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THE UNESCO CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS: A LOOK AT THE CONVENTION AND ITS POTENTIAL IMPACT ON THE AMERICAN MOVIE INDUSTRY

I. INTRODUCTION

In recent years, many countries have become increasingly concerned with the potential impact of economic globalization on cultural diversity. They fear that increased trade liberalization in cultural industries will lead to a uniform, commercial monoculture and a loss of social cohesion and national identity.¹ Previous efforts to preserve or promote cultural diversity focused on excluding culture from international trade negotiations and agreements. These efforts ran into strong opposition from several countries, including the United States.

In response to the apparent lack of progress on the “cultural exception” front, more than fifty nations embarked on an alternative movement.² It involved the negotiation of a new international convention that would highlight the importance of cultural diversity, thereby legitimizing the “roles that national cultural policies play in ensuring cultural diversity.”³

The international organization that was entrusted with the responsibility for drafting the international convention on cultural diversity was the United Nations Educational, Scientific, and Cultural Organization (UNESCO). On October 20, 2005, at UNESCO’s 33rd session, the General Conference voted 148-2 to approve the “Convention on the Protection and Promotion of the Diversity of Cultural Expressions”⁴

1. Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage As a Shared Interest of Humanity*, 25 MICH. J. INT’L L. 1209, 1222 (Summer 2004).

2. PETER S. GRANT & CHRIS WOOD, BLOCKBUSTERS AND TRADE WARS: POPULAR CULTURE IN A GLOBALIZED WORLD 380 (Douglas & McIntyre Ltd.) (2004).

3. Ivan Bernier, *A UNESCO International Convention on Cultural Diversity*, in FREE TRADE VERSUS CULTURAL DIVERSITY: WTO NEGOTIATIONS IN THE FIELD OF AUDIOVISUAL SERVICES 65, 71 (Christoph Beat Graber, Michael Girsberger, Mira Nenova eds., Schulthess 2004).

4. Joelle Diderich, *U.S. Out in Cold in UNESCO Diversity Pact*, ASSOCIATED PRESS, Oct. 20, 2005, available at <http://www.comcast.net/includes/article/print.jsp?fn=/data/news/html/2005/10/20/246305.html> (last visited Aug. 24, 2007).

(the “Convention”); however, thirty member states still have to separately ratify it before the Convention can enter into force.⁵

One of the cultural sectors that could be greatly affected by the ratification of the Convention is the worldwide film industry. Cinema is highly concentrated compared to other audiovisual sectors such as books or music.⁶ The epicenter of the motion picture industry is the United States, which is the premier exporter of films worldwide and also one of the world’s top five producers of motion pictures.⁷

This Note examines the potential impact of the UNESCO Convention on the motion picture industry, particularly Hollywood. Part II traces the development of the UNESCO Convention. First, it presents the history of the cultural exception movement and identifies the key events that sparked the idea for an international instrument on cultural diversity. It then examines the rationale for a convention on cultural diversity as well as the critical issues confronting the drafters of such an instrument. Finally, Part II briefly presents the UNESCO Convention’s drafting process, including the objections put forth by the United States. Part III begins with a brief sampling of American reactions and criticisms regarding the final text of the UNESCO Convention. It then examines some of the important issues that have yet to be resolved as well as some possible ways in which party members could settle them. After that, it considers what the Convention could mean for the American film industry. Finally, Part IV concludes this Note.

II. THE HISTORY OF THE MOVEMENT TO ESTABLISH AN INTERNATIONAL INSTRUMENT ON CULTURAL DIVERSITY

A. *The Cultural Exception Movement*

The movement to exclude culture from trade began after World War I when European countries imposed screen quotas to limit a sudden influx of American films.⁸ By the end of World War II, when countries were establishing a new multilateral trading system called the General Agreement on Tariffs and Trade (GATT),⁹ the European film industry was

5. *Id.*

6. Beverly I. Moran, *United States’ Trade Policy and the Exportation of United States’ Culture*, 7 VAND. J. ENT. L. & PRAC. 41, 44 (Winter 2004).

