canada – Periodicals in European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (Bananas III), para. 221. It rejected the notion that the GATT 1994 and GATS were ‘mutually exclusive agreements’ and held that ‘There is . . . a . . . category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases . . ., the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis’. 
be covered (and thus enjoy protection) by both GATT and GATS, depending on the kind of state measure in question.\textsuperscript{59}

While motion picture production is considered a service (as is the production of wines or cars – wine-makers provide sought after services, as do car designers) the actual product used in cinemas world-wide is as much a good as are cars and wines.\textsuperscript{60} As the service of showing it is specifically regulated in GATT’s article IV, allowing screen quotas to the extent prescribed in that particular clause, this undertaking is binding upon the WTO members without the possibility to resort to further market access restrictions on the basis of a GATS argument that either specific commitment were not entered into or exemptions to MFN had been filed in accordance with art. II GATS.

Of course, the legal status quo could change if audio-visual products would be comprehensively addressed by the WTO members, e.g. through a GATS protocol in which members could clearly establish that all audio-visual products should be treated as services. Such an agreement would do away with a distinction whose rational basis has all but disappeared. In that case, art. IV GATT would have become moot. Until that happens it is not, despite the fact that it may seem undesirable and is arbitrary from a policy standpoint that a Hollywood blockbuster would be subjected to a completely different legal regime if it was to be projected onto foreign screens not from a cinematographic film, but by using digitally transmitted data sent from some central distribution point.\textsuperscript{61} But, of course, the sovereign members being the masters of the WTO Agreement, it is up to them, and to them alone, to determine how a factual situation is to be treated as a matter of treaty law. Their will, as expressed in the treaty, determines how the cookie crumbles, not logic, nor the (desired or undesired) economic consequences of the legal status quo.

D. WTO disputes

So far, three disputes dealing with cultural products have been initiated within the WTO dispute settlement system, leading to one Appellate Body decision. This does not include various decisions and procedures dealing with

\textsuperscript{59} In this article, the author does not wish to take a position in the discussion whether art. IV GATT should be interpreted broadly. The argument is that the changes in technology should not lead to a different legal regime. This sustainable and coherent position is so far not supported by state practice; neither has it been rejected by the Appellate Body.


intellectual property rights, which, of course, have important ramifications for cultural industries but are not within this article’s focus.\textsuperscript{62}

1. Turkey – taxation of foreign film revenues

In 1996, the United States initiated consultations under Art. 4 Dispute Settlement Understanding (DSU) and Art. XXII GATT regarding Turkey’s taxation of revenues generated from the showing of foreign films. At times, Turkey imposed a 25% tax on box office receipts generated from the showing of foreign films, while no such tax was due for receipts from the showing of locally produced films. Turkey acknowledged that this practice was incompatible with art. III GATT which, according to AB jurisprudence,\textsuperscript{63} prohibits members of the WTO to apply ‘taxes and other internal charges, and laws, regulations and requirements affecting the . . . sale, . . . distribution or use of products . . . to imported or domestic products so as to afford protection to domestic production’.\textsuperscript{64} The issue whether GATS was applicable was not touched upon.

2. Canada – periodicals\textsuperscript{65}

On 24 May 1996, the United States requested the establishment of a Panel to review the following three Canadian measures.

(1) The prohibition\textsuperscript{66} of periodicals that happened to be a ‘special edition, including a split-run or regional edition that contains an advertisement which was primarily directed to a market in Canada and that does not appear in identical form in all editions of that issue of the periodical that were distributed in the periodical’s country of origin’.

(2) The imposition of a tax equal to 80% of the value of all the advertisement contained in split-run editions (not already prohibited), in which more than 20% of the editorial material was the same or substantially the same as editorial material that appeared in other issues of one or more periodicals and contained an advertisement that did not appear in identical form in the aforementioned editions.

(3) The preferred treatment of Canadian magazines by the Canadian Post Corporation (which is controlled by the Canadian Government).


\textsuperscript{63} See Japan – Alcoholic Beverages, WT/DS8,10,11/AB/R, adopted 1 November 1996, 18, relating to para. 1 of article III which is said to ‘inform’ the remainder of that provision.

\textsuperscript{64} ‘Following consultations on this matter, and in accordance with Turkey’s obligations under Article III of the General Agreement on Tariffs and Trade 1994, Turkey will equalize any tax imposed in Turkey on box office receipts from the showing of domestic and imported films as soon as reasonably possible’, Turkey – Taxation of Foreign Film Revenues, Notification of Mutually Agreed Solution, WT/DS43/3; this leaves the exact basis of the accepted obligation open.


\textsuperscript{66} Tariff Code 9958, being Part of Schedule VIII of the Canadian Customs Tariff.
For the purposes of this article,\textsuperscript{67} it suffices to point out that on the basis of the \textit{border tax adjustment test},\textsuperscript{68} the panel found that split-run journals and other periodicals would have common end uses, would have been designed for the same readership with the same tastes and habits and would have very similar physical properties and qualities. Thus, domestic periodicals and foreign split-run periodicals were considered ‘like’. The Appellate Body (AB) disagreed with that finding and held that they were directly competitive products.\textsuperscript{69}

In its submission, Canada had carefully made the case why content mattered and, thus, why US magazines and Canadian magazines were \textit{un-like} for the purposes of art. III GATT analysis.\textsuperscript{70} Whether the magazines addressed topics relevant for Canada and Canadian readers, so the argument can be put in a nutshell, made a difference, as the end use of print product is intellectual consumption.\textsuperscript{71} The Panel and the Appellate Body avoided this issue altogether: The panel, however, sensed the need to explain that it \textit{had-not-meant-it-that-way} and stated \textit{obiter} that ‘in order to avoid any misunderstandings as to the scope and implications of the findings above, we would like to stress that the ability of any Member to take measures to protect its cultural identity was not at issue in the present case. The only task entrusted to this Panel was to examine whether the treatment accorded to imported periodicals under specific measures identified in the complainant’s claim is compatible with the rules of GATT 1994’.\textsuperscript{72}

3. \textit{Canada – film distribution}

In 1998, the EC started the formal complaint procedure against Canada,\textsuperscript{73} alleging that the latter’s \textit{‘1987 Policy Decision on film distribution and its application to European companies’} violated the most favoured nation treatment guaranteed by art. II GATS\textsuperscript{74} by treating US competitors more favourably.\textsuperscript{75} The EC and its Member States were of the view that their traders did not get the same treatment as their American competitors. Because the European company most affected by the Canadian legislation was taken over by a Canadian company, the matter was dropped.\textsuperscript{76}

