**INTERNATIONAL**
journal *of*
**CULTURAL** studies



www.sagepublications.com
Volume 13(4): 1–19
DOI: 10.1177/1367877910369975

# An international instrument for cultural policy

## The challenge of UNESCO's Convention for the Protection and Promotion of the Diversity of Cultural Expressions 2005

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**ABSTRACT** This article lays out the contexts informing a unique, international instrument for policy and the development of creative works: the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005. It argues that culture needs to be defended against those interested in including cultural services in global trade negotiations at the World Trade Organization, and demonstrates how the Convention may be implemented to give cultural agendas an equal status alongside economic, social and environmental issues which currently determine policy for development. It gives analysis of some of the key articles and suggests that although the instrument will have to be tested legally, it provides the framework for national policy to build sustainable infrastructures in recognition that diversity of cultural expressions is central to the well-being of our societies.

**KEYWORDS** creativity · cultural industries · human rights · development · UNESCO

Culture is like the air we breathe: in today's world it needs to be defended. Cultural rights are included in the framework of the international human rights regime but, in terms of policy, cultural activity has always been the poor relation. From a governmental point of view this reflects the difficulty of converting cultural benefits into a quantifiable, economic return. In relation to

development policy, while culture may have a recognized place with regard to tradition and heritage, its transformational and catalytic potential is largely overlooked, not least by developing countries themselves.

An international instrument now exists which is a step towards change. In October 2005, the 32nd General Conference of UNESCO, adopted the text of a new convention: the Convention for the Protection and the Promotion of the Diversity of Cultural Expressions. Two years later, on 18 March 2007, it entered into effect with 56 states and one region (Europe) having deposited their instruments. Within a year of its coming into effect, the number of signatories had increased to 80, representing well over half the world's population.

The rapidity with which this Convention has progressed from vision, to draft, to actuality is remarkable. It expresses the concern shared by cultural ministers, parliamentarians, creators and civil society organizations in the 1990s that diversity and identity should not be threatened by the impact of globalization and the internationalization of legal systems in support of trade.

At the opening session of the first conference to mark the achievement of the Convention,[1] this legal instrument was heralded as a 'Magna Carta for cultural policy'.[2] This extravagant claim, invoking the memory of the groundbreaking 13th-century charter (the first to place legal constraints on the absolute power of the English monarchy), expressed the mood of triumph that cultural as well as economic rights were now affirmed in a legal framework, safeguarding the right of nation-states to create cultural policy in defence of their own heritage and diversity of cultural expression. It also signalled the determination and energy of the civil and political groupings whose mobilization had brought this Convention about.

Many of these came from the developing world and it is significant that the needs of the developing countries, where creative industries are often weak, and cultural traditions threatened by rapid globalization and social conflict, have been prioritized. Written into this Convention is the acknowledgement that diversity of cultural expression should become a pillar of development, alongside agendas of economic prosperity, social justice, education, environmental balance and sustainability.

## Contexts informing the Convention

The Convention addresses creative activity in a production and distribution environment transformed by the opportunities brought by new digital technologies. The impact of this technology, particularly in telecommunications, played a major part in the acceleration of global trade in the 1980s and 1990s, which necessitated a re-evaluation of the role played by cultural works and their contribution to social cohesion and to development. Debate on strategy informed by these concerns was ongoing in the 1980s and included, for example, discussions at the World Conference on Cultural Policies (MONDIACULT) held by UNESCO in 1982 in Mexico City and during the

United Nations (UN) World Decade for Cultural Development from 1988 to 1997. The establishment of the World Commission for Culture and Development (WCCD) led to a report, *Our Creative Diversity*, published in 1995, which became a landmark document and largely defined subsequent debates on culture and development (see Kredler, 2007: 1).

Concern was focused on the impact of the World Trade Organization (WTO), set up in 1995, whose objective has been to enable commodity trading and to facilitate agreements between countries for the liberalization of exchange of goods. The WTO absorbed the main corpus of rules from the earlier General Agreement on Tariffs and Trade (GATT) and, using its own principal instrument, the General Agreement on Trade of Services (GATS), has developed a negotiating framework through which nation-states can offer up to other trading partners service sectors which they wish to liberalize according to the logic of supply and demand.