7. *Id.* at 41.

8. Bernier, *supra* note 3, at 68.

9. See generally GRANT & WOOD, *supra* note 2, at 354–56. The General Agreement on Tariffs and Trade (GATT) was adopted in 1947. From 1948 to 1994, it provided the basic legal framework of

still recovering from the disruptive effects of two world wars.¹⁰ In the original GATT negotiations, France wanted a “cultural exclusion” clause to shield cultural industries from the GATT’s general liberalizing trade provisions.¹¹ American negotiators insisted that cultural products were in fact “entertainment products” and should be treated the same as other goods.¹² In the end, the GATT had an added provision that specifically permitted countries to reserve screen time for their domestic films;¹³ however, there was ultimately no general cultural exception clause.¹⁴ The general provisions of the GATT still applied to most cultural goods.¹⁵

In the 1980s, the growth of services led to the negotiation of the first multilateral trade agreement to cover services, the General Agreement on Trade in Services (GATS).¹⁶ It was determined that the GATS covered certain aspects of the audiovisual sector.¹⁷ Thus, tradable audiovisual content, which included cinematic goods in tangible forms like DVDs, fell under the scope of the GATT, while films that were distributed through “service” methods, such as theatrical releases or television broadcasts, were covered by the GATS.¹⁸

the multilateral trading system. The original text was updated to become “GATT 1994” when the World Trade Organization (WTO) entered into force. Frederick Scott Galt, Note, *The Life, Death, and Rebirth of the “Cultural Exception” in the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture’s Hegemony*, 3 WASH. U. GLOBAL STUD. L. REV. 909, 909 n.2 (2004).

The original GATT was designed to promote free trade by eliminating tariffs and trade barriers while providing a mechanism for resolving trade disputes. It contained two key principles that are still important in modern international trade: most-favored nation treatment and national treatment. GRANT & WOOD, *supra* note 2, at 354–55. The principle of most-favored nation treatment, found in article II of the original GATT, essentially requires states to treat “imported products from one country no differently than those from another.” *Id.* at 355. The principle of national treatment in article III of the GATT requires states to treat “imported products no differently than domestic products.” *Id.*

10. GRANT & WOOD, *supra* note 2, at 355.

11. *Id.* at 356.

12. *Id.*

13. The end result of the negotiations was the addition of article IV, which allowed countries to use screen quotas “for films of national origin.” *Id.* In addition, a paragraph was added to article III to ensure that the article’s “national treatment” provisions did not apply to the screen quotas of article IV. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 358.

17. See Christoph Beat Graber, *Audiovisual Media and the Law of the WTO*, in FREE TRADE VERSUS CULTURAL DIVERSITY: WTO NEGOTIATIONS IN THE FIELD OF AUDIOVISUAL SERVICES 15, 15 (Christoph Beat Graber, Michael Girsberger, Mira Nenova eds., Schulthess 2004).

18. Christophe Germann, *Content Industries and Cultural Diversity: The Case of Motion Pictures*, NEWSLETTER 24 (World Trade Inst., Berne, Switz.), May 2004, at 4, <http://www.wti.org> (click “NCCR/Research,” then “Publications,” then “Published Notes”; then click “Document (pdf)” next to the article’s name).

Although the GATS incorporated the principles of national and most-favored nation treatment¹⁹ and lacked a cultural exception provision,²⁰ it provided a more flexible method for promoting trade liberalization than the GATT.²¹ The GATS permitted certain exceptions from national treatment or most-favored nation treatment.²²

However, these exceptions were supposed to be only temporary reprieves. Under article XIX, member states agreed that audiovisual media are subject to the principle of progressive liberalization,²³ which called for successive rounds of trade liberating negotiations.²⁴ Despite the pressure