\textsuperscript{69} \textit{Canada – Periodicals}, WT/DS31/AB/R, 29.
\textsuperscript{70} \textit{Canada – Periodicals}, WT/DS31/R, para. 3.60 ff.
\textsuperscript{71} This argument was quite prominently advanced by Canada and counter-argued by the United states, \textit{Canada – Periodicals}, WT/DS31/R, para. 3.60–3.119.
\textsuperscript{72} \textit{Canada – Periodicals}, WT/DS31/R, para. 5.45.
\textsuperscript{73} \textit{Canada – Measures Affecting Film Distribution Services}, Request for Consultations by the European Communities, WTO doc. WT/DS117/1 of 22 January 1998.
\textsuperscript{74} Canada had not taken a MFN exemption for measures affecting film distribution services.
\textsuperscript{75} In addition, the EC and its member states alleged a violation of Canada’s obligation to take its measures in a transparent manner, art. III GATS.
\textsuperscript{76} M. Hilf and S. Oeter (F. Theune), \textit{WTO-Recht} (Baden-Baden: Nomos 2005) 676.
4. No clear trend
These three cases and the Korean screen quota saga are a rather thin basis for predicting the future direction of the AB's jurisprudence. But two parameters seem to be established: On the one hand, the WTO dispute settlement organs – in line with the determinative will of the members – have not subscribed to a clear-cut notion that cultural products should be treated differently due to a quality that is not fully on the radar of the WTO.\footnote{This conclusion is, however, solely based on the Canadian Periodicals case. Other decisions do not yet exist.} The Korean screen quota case, on the other hand, shows that the existing cultural exception of GATT, its article IV, not only is alive and well but obviously seems to satisfy a need urgent enough to survive the considerable pressure put to bear by the world's strongest economy on one of its most important trading partners and political allies.

E. State practice
As state-sponsored literature contests or poet-in-residence programs have not aroused the ire of the USTR, the following discussion will focus on popular culture and on audio-visual products in particular. With regard to the latter, \textit{Footer and Graber} have comprehensively taken stock of state measures intended to enable domestic cultural products to be present in the marketplace and thus contributing to cultural diversity. They use the following, partially overlapping descriptive categories:\footnote{M. Footer and Ch. Graber, above n 62, 115, 122 ff. see also Ch. Graber, above n 18, 165, 179 ff.}:


(3) measures regulating domestic content with regard to radio and television broadcasting content\(^{81}\);
(4) market access restrictions such as\(^{82}\):
  (a) screen quotas for cinemas;
  (b) rebates on box-office taxes for cinemas that show national films;
  (c) or the prohibition on the dubbing of foreign films and on dubbing licenses\(^{83}\);
(5) regulatory or licensing restrictions, through which states control access to radio or television broadcasting;
(6) tax measures, such as taxes levied on box-office revenues, on receipts of broadcasters and on video cassettes to support local film production;
(7) measures restricting foreign investment and ownership;
(8) border measures, including tariffs or quantitative restrictions, such as restricting the import of film titles to 100 per year.

F. The legal status quo in a nutshell

1. Cultural goods
Both films and audio CDs being goods, WTO members are to grant them MFN and national treatment under art. I and III GATT and are not allowed to impose quantitative restrictions (art. XI GATT) on them. Local content rules and preferential agreements are difficult to reconcile with these fundamental principles.\(^{84}\)

Subsidies are prohibited, if and to the extent that they affect the interests of other states (to make a rather long story short), which is presumed once the support exceeds 5% of total production costs.\(^{85}\) This presumption of serious

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\(^{82}\) See examples provided by M. Footer and Ch. Graber, above n 62, 124.

\(^{83}\) M. Footer and Ch. Graber, above n 62, 124, point at the American way of doing things in that respect: The MPAA’s movie rating system makes it difficult for foreign films to get distributed. As many European films would be less violent but more sexually explicit than their American counterparts, they would get an ‘R’ rating which makes them economically unbearable for cinemas outside of metropolitan areas and college towns.


\(^{85}\) M. Matsushita, T. Schoenbaum and P. Mavroidis, above n 27.
prejudice, can, however, be refuted by showing that the subsidation in question did not have the effects enumerated in article 6.3 SCM Agreement. With regard to the considerable film subsidies paid out by Canada and various European countries, this avenue should more often than not prove successful both in negotiations and in future dispute settlement procedures, as all these monies have had so far only de minimis effect, if at all, on the US film industry. As art. IV GATT allows screen quotas, the only major GATT issues remaining are domestic or regional content quotas for music recordings and audio-visual products (that are goods) which might violate art. I and III GATT, and the various protective measures for audio-visual products which not only prevent national treatment but deviate from the command of art. IV (and I) GATT, according to which states should not, even for cultural reasons, differentiate between foreign sources of supply: While national treatment, even in the 50-year-old GATT system, is not at all a self-evident concept, the discrimination between products from one’s trading partners, however, runs counter a fundamental notion of GATT. While it seems to be a valid argument that culture, including popular culture, transcends the economic sphere, the same holds true for the principle of non-discrimination. This concept clearly has a dimension going beyond its being the engine of trade liberalization (art. I GATT and art. II GATS); it has become an essential for international cooperation and closer international relations.

2. Cultural services
All other contentious products are services and thus subject to GATS obligations. As demonstrated above, this has allowed WTO members to stay clear of any obligation going beyond the status quo, provided they have made pertinent reservations with regard to MFN treatment (art. II GATS) and avoided to enter specific commitments with regard to national treatment and market access (art. XVI, XVII GATS). As almost all first-world countries and most other members have chosen that path, GATS law imposes very few restrictions on Member States’ protective measures for their cultural sector.

According to art. XIX GATS, art. II exemptions should come to an end as the 10-year recommended grace period for keeping them has run out. While art. XIX GATS’ wording is sufficiently open ended to make it difficult to technically violate it, the conclusion of sector-specific preferential agreements with regard to trade in certain services is hardly compatible with the spirit of this clause. It is equally difficult to reconcile the refusal of important WTO

\[86\] Art. XIX GATS reads in part: ‘1. . . . Members shall enter into successive rounds of negotiations . . . with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations. 2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members . . . ’.
members to even negotiate the further liberalization of the audio-visual service sector with the basic policy set-up of GATS, which aims to foster the liberalization of the international trade in services. While GATS allows states to specifically negotiate market access and thus grants members remarkable flexibility as to whether they want to liberalize specific service sectors or not, members also established the rule that services from foreign sources are to be treated even-handedly: Each and every trading partner must, in principle, provide and may expect most favoured nation treatment. Wording and structure of art. II GATS leave little doubt that the art. II exemptions, while legally possible and initially maybe even the de facto standard operating procedure (thus easing the change from an internationally unregulated area to the disciplines of the new GATS), are designed and designated to be exceptions only; indeed, they are supposed to eventually become exceptions in practice. This, however, is not what Canada, the European Community and others are practising with regard to cultural services: To strengthen their domestic audio-visual industries, bi- and multilateral agreements are concluded through which contracting parties grant each other privileged treatment. That course of action is not compatible with the spirit of non-discrimination. It is the wisdom of art. IV GATT to allow deviation from national treatment (and thus to protect domestic cultural industries) but to leave MFN in place. This wisdom fails to inform current practice.

iv. ‘THE DIVERSITY CONVENTION AS WTO’S SECOND BEST EXCEPTION CULTURELLE?’