One of the WTO's new functions was to settle disputes through the creation of the Dispute Settlement Body, and in 1998 two rulings clearly signalled the challenge posed to national cultural policy. It found in favour of the United States against Canada and Turkey in disputes over foreign periodicals and film quotas, in which Canada had sought to protect its publications sector and Turkey its film production sector by imposing a tax on foreign periodicals and foreign film receipts respectively. In 1988 Canada had signed a free trade agreement with the United States designed to remove several trade restrictions over ten years in recognition of the fact that they were each others' most important trading partners. However, thus far it had managed to protect its cultural industries by operating a complex system of exclusions and exemptions. Given the strength of its main competitors, the unimpeded proliferation of American titles on the news-stands was a major threat to a more diverse range of titles which might express the voice of Canada's multiple communities. So even though the notion of 'cultural exemption' had never had legal standing, the ruling was a major setback. It also demonstrated how the status quo with regard to understandings on the 'cultural exception'[3] was coming under pressure from within the WTO itself. Thus far, although WTO members committed to liberalization in principle, they retained the right to make, or not to make, specific commitments in each sector. However, this defeat signalled the weakness of earlier understandings, which, together with the difficulties of classification in the cultural sector, demonstrated the urgency of seeking a solution to keep cultural works out of the GATS in a more definitive way.

There had also been a significant shift in US strategy, as evidenced by the free trade agreements concluded by the United States with Chile (December 2002), Singapore, (February 2003), Central American States (December 2003), Australia (February 2004) and Morocco (March 2004). With regard to the potential of cultural goods and services, and with significance for the audiovisual sector in particular, these agreements reflected a change in approach. The change was informed by a recognition, expressed in a communication

from the United States to the WTO, that the audiovisual sector in 2000 was 'significantly different from the audiovisual sector of the Uruguay Round period when negotiations focused primarily on film production, film distribution, and terrestrial broadcasting of audiovisual goods and services'. The communication goes on to say that 'especially in light of the quantum increase in exhibition possibilities available in today's digital environment, it is quite possible to enhance one's cultural identity and to make trade in audiovisual service more transparent, predictable and open' (WTO Council for Trade in Services, 2000: para. 9).

While a difference is being acknowledged in this document, contrary to earlier positions, that cultural products in general, including audiovisual products were in some respects not equivalent to other goods and services, it was also stating that, given the impact of digital technologies, dissemination was so transformed that approaches to policy in these areas should be liberalized.

This view was picked up and expressed by the Motion Picture Association of America (MPAA) in a presentation given to a US Congress Committee in May 2001, where the argument was developed as follows:

> In today's world, with multiplex cinemas and multi-channel television, the justification for local content quotas is much diminished, and in the e-commerce world, the scarcity problem has completely disappeared. There is room on the Internet for films and video from every country on the globe in every genre imaginable. There is no 'shelf-space' problem on the net. (Richardson, 2001)

This impact and economic potential of digital technologies provided a rationale for changing policy so as to remove trade restrictions, and led to an act in the USA, the Bipartisan Trade Promotion Authority Act (2002), which 'gave fast track authority to the Executive to conclude free trade agreements with the instruction, among other things, to conclude trade agreements that anticipate and prevent the creation of new trade barriers that may surface in the digital age environment' (Wunsch-Vincent, 2003: 7).

These developments informed a new negotiating strategy by the United States with regard to cultural goods and services, and one which adopts a most liberal approach to commitments in the light of technological change. This had a particular impact on cultural services offered under the 'negative list' approach, the practice whereby all trade and services are considered included in negotiations unless an exception, or an opt out, is negotiated. It allows for some acceptance that existing financial support for cultural works will continue, and even that local content requirements may be set up, particularly in the audiovisual sectors where traditional technologies are concerned. However, the new aspect of this strategy is that states must commit themselves to keeping digital networks free of cultural protectionism. With the speed of convergence, and at a time when digital technologies were in the process of transforming the music, audiovisual and publishing industries, this aimed to transfer control to what was already mapped as the commercial

future while seeming to make concessions by withdrawing objections to markets regarded as having limited relevance (Bernier, 2004).