19. For a brief introduction on national treatment and most-favored nation treatment, see *supra* note 9. The most-favored nation treatment provision in GATS is found in article II, paragraph 1. The provision is general in scope, covering all measures under the Agreement, and it “binds all members regardless of whether or not they have made liberalization commitments” in the services sector. Ivan Bernier & Hélène Ruiz Fabri, *Evaluation of the Legal Feasibility of an International Instrument Governing Cultural Diversity* 3 (Groupe de travail franco-québécois sur la diversité culturelle 2002), http://mcc.gouv.qc.ca/diversite-culturelle/pdf/106145_faisabilite.pdf. The provision provides that “each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service supplies of any other country.” *Id.*

20. GRANT & WOOD, *supra* note 2, at 358.

21. See Graber, *supra* note 17, at 15.

22. For example, in order for national treatment to apply to audiovisual services under the GATS, member states have to make specific binding commitments. GRANT & WOOD, *supra* note 2, at 358. In practice, most countries have no commitments in the audiovisual sector. *Id.* at 359.

With regards to the most-favored nation treatment principle, a special provision permits member states to make one-time exceptions to protect international co-production treaties. *Id.* The exception is found in article II, paragraph 2, which states that “a Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.” Bernier & Fabri, *supra* note 19, at 3. The conditions of the “Annex on Article II Exemptions” stipulate that: (1) exemptions should be reviewed if they last more than five years; and (2) exemptions should, “in principle,” last no longer than ten years. *Id.*

In practice, many countries “have asked to have film co-production and co-distribution agreements included in the ‘Annex on Article II Exemptions’ for reasons linked essentially to the preservation of national and regional identities,” and it is doubtful that these agreements will disappear after ten years. *Id.*

23. Bernier & Fabri, *supra* note 19, at 4.

24. *Id.* During the negotiation sessions, which recommenced on January 1, 2000, the United States has pushed hard to obtain firm liberalization commitments from members. *Id.* At the same time, the United States has pursued a more ambitious agenda to eliminate the GATS exemption on audiovisual and related services, which includes film and television. GRANT & WOOD, *supra* note 2, at 372. The quest to eliminate the GATS exemption began in December 2000, when the United States Trade Representative’s Office announced its desire to ensure “an open and predictable environment that recognizes public concern for the preservation and promotion of cultural values and identity.” *Id.* (internal quotations omitted). To achieve that end, it submitted a proposal, which insisted that access to international markets was necessary to recover the high production costs inherent to the high risk audiovisual sector. *Id.* In addition, the proposal called for predictable and clearly defined trade rules to “foster international exhibition and distribution opportunities.” *Id.* (internal quotations omitted). Finally, the proposal insisted that the WTO framework was flexible enough to apply to the audiovisual sector. *Id.* Specifically, the proposal stated that “other sectors also have unique characteristics for the

on countries to liberalize trade in services, under GATS member states still have the ability to reject liberalization measures without making any concessions.²⁵ It is possible then, in theory, for states to simply withhold commitments²⁶ on sectors that implicate culture, including the audiovisual services sector.

B. From Cultural Exemption to an International Convention on Cultural Diversity

1. The Events that Shifted the Focus to Establishing a Convention on Cultural Diversity

The shift away from the strategy of exempting cultural products from international trade agreements coincided with two events: the failure of the Organization for Economic Cooperation and Development (OECD) negotiations on the Multilateral Agreement on Investment (MAI)²⁷ in October 1998 and the failure of the Seattle World Trade Organization (WTO) Ministerial Conference in December 1999.²⁸ Initially, during the

purpose of fulfilling important social policy objectives . . . that the GATS has shown the flexibility to accommodate” *Id.* (internal quotations omitted).

The United States was willing to concede that subsidies “will respect each nation’s need to foster its cultural identity by creating an environment to nurture local culture.” *Id.* at 372–73 (internal quotations omitted). This endorsement was limited, however. The United States argued that the WTO could only recognize subsidies if they were “carefully circumscribed . . . for specifically defined purposes, all the while ensuring that the potential for trade distortive effects [was] effectively contained or significantly neutralized.” *Id.* at 373 (internal quotations omitted).