The legally safest way to reconcile local content rules with general WTO rules, a cultural exception within the WTO, having been prevented by the United States in 1994, France, Canada and other states embarked on developing an alternative solution for securing that their national audiences would be exposed to audio-visual offerings containing a significant percentage of domestic productions. The result of this endeavour is the UNESCO Diversity Convention. Its raison d’être is to create a safe haven for protectionist measures aimed at ensuring cultural diversity, read: For allowing WTO members to legally provide shelf-space for domestic productions in television programs and cinemas. The purpose to serve as an ersatz cultural exception for GATS and GATT is underlined by the almost complete lack of enforceable substantive provisions and a dispute settlement mechanism worth mentioning only as being reminiscent of the very early days of modern international law.

87 See Communication from Hong Kong, above n 18.
A. The Diversity Convention’s most important provisions in a nutshell

Regardless of whether the Convention will indeed be able to perform its intended function to serve as antidote to the evils of trade liberalization brought about by the WTO, it will have been the final breakthrough of the concept of cultural diversity as an internationally recognized policy choice. This, of course, will be subject to its ratification rate reflecting the overwhelming initial support by almost the entire UNESCO membership; but if the pertinent numbers should add up, international lawyers will have witnessed the remarkably quick rise of cultural diversity from being a rather obscure soft-law notion to a recognized legal concept: While the UNESCO Convention of 1946 undertakes to preserve ‘the diversity of the cultures’ inter alia by recommending international agreements destined to promote ‘the free flow of ideas by word and image’ and while other international documents have mentioned the diversity of cultures obiter, it has re-emerged only at the end of the 20th century in the G8 Communiqué Okinawa 2000. Since then, it has acquired a connotation of not only encouraging the free influx of ideas through different media channels but also the right of states to limit the free influx of words, sounds and images and to enable them to protect national cultural expression from being unduly pressured by regular market forces. Cultural diversity was used in this sense by the Council of Europe, the

89 Art. I:3 UNESCO Constitution.
90 Art. I:2 a) UNESCO Constitution.
91 See article 1 of the 1966 UNESCO Declaration of the Principles of International Cultural Co-Operation, http://www.unesco.org, according to which all cultures ‘in their rich variety and diversity . . . form part of the common heritage belonging to all mankind’.
92 See the pertinent paragraphs on Cultural Diversity in the G8 Communiqué Okinawa 2000, 23 July 2000, to be found at http://www.g8.utoronto.ca/summit/2000okinawa/finalcom.htm: ‘Cultural diversity is a source of social and economic dynamism which has the potential to enrich human life in the 21st century, as it inspires creativity and stimulates innovation. We recognise and respect the importance of diversity in linguistic and creative expression. We welcome the work of relevant international organisations, in particular the United Nations Educational, Scientific and Cultural Organisation (UNESCO), in this field. . . . Promoting cultural diversity enhances mutual respect, inclusion and non-discrimination, and combats racism and xenophobia. . . . The first steps toward enhancing cultural diversity are the preservation and promotion of cultural heritage. . . . To maximise the benefits of cultural interaction, we must encourage our peoples to learn to live together by nurturing interest, understanding and acceptance of different cultures . . .’. 
93 Council of Europe, Declaration of the Committee of Ministers on Cultural Diversity (Adopted by the Committee of Ministers on 7 December 2000 at the 733rd meeting of the Ministers’ Deputies) CDMM (2000) 44: Note the very different outlook: ‘Acknowledging that all democratic societies based on the rule of law have in the past developed measures to sustain and protect cultural diversity within their cultural and media policies . . .’, the Ministers declare, inter alia: ‘2. Cultural and Audiovisual Policies for Sustainable Cultural Diversity in a Global World: 2.1 Cultural and audiovisual policies, which promote and respect cultural diversity, are a necessary complement to trade policies; 2.2 Cultural diversity has an essential economic role to play in the development of the knowledge economy. Strong cultural industries which encourage linguistic diversity and artistic expression, when reflecting genuine diversity, have a positive impact on pluralism, innovation, competitiveness and employment; 2.3 Culturally diverse forms of production and practices should not be limited but enhanced by technological developments . . .’.
World Summits on the Information Society 2003 and 2005⁹⁴ and in the non-binding but overwhelmingly supported UNESCO Declaration on Cultural Diversity in 2001; in that document, cultural diversity is, for the first time, described as being ‘the common heritage of humanity’.⁹⁵ Now, it tops the list of the Diversity Convention’s objectives⁹⁶ and is at the centre of its (rather weak)⁹⁷ operative provisions.⁹⁸

Stating explicitly that cultural goods transcend their economic value,⁹⁹ the Convention reaffirms the right of its signatories ‘to formulate and implement their cultural policies and to adopt measures to protect and promote’ the diversity of cultural expressions within their territory. In doing so, States have

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⁹⁴ See the World Summit on the Information Society, Declaration of Principles, *Building the Information Society: A Global Challenge in the New Millennium*, Document WSIS-03/GENEVA/DMSG-E, http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!MSW-E.doc: ‘... Cultural diversity and identity, linguistic diversity and local content: ... Cultural diversity is the common heritage of humankind. The Information Society should be founded on and stimulate respect for cultural identity, cultural and linguistic diversity, traditions and religions, and foster dialogue among cultures and civilizations. The promotion, affirmation and preservation of diverse cultural identities and languages as reflected in relevant agreed United Nations documents including UNESCO’s Universal Declaration on Cultural Diversity, will further enrich the Information Society ... The creation, dissemination and preservation of content in diverse languages and formats must be accorded high priority in building an inclusive Information Society, paying particular attention to the diversity of supply of creative work and due recognition of the rights of authors and artists. It is essential to promote the production of and accessibility to all content—educational, scientific, cultural or recreational—in diverse languages and formats. The development of local content suited to domestic or regional needs will encourage social and economic development and will stimulate participation of all stakeholders, including people living in rural, remote and marginal areas. ... The preservation of cultural heritage is a crucial component of identity and self-understanding of individuals that links a community to its past. The Information Society should harness and preserve cultural heritage for the future by all appropriate methods, including digitisation’.


⁹⁶ See, e.g. Article 1 – Objectives: ‘The objectives of this Convention are: (a) to protect and promote the diversity of cultural expressions’. Note, however, also objective lit. h, ‘to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate (sic) for the protection and promotion of the diversity of cultural expressions on their territory’.

⁹⁷ J. Wouters and B. De Meester, above n 61, text at fn. 31, analyzing prior drafts, state that the ‘rights allow chiefly (but not solely) for measures that protect or support domestic cultural industries ... the obligations rather put the focus on an enabling environment ...’.

⁹⁸ *Article 5 – General rule regarding rights and obligations* ‘1. The Parties, in conformity with the Charter ... the principles of international law and universally recognized human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention. 2. When a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention’.

⁹⁹ Cf. para. 18 of the preamble: ‘cultural activities, goods and services conveying identities, values and meanings have both an economic and a cultural nature, and must therefore not be treated as solely having commercial value’.
to observe the ‘Guiding Principles’ of the Convention, amongst which human
rights are just one consideration, together with, inter alia the principle of open-
ness and balance. Despite this worrying lack of sensitivity for individual human
rights – which has certainly contributed to its popularity with certain delega-
tions – the Convention avoids more damage by expressly stating that it may not
be used to limit the scope of human rights and fundamental freedoms.