Given the slowness with which such trade agreements can be put in place, and in the absence of consensus in the Doha Round of talks on trade, there has also been a growing tendency to substitute bilateral or regional agreements as faster ways to achieve market liberalization. This has been true of the United States, which has sought bilateral free trade agreements which have specifically included the audiovisual sector. In this context the growing movement to safeguard cultural interests through the development of a new convention was seen as a significant challenge. In a letter sent out in October 2005, US Secretary of State Condoleezza Rice urged ministers attending UNESCO's forthcoming General Conference not to vote in favour of adopting the Convention:

> I am writing to you to express my deep concern with the draft UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Due to its extraordinary reach and the ambiguity of some of its language, the convention, if adopted, could be misread to impair rights under existing trade agreements and derail progress toward global trade liberalization at the WTO. We believe this convention could also be misused by some governments to justify efforts to restrict the free flow of information and to suppress minority viewpoints or minority cultural practices. This convention invites abuse by forces opposed to freedom of expression and free trade. (Rice, 2005)

By 2005 the value of the global information and audiovisual entertainment markets was larger than that of steel and textiles combined, and the potential of these new industries was being recognized by Western governments as a key resource and area for expansion. Included in this expansion were the markets of the developing countries and, for the larger corporations, the WTO represented the opportunity not only to build bigger national markets but also – crucially – to remove public policy roadblocks to enable consolidation of international markets throughout the global South.

By 2005 only 63 propositions had been made under GATS to liberalize services, a limited number. However, from the cultural point of view it was significant that six states had offered to liberalize their audiovisual sectors, reflecting the fact that, to many governments, culture was seen merely as a pawn in the negotiations over larger sectors of the economy (L'ARP, 2005: 8). For developing countries in particular, the import of foreign productions further enabled by these agreements made it difficult for local production or distribution to thrive, and facilitated larger commercial groups playing a disproportionate role.

This situation was made worse by the increasing market exploitation of content and intellectual property rights resulting from the convergence of material from sectors previously organized and regulated separately, such as print media, publishing, television, music and film. Convergence brought about

by digital technology also rendered the separation of services and products for trade purposes increasingly anachronistic, particularly in key creative sectors such as music and the audiovisual production. In these creative industries, new technologies were enabling telecoms to deliver content individually and on-line, by-passing quotas and other regulatory devices which had previously governed trade. Significantly, the Marakesh Agreement, which established the WTO in April 1994, had also included an annex, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which specifically related to copyright provision in the new era. In the years that followed the exercise of intellectual property rights began to impact progressively on diversity of cultural expressions.

It may be argued that copyright law, insofar as it delivers Article 15c of the UN International Covenant on Economic, Social and Cultural Rights, can be characterized as supporting human rights. However, copyright law has developed far beyond the simple principle expressed in this Article, of allowing the author to 'benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production' (United Nations, 1976: Art. 15c). While it may still serve the creator in a small way, and does not affect all forms of creative activity or to the same extent, copyright law with regard to the cultural industries has led to a commodification of cultural works, and the development of dominant players and 'copyright facilitated aggregation' (Macmillan, 2008: 5). It has further resulted in the progressive integration of ownership in rights over content, with rights to distribution and also rights over content-carrying technology. It has therefore become open to the dominant players interested in trading cultural works to use international trade law to open up and acquire markets and to manipulate interests by operating as a form of cultural oligarchy. In the music sector for example the position of big record labels and music majors has become even stronger through the trading of copyrights and licences, making it difficult for small labels and regional musicians to compete. Without strong support from institutions financed through public funds, the cultural infrastructure for musical diversity is therefore inevitably weakened.

Ironically, what is referred to in Article 15c as an individual right for cultural self-determination and individual freedom of expression has developed into a system whereby, through their control of markets for cultural products, 'multimedia corporations have acquired the power to act as a cultural filter, controlling to some extent what we can see, hear and read' (Macmillan, 2008: 6).

## Achieving the Convention

It was in response to the dynamics of this changing trade environment, and in anticipation of the radical changes being brought about by the new technologies, that in 1998 the Minister of Canadian Heritage convened a meeting of 16 cultural ministers sympathetic to the need to develop an instrument to

support cultural interests. This resulted in the formation of the International Network on Cultural Diversity (INCP). It was supported by the work of national coalitions of creators and cultural activists, many of which were based in countries of the South and the developing world which, with the least legal, economic and political resources to resist, were most vulnerable. It was at a meeting of the INCP hosted by South Africa in 2002 that the decision to develop a fully fledged Convention with the power to address these agendas was finally taken. UNESCO's Declaration on Cultural Diversity in 2001 provided a framework on which to build, and bringing the initiative under the umbrella of UNESCO recognized its role as standard-setter and as 'a laboratory of ideas in anticipating and identifying appropriate cultural strategies and policies' (UNESCO, 2005?: 3).