Other countries have also sought to eliminate the exemptions on the audiovisual sector under GATS. For example, Japan has urged that “all registered [most-favored nation] exemptions should be eliminated by the end of 2004 or the conclusion of the current negotiations, whichever comes earlier.” *Id.* at 373 (internal quotations omitted).

25. Bernier & Fabri, *supra* note 19, at 4.

26. Indeed, since the recommencement of liberalizing trade negotiations in 2000, ministers from Canada and Europe have been vocal in maintaining existing cultural policies and resisting trade rules “designed for the economics of merchandise rather than those of ideas, values and expression of identity.” GRANT & WOOD, *supra* note 2, at 374. To bypass this resistance to liberalizing the audiovisual sector through the GATS, the United States has tried an alternative tactic, negotiating bilateral agreements with countries such as Chile and Singapore. *Id.* at 374–75.

27. JOOST SMIERS, ARTISTIC EXPRESSION IN A CORPORATE WORLD: DO WE NEED MONOPOLISTIC CONTROL? 26 (Utrecht School of the Arts 2004), available at http://www.culturelink.org/news/members/2004/Smiers_Artistic_Expression.pdf (last visited Aug. 24, 2007). The agreement sought to free investing enterprises from restraints and obligations when they invested in other countries, especially poor countries. *Id.* The MAI met with strong protest from Canadian and French artists, who feared that their governments would be hamstrung from regulating cultural markets in ways that would promote cultural diversity. *Id.* The concern was that, because most cultural activities rely initially on some form of investment, private investment groups could force a country to comply with their demands under the MAI simply by investing in a country’s cultural products or services. *Id.*

28. Bernier, *supra* note 3, at 69.

MAI negotiations, the French delegation argued for a cultural industries exception;²⁹ however, it eventually realized that there was not enough support for its proposal. Dissatisfaction with several aspects of the MAI led the French delegation to withdraw from the negotiations, which ultimately brought the MAI project to a halt.³⁰ The failure of the MAI negotiations convinced some that culture would never be exempted from multilateral agreements.³¹

In 1999, large protests surrounded the third WTO Ministerial Conference in Seattle. The protests revealed genuine public concerns over the cultural effects of globalization and trade liberalization,³² such as “the scope and pace of the changes imposed on society by globalization” and the “subsequent sense of lost cultural references.”³³ The common theme of the protests seemed to be a rejection of a form of globalization that focused exclusively on “commercial considerations” and apparently lay “beyond any form of true democratic control.”³⁴

The intense public opposition to unfettered globalization and trade liberalization provided a backdrop for the emergence of a new idea, an international instrument on cultural diversity.³⁵ The idea first surfaced in February 1999, originating from the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT).³⁶ SAGIT proposed to abandon the previous strategy of carving out a cultural exception in multilateral trade agreements and adopt a new strategy involving the creation of a new international instrument on cultural diversity.³⁷ SAGIT originally

29. *Id.* The French urged other MAI negotiators to adopt the following language: “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 those companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity.” *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 70.

34. *Id.* at 69.

35. *Id.* at 70.

36. SAGIT was put in place by the Canadian Department of Foreign Affairs and International Trade. *Id.* Its membership included senior Canadian executives from “the film, television, music, and publishing businesses.” GRANT & WOOD, *supra* note 2, at 384.

37. Bernier, *supra* note 3, at 71.

In a brief to Canada’s international trade minister, SAGIT stated:

There is growing concern worldwide about the impact of international trade agreements on trade and investment on culture. . . . The tools and approaches used in the past to keep cultural goods and services from being subject to the same treatment as other goods and services may no longer be enough. . . . Just as nations have come together to protect and promote biodiversity, it is time to come together to promote cultural and linguistic diversity. The time has come for Canada to call on other countries to develop a new international cultural

envisioned that the instrument would: (1) “[r]ecognize the importance of cultural diversity”; (2) “[r]ecognize that cultural goods and services are different from other products”; (3) “[r]ecognize that measures and policies designed to guarantee access to a range of national cultural products are different from other policies”; (4) “[d]efine rules applying to regulatory and other measures that countries may or may not implement to enhance cultural and linguistic diversity”; and (5) “[d]etermine how commercial disciplines would or would not apply to cultural measures that comply with the agreed upon rules.”³⁸

Three distinct bodies refined subsequent plans for an international instrument on cultural diversity: SAGIT, the International Network on Cultural Diversity (INCD),³⁹ and the International Network on Cultural Policy’s (INCP)⁴⁰ Working Group on Cultural Diversity and Globalization.