The key provisions for the purposes of this article’s subject are to be found in
art. 6, according to which states may take all the protective measures already
categorized by Graber/Footer: In particular, the Convention allows subsidizing
domestic and selected foreign other producers, to set up local content thresh-
olds and to set up quotas. The convention grants states, as an exception, the
right to determine ‘special situations’ characterized by cultural expressions in
their territory being at ‘risk of extinction, . . . under serious threat, or . . . other-
wise in need of urgent safeguarding’. In such exceptional cases, contracting

100 These laid down in Article 2 of the Convention: 1. the Principle of respect for human rights and
fundamental freedoms, 2. the Principle of sovereignty, 3. the Principle of equal dignity of and
respect for all cultures, 4. the Principle of international solidarity and cooperation, 5. the Principle
of the complementarity of economic and cultural aspects of development, 6. the Principle of sus-
tainable development, 7. the Principle of equitable access, 8. the Principle of openness and balance.

Cultural diversity can be protected and promoted only if human rights and fundamental freedoms,
such as freedom of expression, information and communication, as well as the ability of individuals
to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Conven-
tion in order to infringe human rights and fundamental freedoms as enshrined in the Universal Dec-
laration of Human Rights or guaranteed by international law or to limit the scope thereof. 2. Principle of sovereignty States have, in accordance with the Charter of the United Nations and the
principles of international law, the sovereign right to adopt measures and policies to protect and
promote the diversity of cultural expressions within their territory’.

102 See Article 6 (‘Rights of Parties at the national level’): ‘1. Within the framework of its cultural pol-
cies and measures as defined in Article 4.6 and taking into account its own particular circumstances
and needs, each Party may adopt measures aimed at protecting and promoting the diversity of cul-
tural expressions within its territory. 2. Such measures may include the following: (a) regulatory
measures aimed at protecting and promoting diversity of cultural expressions; (b) measures that
provide opportunities in an appropriate manner for domestic cultural activities, goods and services
among the full range of cultural activities, goods and services available within the national territory
with regard to the creation, production, dissemination, distribution and enjoyment of such domestic
cultural activities, goods and services, including provisions relating to the language used therefor;
(c) measures aimed at providing domestic independent cultural industries and activities in the infor-
mal sector effective access to the means of production, dissemination and distribution of cultural
activities, goods and services; (d) measures aimed at providing public financial assistance; (e) mea-
ures aimed at encouraging non-profit organizations, as well as public and private institutions and
artists and other cultural professionals, to develop and promote the free exchange and circulation of
ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the cre-
ative and entrepreneurial spirit in their activities; (f) measures aimed at establishing and supporting
public institutions, as appropriate; (g) measures aimed at nurturing and supporting artists and oth-
ers involved in the creation of cultural expressions; (h) measures aimed at enhancing diversity of the
media including through public service broadcasting’.

103 The exceptional character of such a determination under art. 8 of the Diversity Convention is made clear
through the corresponding duty to ‘report to the Intergovernmental Committee all measures taken to
meet the exigencies of the situation, and the Committee may make appropriate recommendations’.
parties may take ‘all appropriate measures to protect cultural expressions . . . in a manner consistent with the provisions’ of the Convention. Thus, the obligation to respect freedom of expression and to allow access to and of foreign cultural expressions is to be observed even under those dire circumstances.

To the extent that the Convention’s provisions do not restate (and emphasize) well-established rights of states to determine their internal affairs without outside interference, they oblige the signatories to good faith efforts to make the world and themselves culturally more diverse: Signatories shall encourage, endeavour and promote many pertinent activities by themselves, other signatories and the civil society to further cultural diversity which is recognized as common heritage of humanity. A limited number of provisions seem to be of a more operational nature than the above-mentioned enunciations: Thus, article 16 contains an obligation for developed countries to facilitate cultural exchanges with developing countries ‘by granting . . . preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries’. What seems far-reaching at first glance is, however, being mitigated to a bona fide effort obligation, typical for the Convention. In this case, the result is achieved through a qualification that all pertinent applications will have to pass ‘through the appropriate institutional and legal frameworks’. The EC thought that this clause made immigration-related worries baseless, while New Zealand took the precautionary measure to put its pertinent (and plausible) view on record.

The institutional side of this agreement matches the flexibility of its substantive provisions: An International Fund for Cultural Diversity is set up, however, without any obligation to fund it. The Convention’s Annex contains a Conciliation Procedure which will serve as a classroom example for a treaty-based dispute settlement regime protecting primarily state sovereignty and less so the integrity of the treaty-based legal obligations. Parties to a dispute will only go as far as to ‘consider’ the Conciliation Commission’s proposals for the resolution; however, they shall do so ‘in good faith’.

104 E.g. article 9 – Information sharing and transparency, article 10 – Education and public awareness and article 12 – Promotion of international cooperation.
105 Preamble, 2.
106 UNESCO Doc. 33 C/84 Prov., Annex, p. 2: ‘On the basis of the discussions at the Third Intergovernmental Meeting of Experts in June, 2005, it is New Zealand’s understanding that the obligation in Article 16 on developed countries to facilitate cultural exchanges with developing countries by granting preferential treatment to artists and other cultural professionals and practitioners through the appropriate institutional and legal frameworks is not intended to affect the content or implementation of domestic legislation, policies or individual decisions on the entry of persons into New Zealand territory and other immigration matters’.
107 Article 1 – Conciliation: ‘A Conciliation Commission shall be created upon the request of one of the Parties to the dispute. The Commission shall, unless the Parties otherwise agree, be composed of five members, two appointed by each Party concerned and a President chosen jointly by those members . . .’. Article 5 – Decisions: ‘The Conciliation Commission shall take its decisions by majority vote of its members. It shall, unless the Parties to the dispute otherwise agree, determine its own procedure. It shall render a proposal for resolution of the dispute, which the Parties shall consider in good faith’.
effective dispute settlement mechanism is most regrettable, as it sets a near-perfect stage for circumventing the Convention’s general prohibition of using diversity enhancing measures to limit the scope of human rights and fundamental freedoms: A proper interpretation of this provision would apply the canon of treaty interpretation contained in art. 31, 32 of the Vienna Convention on the Law of Treaties (Vienna Convention or VCLT) and thus ensure that the *Diversity Convention* and its provisions emphasizing the rights of states to restrict the transboundary influx of cultural expressions in the name of cultural diversity would not be used to stifle freedom of speech and of expression and thus endanger the very foundation of cultural diversity. But the negotiators made sure that no permanent dispute settlement organ exists. If State parties should abuse the *Diversity Convention*, only fellow State parties might raise a red flag; the much more authoritative evaluation by a quasi-judicial organ was not what the negotiators of the *Diversity Convention* had in mind.

This lacuna is disappointing indeed. Subsequent state practice will show whether the Convention lives up to its purpose to promote and bolster freedom of expression. At present, however, it cannot be overlooked that the Convention contains all necessary tools to abuse it in a way that severely endangers its self-declared goals.