It was at the 31st UNESCO Assembly in 2003 that it was agreed to adopt the initiative to draft a Convention. There were 148 votes in favour, 4 abstentions (Australia, Honduras, Liberia and Nicaragua) and 2 votes against (the United States and Israel). 'There was an insistence that the debate should take place in the largest chamber. It left an indelible mark but it was only the first step' (Wilczynski, 2006). Ahead lay thousands of options to be discussed and huge differences to be negotiated, clause by clause, before arriving at the 34 principal articles of the treaty. The achievement of this task was a huge act of political will, advanced between governments and between civil society organizations, coalitions of creators and cultural organizations, and governments in a complementary approach which has come to inform one of the distinctive features of the Convention – the active role which is ascribed to civil society in achieving its goals (Article 11). In this respect it is not only the text of the final document which marks the achievement of the Convention, but also the radical process through which it came into being.[4]

In spite of the rapid ratification of 82 state signatories, and 1 regional signatory, the EU, the Convention will need to attain nearer 150 ratifications in order to achieve equivalent status to other international treaties, such as the Kyoto Treaty on the environment. This will also ensure greater balance in the spread of countries and regions which are represented. Currently, the number of signatories from the Middle East, Indochina and Anglophone Africa is low. Given the economic strength of its principal detractor, it is equally important to raise awareness in the USA, and to urge ratification under the new presidential order.

In addressing diversity of cultural expression, this Convention stands out among heritage-related conventions. It builds in particular on Articles 8–11 of the Declaration on Cultural Diversity, 2001. Article 8 states that 'particular attention must be paid to the diversity of creative works taking into account the rights of authors and artists as well as the specificity of their goods and services as carriers of identity'. It goes on to state that the value of cultural works should be considered as distinct from the profits associated with other consumer products. Article 9 goes further in stating that each state should ensure an environment which promotes production and circulation of cultural

works and that 'with respect to their international obligations each state should define its cultural politics and implement them in the manner they consider best suited' (UNESCO, 2001: Art. 9).

For the purposes of the Convention 'cultural expressions' refers to:

> … the various ways in which the creativity of individuals and social groups takes shape and manifests itself. These manifestations include expressions transmitted by words (literature, tales …), sound (music …) images (photos, films …) – in any format (printed, audiovisual, digital etc) – or by activities (dance, theatre …) or objects (sculptures, paintings …), UNESCO (2005c: questions 2:2).

It is significant that the Convention not only covers the many forms of cultural expression that result from the creativity of individuals, groups and societies, but also considers these in whatever form and/or technology used in their production or transmission. In this way the Convention is committed to strengthening the five links which it distinguishes as part of an inseparable chain: creation, production, distribution/dissemination, access and enjoyment of cultural expressions conveyed by cultural activities, goods and services – particularly in developing countries' (UNESCO, 2005b: Keynotes 4).

## The Convention and strategies for development

A third and determining aspect of this Convention is the objective expressed in Article 1 of its guiding principles: 'to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries, in order to protect and promote the diversity of cultural expressions' (UNESCO, 2005a: Art. 1:3). Cooperation for development is included as part of an extended article, Article 14, which is included under title IV of the Convention, which deals with 'Rights and Obligations of Parties'. It is thereby given the status not of an objective or goal but of an obligation. Together with the strategies outlined in the full text of the Convention (Articles 12, 14, 16, 17) it implies a major shift in strategy towards development agendas, and one which gives culture equal status with economic, governmental, environmental and educational priorities (Thiec, 2006: 10).

This emphasis is consistent with the work carried out in other international forums, in particular the work carried out with the United Nations Conference on Trade and Development (UNCTAD), which in 2004 identified the significance of exploiting the economic potential of cultural industries in developing countries and is continuing this commitment (UNCTAD, 2004). Nurturing this process and safeguarding a thriving diversity of expressions is central to people's empowerment and to their ability to realize development objectives, not least in the context of the UN Millennium Development Goals (MDGs) and the commitment to eradicate poverty by 2015 (UN, 2005).

The centrality of culture informs a concept of development which has evolved to recognize that human development has the aim of 'enhancing human capabilities – to expand choices and opportunities so that each person can lead a life of respect and value' (UNDP, 2000). Choice in this context is not construed as the right of the consumer to be a stakeholder in society, but addresses each individual's right to play an active role as a citizen in the world community. Poverty in this context is defined as 'capability deprivation', and the exclusion of a majority from their rights of free expression, the means to communicate, as well as the material benefits of the contemporary world they live in.