2. *The Rationale and Core Objective of Any New Convention on Cultural Diversity*

The rationale for a convention on cultural diversity rests on the notion that the markets for cultural products experience market failures, in which case market interventions are justifiable.⁴¹ Purportedly, cultural markets fail because cultural products are “significantly different from conventional merchandise⁴² in ways that make them highly vulnerable to a

instrument that would acknowledge the importance of cultural diversity and address the cultural policies designed to promote and protect that diversity.

GRANT & WOOD, *supra* note 2, at 384.

38. Bernier, *supra* note 3, at 71.

39. The INCD consisted of delegates from seventy non-governmental organizations (NGOs) representing artists and cultural groups in twenty-one countries. GRANT & WOOD, *supra* note 2, at 387. The INCD was “set up by Canada to give civil society an opportunity to continue the debate on cultural diversity.” Bernier, *supra* note 3, at 71.

40. *Id.* Established by culture ministers from different countries, the INCP was a “loose but ongoing association” that tackled a wide range of cultural policy issues. GRANT & WOOD, *supra* note 2, at 383.

41. See GRANT & WOOD, *supra* note 2, at 390.

42. Many reasons have been given for why cultural products are different from other products. See generally *id.* at 42–60. First, cultural products allegedly “communicate ideas and emotions” while other products typically serve “utilitarian purposes.” *Id.* at 46. The value of a cultural product comes from its “symbolic or representational content” rather than from any physical quality or practical usefulness. *Id.*

Second, cultural products, like other types of intellectual property, generally involve large, upfront expenditures to produce the “first master copy.” Once the intellectual property is embedded in the master copy, it can be cheaply stored, duplicated, and distributed with little additional costs. In contrast, the manufacturing process of ordinary commodities draws on significant capital-intensive

variety of market effects”⁴³ that act to limit the “diversity of choices.”⁴⁴ Along with economic efficiency concerns, another potential problem with unregulated cultural markets is the chance that a group’s cultural identity and values may suffer.⁴⁵ When the only cultural products available have “symbolic significance” for just one group of individuals, the people who are excluded are essentially denied the opportunity for cultural identification and self-recognition.⁴⁶ Ultimately, supporters of a convention on cultural diversity believe that, up until now, the law

resources and raw materials to produce each unit. *Id.* at 47. In this situation, the cost of producing an additional unit (marginal cost) is significant. *Id.*

Third, cultural products are non-rival goods (goods in which one person’s use does not limit another’s use). *Id.* at 48. In other words, cultural products can be conveyed to many consumers at little additional cost. *Id.* at 47–48.

Fourth, it is difficult for artists to predict in advance how successful any particular cultural product will be. This is because consumers can only evaluate the full merits of cultural products after purchasing and experiencing them. *Id.* at 48.

Fifth, cultural products are more or less unique from each other. This distinctiveness means that suitable substitutions may not exist. *Id.* at 49.

Sixth, the demand for a cultural product tends to diminish quickly after its introduction to the marketplace. *Id.* at 50.

Seventh, the range of cultural products that the consumer is actually exposed to depends in large part on “gatekeepers,” middlemen who decide which products get displayed and which products get completely excluded. *Id.* at 51. Because many gatekeepers generate revenue primarily through the sale of advertising, they tend to display cultural products that cater only to the specific demographic desired by advertisers rather than to all audience members. *Id.* This means that in a world where there are always far more titles available than room to display them, gatekeepers are, at best, “imperfect proxies for consumer demand.” *Id.*

Eighth, the pricing of cultural products can be highly discriminatory between markets whereas with normal products, pricing is dependent on competitive forces and is constrained by significant marginal costs. *Id.* at 51–52.