**B. Japanese cars? French *foi gras?* – the Convention’s coverage**

The Convention introduces the term *Cultural expression* and thus a concept which is to be understood to go beyond the ‘cultural activities, goods and services’ which are mentioned separately and which had been a focus of the UNESCO declaration of 2001.\(^\text{108}\) *Cultural expressions* are defined as expressions ‘that result from the creativity of individuals, groups and societies, and that have cultural content’. *Cultural activities, goods and services* are defined as those ‘activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have’.\(^\text{109}\) Many delegations considered this provision as being far too wide to be helpful: Taken at its word, this definition might be viewed as covering, e.g., Japanese *Toyotas*, as they clearly are the materialization of Japanese designers’ and Japanese engineers’ creativity and thus firmly rooted in a specific Japanese culture of education and training. While this is not an absurd result given that some of the world’s finest art museums have hosted exhibitions featuring cars, a *Diversity Convention* covering many, if not most man-made products, does not really

\(^{108}\) See J. Wouters and B. De Meester, above n 61, text at fn. 18.

\(^{109}\) *Diversity Convention*, Article 4, para. 3, 4; the *Diversity Convention* continues to say that cultural activities may be an end in themselves or they may contribute to the production of cultural goods and services.
help and was clearly beyond the mandate the negotiators had.\textsuperscript{110} \textit{Deutsche Industrienormen}, \textit{Dresdner Weihnachtstollen}, French \textit{foi gras} and Italian \textit{Barolo} reflect centuries-old cultures and traditions and might well fit the \textit{Diversity Convention}'s definition of cultural expression, maybe even more than today's Japanese cars. In the same sense, all things maritime or fish-related have, for many trading nations, a strong cultural connotation; that holds particularly true for island nations like Japan, New Zealand or the United Kingdom, where even everyday language (‘they were like ships in the night’) gives testimony to the important impact these activities have on a society’s cultural status quo. Nevertheless, these matters are – as a matter of public international law – looked after in particular agreements dealing with maritime affairs, fishery regimes or the law of the sea. Clearly, thus, neither Japanese cars nor Japanese whaling practices were what UNESCO was created for. It also was not the mandate UNESCO members had in mind when they started the negotiations for the \textit{Diversity Convention}.

When exploring the exact content of \textit{cultural expression}, the Vienna Convention instructs the interpreter to look beyond the actual words used. Rather, the wording has to be read in context and in the light of its object and purpose, art. 31:1 VCLT. When taking into account that all of the \textit{Diversity Convention}'s operational provisions have cultural goods and services in mind, and with a view to the purpose of the Diversity Convention to offer some measure of protection for cultural goods from ‘too much free trade’, a narrow reading of that term seems to be the most appropriate understanding.

However, for the purpose of this article, this interesting question might be moot. This is at least what many delegations thought when they agreed to the term \textit{cultural expression} in its present form. The reason for this was the understanding that the \textit{Diversity Convention} would not affect other treaties dealing with goods and services, in particular the WTO Agreement, but also many other bi- and multilateral agreements dealing with specific goods, foodstuff, intellectual property, fishery regimes, navigation and so forth. The reason for this is the collision clause of art. 20 \textit{Diversity Convention} explored in the next two sub-paragraphs.

C. Compatibility of WTO obligations with the provisions of the \textit{Diversity Convention}

The purpose of the Convention to create a safe haven for cultural policies and protect them (largely \textit{pro futuro} as has been shown) from WTO disciplines
manifests itself already in its substantive content, in particular by establishing the concept of cultural diversity and by empowering states to support their domestic industries and restrict the influx of foreign cultural products. However, the central operative provision for bringing about the desired shielding effect for domestic policies safeguarding national cultural industries against foreign competition was supposed to be its now-article 20. This provision deals with the ‘relationship to other treaties: Mutual supportiveness, complementarity and nonsubordination’ and was supposed to be the magic antidote for the perceived or real grievances resulting from the application of WTO law to cultural industries and policies.\footnote{\textit{Article 20 – Relationship to other treaties: mutual supportiveness, complementarity and nonsubordination}: ‘1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties’.} Has this object been achieved?

1. Article 20:1 of the Diversity Convention
The first sentence of Article 20:1 of the Diversity Convention orders signatories to perform in good faith all their obligations under both the Convention and all other treaties. In doing so, the Convention repeats a ‘universally recognized’\footnote{Para 2 of the Preamble of the Vienna Convention on the Law of Treaties (VCLT), accessible, \textit{inter alia}, http://fletcher.tufts.edu/multilaterals.html.} principle of international law, according to which every ‘treaty in force is binding upon the parties to it and must be performed by them in good faith’.\footnote{Cf. article 26 VCLT.} Article 20:1 lit. a) then introduces the concept of mutual supportiveness between the Convention and other treaties; signatories undertake to ‘foster mutual supportiveness between this Convention and the other treaties to which they are parties’. This flexibly worded provision entails the obligation of conduct to undertake (according to the first sentence of article 20:1: in good faith) efforts to reconcile as much as possible discrepancies – in both law and practice – between the Convention and other treaties. Again, this undertaking is an old acquaintance: It would be a violation of the good faith obligation states carry under Art. 26 VCLT to not to avoid as much as possible to enter into contradictory obligations and, even more so, to contribute to an actual collision of treaty obligations. While the obligation might be old, one would be inclined to applaud the effort to remind signatories of this fundamental obligation of treaty law. Article 20:1 states clearly that the undertaking to achieve mutual supportiveness is, in principle,\footnote{As will be shown immediately sub E. 3. b), this statement is modified in para. 2 for prior treaties, including the WTO.} not intended to subdivide the Convention to other treaties per se.
Thus, if obligations arising from a treaty (‘second treaty’) concluded after another treaty (‘first treaty’) determine a corridor of acceptable behaviour, of which only a part would be compatible with the first treaty, state parties to the second treaty that are also bound by the first treaty are obliged under art. 26 VCLT to interpret the second treaty in a fashion compatible with their obligations under the first treaty. In the case of a multilateral agreement (like the Diversity Convention), every signatory bound by a prior agreement has the obligation of conduct\textsuperscript{115} to undertake a \textit{bona fide} effort to convince the other contracting parties to the second agreement to interpret and implement it in a ‘first-treaty-compatible’ fashion. This is reinforced by article 20 para. 1 lit. b) of the Convention which reads as follows:

\[
\text{when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.}
\]

Clearly, every effort should be made to reconcile the different obligations by the constantly increasing number of treaties. Prosper Weil’s recognition some 25 years ago\textsuperscript{116} that normative relativity was endangering the integrity of international law has by now become commonplace; the International Law Commission (ILC) has just started to address the issue.\textsuperscript{117} Article 20:1 lit. b) is a timely reminder to reconcile, if at all possible, conflicting treaty obligations. This, however, is not affecting the integrity of the ‘other’ treaty obligations: States come into treaty relations with their baggage, and they keep it, unless determined otherwise.

As could be seen, many of today’s state measures to protect domestic cultural offerings, and certainly the majority of those affecting services, would not be in violation of GATS.

However, GATS is committed to ‘progressive liberalization’ (Part IV GATS), and WTO members have agreed that exemptions from art. II GATS (MFN) obligation should ‘in principle . . . not exceed a period of 10 years’.\textsuperscript{118} It is somewhat ironic that at the end of that agreed upon grace period most WTO members might commit themselves to a treaty that de facto requires the permanent continuation of MFN exemptions related to cultural goods.