Some development agencies, such as the Danish International Development Agency (DANIDA), already regard a consideration of cultural practices as a precondition for development cooperation; this involves specific forms of cultural and artistic expression as means of communication, as well as support of multilateral activities such as the improvement of intellectual property rights. However, it is only recently that the scope of this approach has been understood. For example, in the Organisation for African Unity's New Partnership for Africa's Development (NEPAD) policy document, adopted in 2001 and intended to provide an integrated socio-economic development framework for Africa, cultural agendas are dispatched in 15 lines, with a general reference to the need to nurture and protect indigenous knowledge and traditions.[5] In its later Strategic Framework, the 2004–2007 Plan of Action, however, NEPAD's thinking and strategies have shifted. Culture is listed as one of six key areas of prioritization, and a special programme is included to support film production, to run festivals and exhibitions, and to disseminate the artistic works of Africans.

This shift is also picked up in Tony Blair's Commission for Africa which endorses the NEPAD support for culture and states that:

> We want culture to become an inherent component of all development strategies – not just in terms of cultural products, but also in defining the terms of the development debate and the actions that follow. Culture becomes a way of working as well as an end in itself. (UK Government, 2005: section 3.6, p. 48)

It also goes on to signal the danger in the 'lack of attention to culture in policy-making' (2005: section 3.6, p. 49), with regard to sustaining family and social networks for the future, and the intergenerational transmission of values and education which underpin society's survival.

The scope of the Convention takes these agendas much further, and in doing so it indicates a substantive shift in focus from other approaches to development. Cultural tourism, for instance, has long been recognized as a powerful catalyst for economic development, not least in providing employment and supplementary income for rurally based, small-scale craft producers (Robinson and Picard, 2006). Many project-based initiatives have also used creative practices to achieve development goals.[6] However, what the Convention encourages, both at national government level and through international cooperation,

is policy to realize the potential of the cultural sector for development, in recognition of its centrality to diversity of expression. It also motivates strategic exchange and economic partnerships, which can help build infrastructure, and provide resources and training. The distinctiveness of this strategy might be compared to the fundamental difference in perspective and scope between the Fair Trade philosophy, which is more significant as an awareness-raising project for Western consumers than in terms of the monies it transfers to the producers, and the approach of strategies informed by the aims of Trade Not Aid, which seek to increase processing and manufacturing capacity locally so that the benefits of employment and the value-added on staple products remains in the country of origin. This is a challenge which requires the restructuring of the terms of trade, ending such practices as tariff rigging and barriers to travel, and committing instead to an increase in exchange with the South that will enable their voice and products to circulate.

The concept of cultural preference, articulated in Article 16 of the Convention, is central to achieving these objectives. It motivates signatories to correct powerful market dynamics, and to adjust asymmetries in trade to achieve greater reciprocity with minority cultures excluded or weakened in cultural exchange by the hegemony of more dominant cultures. In trade negotiations, developing countries are often in the weakest position with regard to achieving favourable terms for their creative industries in economic partnership agreements because their cultural policy is ill defined or non-existent, their dependency on donor countries is critical to economic stability, and/or, more simply, the existing market practices are heavily stacked against them. The principle of cultural preference, taken together with Articles 14 on Cooperation and Article 15 on Partnerships should provide a basis for measures to increase sharing of resources and experience on best practices; technical capacity-building and transfer of technology; fiscal incentives; joint investment and joint production, and diffusion of cultural expressions.

## The legal status of the Convention in the context of human rights

Principled discussion on culture and cultural value has never been enough to promote or safeguard its importance, whether in the economic, social or political spheres. This Convention, however, is the first international treaty of its kind to set up rights and obligations in the field of culture. Under Rights and Obligations of Parties (section IV ), Article 6 affirms the rights of parties at national level to adopt policies to protect and promote the development of cultural expressions in their territory. However, to achieve these measures, the Convention will have to help create a new balance between commerce and culture with regard to existing international law.

There are two articles whose interpretation will be critical in this regard, Article 20, governing relationship, complementarity and supportiveness

to other treaties, and Article 21, promoting international consultation and coordination. During negotiations on the Convention this section was the most debated and the definitive wording was not applied until the very end, in particular because its scope includes potentially irreconcilable obligations under international law. In Article 20, what is laid out provides that parties should observe obligations to this and other treaties 'in good faith'; it affirms the principle of non-subordination in relation to other international treaties (Art. 20.1), and urges mutual supportiveness and complementarity where there is a link or relationship with other international treaties (Art. 20.1a, 20.1b). In the same article, however, it states that 'Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties' (Art. 20.2).