43. GRANT & WOOD, *supra* note 2, at 390.

44. *Id.* Cultural industries are generally high risk and high reward environments where most cultural products fail to achieve commercial success. *Id.* at 55. The cultural products that do succeed produce very high rewards for the producer of the product. However, because demand for any particular cultural product is hard to determine ahead of time, it is difficult to predict which cultural products will be commercially successful.

Cultural products that will most likely appeal to large geographical markets are therefore less risky and have greater expected returns than those products that cater to smaller markets. *Id.* Mathematically speaking, if the cost of making a product for a large market is comparable to the cost of making a product for a smaller market, the product in the smaller market has less of a chance of being profitable simply because there are fewer potential consumers who may be interested in the product. *Id.* at 55–56. For a profit-maximizing firm, there is an incentive to produce cultural products that will appeal to the greatest number of people, which means that certain subjects or viewpoints may rarely be addressed to audiences due to lack of widespread appeal.

In the movie industry, another way to reduce the financial risk of a film is to invest in people and projects that did well financially in the past. *Id.* at 68–71. In practical terms, this means hiring popular movie stars and copying past successes by franchising popular movies and making sequels. *Id.* at 70–71. However, the downside is that it may reduce audience exposure to new talent and new perspectives.

45. *Id.* at 390.

46. *Id.*

governing international trade has placed little emphasis on the difference between cultural products and ordinary commodities.⁴⁷ As a consequence, cultural diversity has suffered.

One of the core objectives of a convention on cultural diversity is the reconciliation of commercial and cultural perspectives in trading cultural products.⁴⁸ On the one hand, this means devising transparent rules that are fairly applied and cause minimal economic distortions to preserve healthy competition.⁴⁹ But at the same time, the populace has the right to correct for market failures, such as a lack of diversity in choice or access to many cultural products.⁵⁰

3. *The Main Issues Involved when Conceptualizing a Convention on Cultural Diversity*

To achieve the objective of reconciling commercial and cultural conceptions of cultural products, two main⁵¹ issues have to be addressed

47. *Id.* at 391.

48. *Id.* at 392.

49. *Id.*

50. *Id.*

51. There are many other important issues that should also be considered. For example, the role of foreign investment in the cultural sector was debated by supporters of a convention on cultural diversity. The INCD's draft convention contained a provision that restricted foreign investment in cultural sectors to "achieve a given level or percentage of domestic content." SMIERS, *supra* note 27, at 42.

Another question is whether the convention should require member states to play an active role in supporting the arts and regulating cultural markets. *Id.* On the one hand, this may create an incentive for governments to be fully engaged in developing cultural policies. On the other hand, countries that are sensitive to issues of sovereignty could be discouraged from signing onto a convention that imposes concrete domestic obligations on governments. *Id.*

In February 1999, a Canadian association weighed in on this discussion by stating that "a new cultural instrument would seek to develop an international consensus on the responsibility to encourage indigenous cultural expressions and on the need for regulatory and other measures to promote cultural and linguistic diversity . . ." *Id.* at 43 (internal quotations omitted). However, "the instrument would not compel any country to take measures to promote culture, but it would give countries the right to determine the measures they will use to safeguard their cultural diversity." *Id.*

A basic question is whether human rights, in the form of freedom of expression and communication, should be explicitly mentioned in the Convention. *Id.* at 44–45. The premise is that true cultural diversity can only exist in an environment that allows for free creative expression and cultural exchange. Without an explicit reference to human rights, some countries may claim that the convention gives them the full right to regulate the fields of cultural production and distribution however they wish. *Id.* These countries may then proceed to oppress basic freedoms and human rights. "Including such human rights principles in the text of the [c]onvention might oblige countries to respect the freedom of expression and communication." *Id.* at 45.