Does this policy conflict entail a legal incompatibility between Diversity Convention and WTO law? While the Convention does not contribute to progressive liberalization, the mere acceptance of the Convention as binding would not


\textsuperscript{118}GATS, Annex on Article II exemptions, para. 6.
be a violation of a WTO member’s obligation to contribute in good faith to progressive liberalization (Article XIX GATS). This provision requires the members’ general commitment to progressive liberalization, but not an undertaking to liberalize each and every service sector in each and every future trade round. Any other interpretation would be un-reconcilable with the clearly expressed wish of the contracting parties to treat services fundamentally different from goods and therefore not compatible with the Vienna Convention’s mandate to read a provision in its context. The Doha Round negotiations show the commitment of the WTO membership to overcome their fundamental differences with regard to further liberalization. Despite the lack of tangible success, the very effort goes beyond the call of duty as defined by the Annex to Art. 2 GATS. With regard to the provision that MFN exemptions should end after 10 years’ time, the wording quite specifically is not indicative of an operational provision: Exemptions ‘should’, ‘in principle’, end after 10 years.

If the Diversity Convention would require all article II GATS exemptions entered to be kept ad infinitum, then this might indeed contradict this standard. The Convention, however, only, if at all, encourages the continuation of exemptions of a relatively small segment of services and not necessarily ad infinitum. Obviously audio-visual products can still be subject of future trade negotiations, as the Convention only allows its signatories to introduce and maintain protective measures but does not require them to do so.

2. When the going gets rough: Article 20:2 of the Diversity Convention

There will be situations in which the tension between free trade and state measures to protect domestic cultural industries (and consequently cultural diversity) will, despite all efforts undertaken in accordance with general international law and Art. 20:1 of the Convention in particular, result in conflicts of rights and obligations. Some local content rules will not be compatible with Art. III GATT, and other diversity enhancing measures will most certainly violate Art. I GATT. When New Zealand’s new Labor Government wanted to introduce a domestic content rule by an Act of Parliament, it was informed in no unclear terms by the US Government acting through the USTR that this would be in violation of its obligations entered under GATS.119 Thus, while as of now, most trade-restricting state measures would be compatible

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119 See USTR, 2002 National Trade Estimate Report on Foreign Trade Barriers, 302, http://www.ustr.gov/assets/Document_Library/Reports_Publications/2002/2002_NTE_Report/asset_upload_file129_6419.pdf: ‘The New Zealand Government is developing proposals to implement a post-election pledge to introduce format-specific quotas for local content on radio and broadcast television. Government-imposed local content quotas on radio and television could violate New Zealand’s audio-visual commitments under the WTO General Agreement on Trade in Services (GATS). The United States immediately raised its concerns. ...We plan to continue monitoring this issue’. The local content policy now applied by New Zealand’s television and radio broadcasters is voluntary and thus at first glance of no interest for GATS. However, the Government has made clear that it would impose mandatory local content rules if no voluntary solution would be found, two of three television programs are state owned and a state agency is administering the industry’s self-imposed regulation, see USTR, above n 36.
with GATS law, due to the fact that exemptions to the MFN rule are in place and both market access and national treatment are only due when specifically promised, certain quotas, local content rules and preferential agreements for films and audio-visual productions are unsustainable under WTO law, but clearly possible under the *Diversity Convention*. It is then, at the latest, that one has to address the issue how to resolve the conflict between ‘trade’ and ‘culture’ that could not be avoided despite all efforts to make mutual supportiveness work.

(a) *A WTO cultural exception outside of the WTO system?* According to article 20:2, nothing ‘in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties’.

It is thanks to this provision and the understanding that it protected the integrity of the WTO obligations in case of conflict that the *Diversity Convention* got the near-unanimous endorsement reported above. While happily supporting an international document intended to foster cultural diversity, many states would not have been prepared to subscribe to the versions the true believers had favoured. One of the tabled proposals had read: ‘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’ (emphasis added). Such a wording would have meant that the Convention would have declared itself superior to WTO law in case of conflict, provided that the situation was unsettling enough from the perspective of the Convention (‘serious damage or threat to the diversity of cultural expression’). There is no question that acceptance of such a text as legally binding would have impinged on the obligation of members of the WTO to abide by its rules and to perform it in good faith: Even the reasoning of the *Section 301* Panel report – negate an existing conflict between domestic law and treaty law if you can get hold of some declaration that the domestic norm will only be used in a WTO conforming fashion – would not


have helped as there would not have been an infrastructure capable of producing a ‘solemn’ declaration to not use the existing law.

(b) No inter se modification of WTO obligations between the Convention’s signatories. Does Art. 20:2 really mean what it says or is there a lawyerly way to take – from the point of view of the diversity camp – the pain out of its recognizing the prevalence of pre-existing treaties, including the WTO Agreements?

A way out of the difficulties could be provided by article 30:4 VCLT which states

When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two parties, each of which is a party to both treaties, [the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty];
(b) as between a party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations.

Could thus the signatories of the Diversity Convention – potentially all WTO members with the exception of the United States – apply inter se Diversity Convention rules if they conflict with WTO law? The answer is clearly negative, for two reasons.

First, Article 20:2 Diversity Convention restates, with a slightly different wording but with great precision, the text of art. 30:2 VCLT. This provision, it will be recalled, states that a treaty does not have to specify that it is subject to another treaty for that other treaty to prevail. Rather, it suffices that a treaty specifies ‘that it is not to be considered as incompatible with[,] an earlier or later treaty’ in order for that other treaty to prevail. This is exactly what article 20:2 Diversity Convention is providing for: ‘Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties’. Article 20:2 Diversity Convention is the basis, the reason and the conditio sine qua non for the overwhelming support it received in the final vote in UNESCO’s General Conference. That even holds true for some delegations caring less for the integrity of the WTO than for the diversity of cultural expressions proper: Their centres could safely anticipate their allies’ stance and externalize the hard work of settling intra-government differences.123

Secondly – and independently of the reasoning based on article 30 VCLT – the UNESCO Convention’s signatories may not modify their WTO obligations, even between themselves (inter se): Treaty law, as enshrined in Art. 41 VCLT,

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123 Even in heterogeneous institutions like the EC, the coherence of pertinent external legal obligations is institutionally safeguarded and monitored; the actual harmonization is often difficult. See the pertinent statement by Australia, WTO General Council, Minutes of Meeting Held on 20 October 2004, WT/GC/M/88 (11 November 2004), 65.
prohibits ‘two or more of the parties to a multilateral treaty [to] . . . conclude an agreement to modify the treaty as between themselves’ unless the modification in question is not prohibited by the treaty and

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.124

The dogmatic structure of substantive WTO obligations is more appropriately explained as a bundle of bilateral obligations,125 rather than constitutional provisions, these structurally bilateral obligations are uniform in content. The most favoured nation principle does not alter the reciprocal nature of inter-state trade relations – one may point at article XXVIII GATT or the structure of the dispute settlement system, notably the provisions on remedies and how to avoid them as illustration of that thesis; however, it does make them an integral part of a treaty system thus characterized by a multitude of uniform obligations. As a (very much intended) consequence, all WTO members enjoy, with regard to a specific member and a specific product the same rights under GATT and, in principle, under GATS. This inter-connectedness is not limited to the legal realm: More than ever, disruptions in trade relations will change (potentially: all) other trading relations, in particular the flow of products and of capital.126

Exceptions to this WTO-specific uniformity apply but are limited to the ones granted in the WTO Agreement. Thus, e.g., while the inflationary rise of FTAs is a problem, it is a problem addressed (possibly even created) by article XXIV GATT accepting FTAs as a valid excuse from the obligation to treat all members in a non-discriminatory fashion.