Questions inevitably arise over how to interpret the wording of these clauses in any action that is contestable. Article 30 of the Vienna Convention on the Law of Treaties describes the application of successive treaties on the same subject, and in paragraphs 3 and 4 stipulates that where parties to an earlier treaty are all parties to the later treaty, 'the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'. However, when the parties to the later treaty do not include the parties to the earlier treaty 'the treaty to which both States are parties governs their mutual rights and obligations'. This seems to raise a possibility that Article 20.2 might in some cases legally subject the Convention to other treaty law. However, the wording of the Vienna Convention is precise. It stipulates that 'when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'. Since Article 20.2 does not use the terms 'subject to' or 'incompatible with', and instead states that the Convention 'will not modify the rights and obligations' of the parties, i.e. will not prevail over them, it has been argued (Bernier, 2009: 9) that this is not equivalent to an interpretation that the Convention is subordinate to them as other authors such as Michael Hahn (2006: 515–41) have claimed. In this case the clause expresses a statement of equal weighting consistent with the concept of 'mutual support' expressed in the first paragraph of the Article.

The wording of this crucial clause has borrowed from the language of several other conventions, in particular the Cartagena Protocol on Biosafety to the Convention on Biological Diversity.[7] It is not within the scope of this article to unravel the legal hinterland behind the wordings in detail but the intention of the wording would seem to favour a progressive rather than a fixed interpretation in any future challenges. These are likely to come through interpretation of the liberalizing policies of the WTO in relation to the GATS, and the spirit of the Convention in calling for parties to undertake measures to protect diversity of cultural expression. With regard to audiovisual services, for example, the practice of operating cultural exemptions would not apply to co-production or co-distribution agreements unless they were already inscribed in the Annexes to the GATS. This would seem to threaten some ini-

tiatives set up to achieve objectives for cooperation as provided for under Article 14. However, given the number of these agreements already in existence, and the encouragement of regional agreements in treaties such as the European Convention on Cinematographic Co-Production and the MERCOSUR Protocol of Cultural Integration, it is likely that, in the event of a dispute, parties would seek to promote principles of 'mutual support' rather than conflict.

As yet the Dispute Settlement Body of the WTO has not issued an opinion on Article 20 of the Convention. It was referred to, however, in the recent case between the United States and China – *Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (WTO, 2009: DS363/R) – where the Chinese included an argument in favour of its position of setting up protective measures by invoking the Convention, among other international instruments. In its oral evidence the United States invoked the Vienna Convention on the Law of Treaties, noting that:

> … nothing in the text of the WTO provides for an exception from WTO disciplines in terms of 'cultural goods'.… China's reference to the work of UNESCO is thus unavailing even without considering the fact that the United States and a number of WTO members are not parties to the UNESCO Convention. (UST, 2008: para. 26)

The position articulated by the Convention's strongest opponent indicates the importance of both increasing the number of signatory states and of promoting the instrument in international forums and through setting up consultations with other parties. It is Article 21 that provides for strengthening consensus, particularly in trade negotiations. To be effective its remit should encompass not only multilateral forums such as the WTO, but also forums based on regional and linguistic associations, such as the Organization of American States, MERCOSUR, the AU, the Commonwealth, La Francophonie and others. The scope of consultations to take place also needs to be clarified and could include adoption of declarations, exchange of best practice, agreement on international negotiation. At the Second Congress of Parties in June 2009, Articles 20 and 21 were not included in the priorities set for the Intergovernmental Committee to develop operational guidelines over the next two years, despite the positions taken by civil society organizations and several parties to the Convention. However, the development of consensus and dialogue can still take place through the provisions of Article 23.6 (e), under which the Intergovernmental Committee has the responsibility 'to establish procedures and other mechanisms for consultation aimed at promoting the objectives and principles of this Convention in International forums.'

This process is important, given the conciliatory approach which informs the procedure in the event that two or more parties disagree over the implementation of the articles of the Convention itself. An annex provides for a

Conciliation Procedure, whereby a conciliation Commission would be created at the request of one of the parties to the dispute and would be composed of five members, two appointed by each party concerned and a president chosen jointly by those members. In establishing the facts of the case, this body would not only take into account legal rules but also non-legal elements affecting the dispute, such as political, economic, social and cultural considerations. Arguably, these characteristics of the conciliation process might be best suited to the nature of the cultural issues at stake. However, it is a weakness of the conciliation provision that there is no clear role for the UNESCO Secretariat in administering the mechanism. This is something which might usefully be addressed both by the Intergovernmental Committee and the Council of Parties in 2009, Macmillan (2008: 14).