Others maintain that this risks overburdening the convention with too many topics and is unnecessary. *Id.* After all, the member states of the United Nations have already accepted the Universal Declaration of Human Rights (UDHR). It is not necessary to "repeat the intention" of the

when devising a convention on cultural diversity: (1) the appropriate form of the new instrument; and (2) the instrument's relation to currently existing international agreements on trade and culture.⁵² The form of the new cultural diversity instrument involves two sub-issues. The first is the "scope of its coverage"—whether it should be broad or narrow.⁵³ The second sub-issue concerns enforceability—whether the instrument should be "merely declaratory" or impose positive, enforceable obligations.⁵⁴

The appropriate form of the convention depends on the notion of cultural diversity that needs protection and promotion. Culture, in its broadest sense, is defined as "the set of distinctive spiritual, material, intellectual, and emotional features of society or a social group. In addition to art and literature, it encompasses lifestyles, basic human rights, value systems, traditions, and beliefs."⁵⁵

This broad definition of culture contains two distinct but related conceptions of culture.⁵⁶ One views culture as it is expressed by a community or group through the arts and literature.⁵⁷ The other conception of culture takes a "sociological and anthropological perspective" by considering "lifestyles, basic human rights, value systems, traditions, and

UDHR with a new convention on cultural diversity. *Id.* In any event, if the convention were to have a "human rights" provision, it would be unenforceable. *Id.*

Some advocates for a convention on cultural diversity have expressed concerns about the practical impact of the convention on developing countries. *Id.* at 46. Many developing countries simply do not have the financial resources or institutions to establish effective cultural policies. *Id.* Domestic law enforcement may be weak. *Id.* In poor countries, scarce government resources may be used to address more pressing needs than cultural market regulation, needs such as economic growth, job creation, agriculture, health, education, housing, and running water. *Id.*

INCP, in particular, has emphasized that the convention should allow developing countries to nurture domestic cultural enterprises, which will provide the local populace with its own unique cultural identity to share with others at the international level. *Id.* at 47. The INCP's draft text of the convention states that "Members shall facilitate the exchange of information, from all publicly available sources, relevant to the promotion and presentation of cultural diversity, taking into account the special needs of developing and least developed countries." *Id.* There have been proposals for wealthy nations to establish some sort of "cultural development fund" that would give poorer countries a chance to invest in infrastructure, attract audiences in their own parts of the world, and eventually compete with richer countries. *Id.* at 18–19.

Another concern is that an emphasis on cultural diversity could threaten national unity and the authority of the state in countries with strong multi-ethnic structures. *Id.* at 46. Ethnic groups that have a strong sense of identity may demand for stronger forms of official recognition. This could lead to national discord and the possible destabilization of government.

52. GRANT & WOOD, *supra* note 2, at 392.

53. *Id.*

54. *Id.*

55. Bernier, *supra* note 3, at 66. This is the most widely accepted definition of culture, which was adopted at the Mexico City MONDIACULT World Conference in 1982. *Id.* "This set of distinctive features that characterize a society or social group" defines its cultural identity. *Id.*

56. *Id.* at 67.

57. *Id.*

beliefs.”⁵⁸ Thus, the scope of the instrument on cultural diversity depends on the aspects of culture one wishes to preserve or promote.

The concept of diversity has different meanings as well. One is the notion of diversity within a society, or internal diversity, and the other is the notion of diversity across societies.⁵⁹ Diversity across societies compares one society to another, instead of comparing one individual to another, or instead of looking at the variety of choices faced by an individual.⁶⁰ If the primary focus of the instrument on cultural diversity is preserving and promoting cultural diversity within a society, then nation-states may not be legitimate actors who speak on behalf of the public since under-privileged groups may not be adequately represented.⁶¹ On the other hand, if the primary focus of the instrument is the preservation and promotion of diversity across societies, then national governments are arguably the most effective agents of the public because national governments are the only actors that can secure commitments from international partners.⁶²

Although SAGIT, the INCD, and the INCP differed in their beliefs as to what the appropriate form of the convention ought to be,⁶³ they all agreed that a convention on cultural diversity must strive to both “preserve” and “promote” cultural diversity.⁶⁴ This insistence was based

58. *Id.*

59. TYLER COWEN, *CREATIVE DESTRUCTION: HOW GLOBALIZATION IS CHANGING THE WORLD'S CULTURES* 14–15 (Princeton Univ. Press) (2002).