To make a long story short: To allow members to change their obligations inter se without an equivalent to article XXIV GATT would compromise the WTO Agreement’s object and purpose to provide a comprehensive basis for all trade relationships between members. As restrictive trade measures affect potentially all WTO members, the first condition of art. 41:1 VCLT would

124 Article 41:1 VCLT.
126 Thus, e.g., safeguard measures will, sooner rather than later, have an impact on states which are not subjects of the primary trade relationship interrupted by said safeguard measure; see M. Hahn, ‘Balancing or Bending? Unilateral Reactions to Safeguard Measures’, 39 JWT (2005) 301 ff.
not be met. This state of the law is echoed by art. 20:2 Diversity Convention according to which it shall not ‘be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties’. The Diversity Convention bows to the WTO, and the general claim to non-subordination in paragraph 1 is specifically modified in paragraph 2 so as to only apply to treaties concluded at the same time or later.

V. THE ROAD AHEAD

Those who advanced the adoption of the Diversity Convention to obtain the long-desired cultural exception outside of the WTO have won a pyrrhic victory: Yes, the Diversity Convention might have far-reaching consequences and lay the groundwork for a greater cultural diversity. However, because the lack of substantive consensus, in particular the lack of US consent, article 20:2 had to become part of the package. As a consequence, the Diversity Convention will not have the effect to shield the cultural sector from the rules and obligations of the WTO Agreement. The ‘mutual supportiveness between this Convention and . . . other treaties’ envisaged by art. 20 of the Convention will be more difficult to achieve than would be desirable, both for the integrity of the world trading system and the promotion of cultural diversity.

If the Convention becomes indeed a ‘reflection of contemporary concern’ – which is not certain, as its unequivocal adoption may or may not translate into the acceptance of the document as binding – the WTO system would be ill-advised to not try to accommodate the Convention’s leitmotiv to exempt states’ policies to support local and regional producers of cultural goods with both subsidies and market access restrictions from the full scope of WTO law.

The Appellate Body has held that WTO law was not to be ‘read in clinical isolation from public international law’. 127 And indeed, the Appellate Body can, to some extent, request co-authorship for art. 20 paragraph 1’s heading (‘mutual supportiveness’ and ‘complementarity’ of treaty regimes): Quoting from the ICJ’s Namibia (Legal Consequences) Advisory Opinion128 and Aegean Sea Continental Shelf Case,129 the US – Shrimp report took a treaty that had not been ratified by all parties to the dispute into account for interpreting the term ‘natural resources’ in Article XX(g). In the Appellate Body’s opinion, it reflected the ‘contemporary concerns of the community of nations’.130 The

readiness to listen and open up to multi-laterally voiced concerns of the community of nations is reflected in the interim report by the Panel in the pending case on European restrictions on biotechnological products.\textsuperscript{131} The Panel clearly accepts the notion that it would take the Biodiversity Convention and the Cartagena Protocol into account, if they were binding upon the WTO members as treaty law or, alternatively, as customary law, which would be the case if the above-mentioned treaties had become restatements of present-day customary law.\textsuperscript{132} Of course, both of these pre-conditions were not met, given the explicit refusal by some WTO members to ratify these agreements. Thus, the Panel, like the Appellate Body before, accepted that it would apply agreements concluded outside of the WTO, if they were indeed supported by all members. Absent such consensus, however, the strategy of systematically creating WTO-contradicting multilateral agreements in non-WTO fora seems legally misguided and politically unfortunate.

A. The preservation of domestic producers: ‘public morals’ and ‘national treasures’

At the end of the day, it might very well be up to the WTO Appellate Body to find a way to sort out the potential conflict between domestic cultural policy and WTO obligations. This would be an undesirable scenario, as the Appellate Body is sub-optimally suited for that task. In particular, the great reluctance of some important members, amongst them China and the United States, to accept general international law permeating the Appellate Body’s trade jurisprudence puts the Appellate Body in an uneasy spot. However, given the lack of credible alternatives, the Appellate Body might have to assume the role of peacemaker by default.

If a WTO member such as the United States would attack certain diversity-enhancing state measures as being incompatible with GATT or GATS, then would the fact that they were based on the Diversity Convention (which, for the sake of argument, is assumed to have been ratified by all those voting for its adoption in UNESCO – a scenario, which, obviously, is hypothetical, indeed) make a difference, despite the above analysis?

The first route the WTO and its dispute settlement organs could choose would be a more expansive interpretation of the ‘General Exceptions’ provision of article XX GATT and article XIV GATS, in the light of the Diversity Convention. According to these provisions, nothing in GATT or GATS should be construed to prevent measures


\textsuperscript{132} See European Communities, above n 131, para. 7.67–7.75.
(a) necessary to protect public morals;

... 

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

provided that such measures are not applied in a manner ‘which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’.

Obviously both provisions were not intended to protect local entertainment industries from the onslaught of Hollywood. While morals does not read morale, and the argument to the contrary seems a bit far-fetched to be a winning one, one could indeed imagine that national treasures of artistic value would in the 21st century also include popular culture. Donald Duck and his fellow cartoon characters but also the Hollywood movie as such: Should these not be viewed as a national treasure the United States should be entitled to protect against extinction by market-dominating Hong Kong media oligopolists? The UNESCO’s Convention reminds us (and possibly the AB) ‘that cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all [and] creates a rich and varied world’.133 If this was a consensus – and it could be, as the United States refusal to support the Convention was not at all based on that point – then the case could be made that something being ‘an integral part of a common heritage of mankind and contributing to a rich world’ is indeed a cultural treasure, rooted in the national culture and being an inalienable part of the world’s artistic (read: cultural) diversity. On the basis of that reasoning, the argument that Asterix le Gaulois, Charlie Brown and Mickey Mouse are as much part of their respective nations’ cultural heritage as Mona Lisa, Déjeuner sur l’Herbes or Nighthawks is a valid one and might give the Appellate Body occasion to interpret art. XX GATT accordingly.

However, given the reluctance of the Appellate Body’s jurisprudence to read art. XX GATT broadly, this line of reasoning would face an uphill battle which – on the basis of Shrimp-Turtle – might not necessarily end with a defeat, provided the Diversity Convention became a reflection of contemporary concerns of the community of nations or, at least, of the WTO Members’ views on cultural policies.134 It might help that from a Diversity Convention – skeptical perspective, this interpretation of article XX GATT would have – somewhat counter-intuitively – the added advantage of being rather restrictive with respect to the outcome, as the chapeau of Article XX would make sure that the wiggle-room for measures intended to protect national cultural products would be rather limited.