It is significant that, unlike other treaties pertaining to trade, this Convention has no provisions on judicial or arbitrated settlement of disputes, hence its effectiveness in the event of a conflict of interests with regard to a trade issue is open to challenge. The Annex to the Convention which contains the Conciliation Procedure has been described as 'worth mentioning only as being reminiscent of the very early days of modern international law' (Hahn, 2006: 533), and it is likely that, in the event of serious dispute, the forum would be a WTO dispute settlement proceeding, primarily because 'the WTO has become the pre-eminent system for international dispute resolution' (Macmillan, 2008: 14). In this case, clause 20.2 of the Convention would provide significant leverage in a case where the provisions of GATS are seen to be contravened in the upholding of the principles of diversity of cultural expressions. However, since under Article 25 the dispute settlement mechanism of the Convention can be activated by the plaintiff alone – unless the defending party has not signed up to the procedure on ratification, thus far only the case with 3 of the 99 signatories – it is likely that Article 20 would first be tested through the Convention's own frameworks.

The legal bearing of the Convention with regard to trade law raises a more systemic consideration, which goes beyond diversity of cultural expressions, although this is central to it. How does human rights law, of which rights regarding cultural self-determination and freedom of expression are part, engage with WTO law? At present in international legal governance there would seem to be: 'a no-man's land on which the clash – unregarded by the eyes of the law – between human rights and WTO law is taking place' (Macmillan, 2008e: 16). The challenge that this represents will require diverse approaches, both to the normative frameworks and the details of laws regarding particular areas such as copyright law or international trade law, and depends on a political willingness and diplomatic negotiation.

While 'cultural rights are often neglected in the cataloguing of human rights in favour of the more succinct "economic and social rights"' (Marks, 2003: 293), they do constitute a complex web across various international instruments, and are anchored in Article 15 of the International Covenant on

Economic, Social and Cultural Rights (ICESCR). To establish culture more strongly in the scheme of international human rights, these provisions now need to be read in relation to the UNESCO Convention (2005), which is the most elaborate UNESCO treaty to date addressing contemporary creative activity. This will be a consensus-building process over years. However, the Convention is a huge step forward, a legal instrument that will enable its stakeholders to argue their case and build juridical norms in recognition that cultural rights provide 'the grounding of the aesthetic, cognitive, spiritual, and emotional bonds of all humans to their society and, for many, to the cosmos' (Marks, 2003b: 324), and that it is through safeguarding these rights that these bonds can find expression.

## Implementing the Convention

In a first move to bring the Convention to life, in April 2007, under the term of the German Presidency of the EU, the German national UNESCO Commission hosted the first major international gathering of stakeholders in the Convention since it had come into being. It was held in the northern city of Essen, once an industrial anvil of Europe, and now extensively redeveloped through investment in urban and cultural regeneration. Realizable strategies for implementation emerged through broad-based debate at eight thematic fora on film, music, the role and place of civil society, urban public spaces, North–South cooperation, media politics/media economy, public awareness and education, and a forum addressed and organized by the under-40s entitled 'Cultural Diversity 2030'. These strategies included short- and long-term policy goals, realizable through economic collaboration by the public and private sectors, and can be viewed in the full, online report from the conference (UNESCO-de, 2007: 102).

Beyond individual state policy, regional organizations will also have a key role to play in implementing the Convention. The EU is the first regional signatory, and, building on Article 151 of the Maastricht Treaty (EU, 1992: Art. 151), it is expected that the articles of the Convention will be mainstreamed across all policy areas, leading to both new policy and the reinforcement of existing policy. Jan Figel, EU Commissioner, recently stated that the EU would be duty bound to implement it 'when exercising the competences it enjoys in various policy areas: free movement of goods, persons, property, services and capital, competition, internal market including intellectual property rights' (Figel, 2007).

The EU has recently acted on a strategy for cultural accords to be included in trade agreements. At the Cariforum meeting with the EU (in December 2007), it was agreed for the first time that a cultural protocol would be included in economic partnership agreements between Caribbean countries and the EU in respect of the Convention,[8] and it is expected that this will form a model for future economic partnership agreements with other countries.

However, there is also recognition that the tension between diversity of cultural expressions and the provisions for an internal market and competition might lead to contradiction in the enlarged European community, and that countries will also have to overcome postcolonial and post-Cold War tendencies and spheres of influence so that existing and new policies can maximize the potential of North–South and South–South cooperation (Aylett and Tongue, 2007: 136–47).