133 Preamble, para. 2, 3.
134 See above n 130.
B. ‘Like’ cultural products: Border Tax Adjustment à l’UNESCO

Finally, the Appellate Body could – to appreciate the contemporary concerns of the overwhelming majority of states – take a step back and consider whether the most favoured principle and the national treatment clauses of GATS and GATT, i.e. those provisions most affected by the various measures to protect and promote domestic cultural industries, would indeed apply: It will be recalled that they only come into play with regard to like products. On the basis of the Convention’s basic assumption that cultural expressions of any kind are decisively shaped by their national cultural roots, one would have to assume that cultural goods are per se unlike, if they originate from different cultural backgrounds. If that positions was accepted, e.g. on the basis of near universal ratification of the Diversity Convention, then the Appellate Body could, without overruling prior decisions, introduce a presumption that films from distinct cultural backgrounds – say, the United States (Hollywood) on the one hand and India (Bollywood) on the other hand – would not be regarded as ‘like products’ for the purpose of WTO law.

In one of its early decisions, the Appellate Body has emphasized the flexibility of the term ‘like product’. Its Member Justice Florentino Feliciano, author of some of the most memorable Appellate Body prose (featuring, inter alia, ‘the real world, where people live, work and die’) likened the ‘concept of likeness’ to

[a]n accordion. . . . The width of the accordion in any of those places must be determined by the particular provisions in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.136

The Appellate Body has embraced the jurisprudence of GATT panels, according to which the criteria first developed by a Working Party in the Border Tax Adjustment case determine likeness. Emphasizing that these criteria were only indicative and to be applied on a case-by-case basis, the Appellate Body examines (1) end-use in a given market, (2) consumer tastes and habits, (3) products properties (nature and quality), and, in addition to the classic Border Tax Adjustment test, (4) tariff classifications. Those classifications

135 After all, national/regional distinctiveness is the basis for diversity, i.e. a multitude of distinct cultures.
carry particular weight if and to the extent that they are based on the *Uniform System of Classifications*, a multi-laterally set international standard, provided they are precise enough.\textsuperscript{140} However, the Appellate Body recognizes that the determination of likeness ‘will always involve an unavoidable element of individual, discretionary judgement’.\textsuperscript{141}

A universally ratified *Diversity Convention* could influence the Appellate Body’s judgement with regard to at least two elements of the *Border Tax Adjustment* test. First, consumers’ tastes and habits are concepts with particular relevance for intellectually consumed products, such as movies or television productions. Clearly, consumers perceive local stories and local pictures as being different from international audio-visual productions. While most goods have certain links to the place of their production, cultural goods and audio-visual products in particular have the potential to directly mirror in their creator’s cultural environment. A recognition of this in the *Diversity Convention* (and a hypothetical development of a pertinent rule of general international law) would be important information for the Appellate Body. Second, the present day *Border Tax Adjustment* test allows a purely normative criterion, namely a customs classification prepared by an international body, to be considered in the process of determining ‘likeness’. It would seem to be a rather moderate extension of that approach to allow the classification established by another international body (the UNESCO) and (possibly) heavily subscribed by the international community,\textsuperscript{142} to be considered when determining ‘likeness’. The *Diversity Convention* leaves no doubt that its signatories do not accept the notion that cultural goods ought to be treated like regular merchandise. If it is conceivable within the parameters of WTO law that customs classifications, which are categories of national tariffs, but conceived by international organizations and fora, determine ‘likeness’, then there is no reason why a UNESCO convention should not have the force to determine that Hollywood flicks are not the same as Bollywood flicks. However, such normative determination of likeness is, for the sake of the integrity of the WTO system, only acceptable if solid roots provide additional international legitimacy: The *Diversity Convention*’s ratification rate must be quite strong for it to have a pertinent influence.

The *Border Tax Adjustment* criteria are supposed to establish a bright-line rule to avoid discrimination. The obvious policy consideration underlying this approach is the belief that a balancing approach would invite abuse. Even

\textsuperscript{140} *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 21, 22: “Uniform classification in tariff nomenclatures based on the Harmonized System (the “HS”) was recognized in GATT 1947 practice as providing a useful basis for confirming “likeness” in products. . . . [T]ariff bindings which are . . . extremely precise with regard to product description . . . can provide significant guidance as to the identification of “like products”’.

\textsuperscript{141} *Japan – Taxes on Alcoholic Beverages*, above n 140, 20 ff.

\textsuperscript{142} This is as of now, of course, hypothetical and depends on the number of ratifications.
more troubling, it would be difficult to adjudicate in practice: The *Appellate Body*, having just started its teenage years, tries to avoid situations endangering its authority. Thus, it came as no surprise that the Appellate Body rejected the *aims-and-effects* test, both for the purposes of art. XVII GATS\(^{143}\) and art. III:2 GATT. The *aims-and-effects* test, it will be recalled, wanted to ensure that free trade rules did not unnecessarily impinge on legitimate policy choices of WTO members by specifically targeting protectionist measures, i.e. measures which protect products from competitive stress for *economic* reasons.\(^{144}\) Only if the aim or the effect of certain trade measures were protectionist in that sense should they be made subject to questioning and reversal through WTO organs.

Despite its rejection of the aims-and-effects test, the *Appellate Body* could not avoid introducing a very similar approach in an art. III:4 GATT analysis relating to the alleged discrimination of asbestos containing products by France. In *Asbestos*, the Appellate Body based its decision to allow the policy to treat asbestos-containing products different from other fibre-containing products not the least on adverse health effects. The *Appellate Body* considered this aspect because the measure had not been taken to stifle competition but for a valid policy goal: public health.\(^{145}\) The *Diversity Convention* could elevate cultural diversity, in the *Appellate Body*’s eyes, to the same dignity as public health. In that case, the argument that the nature of a French television production was indeed different from an American television production, and thus not ‘like’, would be fully compatible with prior case law. Indeed, if health consideration (i.e. the EC’s and France’s public health policy) is being taken into consideration when determining consumer tastes and habits, it seems artificial to not take into account a policy for cultural diversity, i.e. a policy aimed at creating certain market conditions favouring a state of play which is considered by state organs to be as beneficial for society as certain (physical)

\(^{143}\) See *Japan – Taxes on Alcoholic Beverages*, above n 140; *EC – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS/27/AB/R, para. 240 ff: ‘We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the “aims and effects” of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the “aims and effects” theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations “should not be applied to imported or domestic products so as to afford protection to domestic production”. There is no comparable provision in the GATS. Furthermore, in our Report in *Japan – Alcoholic Beverages* the Appellate Body rejected the “aims and effects” theory with respect to Article III:2 of the GATT 1994. The European Communities cites an unadopted panel report dealing with Article III of the GATT 1947, *United States – Taxes on Automobiles* as authority for its proposition, despite our recent ruling’.


health standards, especially when taking into account that this standard of diversity might be embraced by 148 ratifying states.

The Diversity Convention has by no means put the culture vs. trade debate to rest. Rather it has re-started it. At the end of this discussion, it will eventually be up to the states to develop concepts to reconcile non-discriminatory trade and certain state measures aiming at protecting domestic popular culture. That process, however, could be accompanied by diverse tunes, played on a Philippines-designed accordion under the Geneva Sky.