Evidence of the impact of the Convention is also coming through the Commonwealth. In November 2007, over 1500 delegates from 600 organizations in 59 countries came together at the Commonwealth People's Forum in Kampala, 'Realising People's Potential', in the run-up to the Commonwealth Heads of Government Meeting (CHOGM). From this assembly came the Kampala Civil Society Statement, listing key concerns and giving recommendations for action to Heads of Government. Included in paragraph 116 is a recommendation that Commonwealth member sssstates should ratify the Convention and 'meaningfully involve and support civil society in its implementation at national, regional and international levels, notably in the development and application of cultural policies and strategies' (Commonwealth Foundation, 2007a: 9).

Internationally, although the thinking is advanced around the Convention, the project is still only in its planning stage. Funding is crucial. To date 15 countries have committed to the Cultural Fund which will implement action on behalf of developing countries, building infrastructure, policy and human resources. The fund currently stands at about US $1.321 million, and now that the Conference of Parties has accepted operational guidelines, the funds are likely to increase and the programmes can be initiated from next year to ensure that 'diversity of cultural expressions (is not) limited *de facto* to the diversity of developed country cultural expressions' (Bernier, 2007: 17).

For these to deliver innovative, structural change, input is essential from civil society, not only from the creative sectors, but also from the breadth of organizations whose work recognizes the centrality of creative works in achieving social cohesion, ending social conflict, and promoting understanding of science, international relations and more. Facilitating structures which can sustain this input, and ensure the transfer of knowledge and best practice from the diversity of stakeholders to individual governments at local, national and regional level, and to the Council of Parties, is one of the challenges to those responsible for delivering the complexity of the instrument and its objectives. An important first step was taken at UNESCO, Paris, on 23 June 2008, in anticipation of an extraordinary session of the Convention's Intergovernmental Committee: 200 NGOs, representing thousands of creators' and cultural organizations, were granted an official audience and exchange with governments, the first in UNESCO's history, and one which has set a new precedent.

By extending dialogue and harnessing the expertise of civil organizations, especially in developing countries, the Convention signals a fundamental

challenge to the way the term, 'development', has been abused, in being applied to refer largely to economic growth leading to the imposition and replication of failed Western development models. These models might be seen as 'creating a discourse on development, which establishes a hierarchy of knowledge and legitimises a particular cultural standpoint … [and] suggests that the "West" knows what is best for the "rest"' (Nurse, 2007: 3).

Thus far, progress in the name of new technology and market forces in an era of globalization has not enabled humankind to circumvent natural scarcity. From the point of view of the people in developing countries, whose interests lie at the heart of this Convention, the absence of diversity of expression and the greater understanding and access to human rights which it brings, has only accelerated today's political and environmental disasters and increased inequality. If the Convention can help facilitate and see through mechanisms for change, its achievement might prove to be a Magna Carta moment in history, ushering in a different consensus.

## Notes

1 The conference, entitled 'Bringing the UNESCO Convention to Life', was held in Essen in June 2007. It was convened by Christine Merkel from the cultural department of the German Commission.
2 The convenor of the conference, Christine Merkel made this remark. The Magna Carta was the Great Charter of Freedoms, conceded by King John to his barons in 1215.
3 The principle developed by European countries, though with no legal standing, to keep cultural products out of the jurisdiction of the GATS, exempting certain goods and services from the offers process.
4 In September 2007,the coalitions of creators and cultural organizations involved in this process founded the International Federation of Coalitions for Cultural Diversity, representing over 600 creators' organizations and with observer status at the Intergovernmental Committee administrating the Convention.
5 NEPAD was initiated by five heads of State (Algeria, Egypt, Nigeria, Senegal and South Africa) and adopted at the 37th Summit of the OAU in July 2001.
6 There is a plethora of such projects in the Middle East, for example the 'Eye to Eye' project coordinated by Save the Children UK using photography and multi-media activities, or Daniel Barenboim and Edward Said's West-Eastern Divan Orchestra, involving young Israeli and Palestinian musicians in the same orchestra.
7 The Cartagena Protocol, adopted in 2000, entered into force in 2003.
8 The protocol provides for horizontal (development of cultural policies, cultural exchanges, artists' mobility, technical assistance) and sectoral (audiovisual and cinema, performing arts, books and heritage) links, and builds on principles of cultural cooperation rather than trade liberalization.

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