60. *Id.* at 15.

61. GRANT & WOOD, *supra* note 2, at 394.

62. *Id.* See also SMIERS, *supra* note 27, at 18.

63. SAGIT concentrated its efforts on the interaction of national policy and international trade law. GRANT & WOOD, *supra* note 2, at 392. For SAGIT, the cultural instrument would clarify how government measures designed “to secure access to and the distribution of domestic cultural products” fit into the current trade regime. *Id.* In this conception of the cultural instrument, national governments would be the central players—first, as members of the existing trade regime, and second, as the advocates of culture on behalf of all their citizens. *Id.* at 392–93.

On the other hand, the INCD pushed for a much broader cultural instrument. *Id.* at 393. Delegates to the 2002 INCD meeting urged: “There must be special recognition of the need to preserve threatened cultures, especially languages, including those of indigenous peoples [as well as] of the need to protect traditional knowledge.” *Id.* (internal quotations omitted).

With respect to the legal force of the instrument, the INCD wanted the instrument to impose “positive obligations on national governments,” which would require them to “take specific action to sustain cultural diversity.” *Id.* In addition, if national governments failed to comply with their obligations, third parties, such as NGOs or individuals, should be able to “trigger the international enforcement of those obligations.” *Id.* SAGIT, on the other hand, rejected the idea that the instrument should commit states to positive obligations. *Id.* The association insisted that despite a weaker enforcement provision, the instrument could still provide member states with an effective dispute mechanism to settle disagreements over national cultural policies that appear to conflict with existing trade commitments. *Id.*

64. SMIERS, *supra* note 27, at 38.

on the idea that “each culture develops and evolves in contact with other cultures.”⁶⁵ The preservation of cultural diversity implied “maintaining and developing existing cultures while ensuring an openness to other cultures.”⁶⁶

The second critical issue, the instrument’s relation to the preexisting structure of international agreements on trade and culture, is highly contentious. According to the 1969 Vienna Convention on the Law of Treaties (VCLT), when successive international conventions operate in the same subject matter, the first convention has priority.⁶⁷ If a convention on cultural diversity were to contain positive obligations, those opposed to the convention could argue that the obligations of the WTO have priority above those of the new convention because culture became part of GATS.⁶⁸ In other words, any positive obligations or duties spelled out in a later convention with regards to cultural products should be given less priority compared to the trade liberalizing obligations under the WTO legal regime.

One proponent of the convention suggests that the 1948 Universal Declaration of Human Rights (UDHR), which predates the GATS, is arguably like a legally binding international instrument that operates in the field of culture.⁶⁹ According to this argument, the culturally relevant feature of the UDHR is its assertion that every person should have “access to the means of communication.”⁷⁰ Under the WTO treaties, however, this

65. Bernier, *supra* note 3, at 66.

66. *Id.* at 67.

67. “When a treaty specifies that . . . it is not to be considered as incompatible with . . . an earlier . . . treaty, the provisions of that other treaty prevail.” Vienna Convention on the Law of Treaties art. 30, para. 2, May 23, 1969, 1155 U.N.T.S. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited Aug. 24, 2007).

68. SMIERS, *supra* note 27, at 34.

69. *Id.* at 35.

70. *Id.* at 34–35. Two articles in the UDHR supposedly address every person’s right of access to the means of communication. *Id.* at 16. First, article 19 states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights]. The article’s use of the plural term “opinions” suggests that people’s opinions should originate from multiple sources through “any media.” SMIERS, *supra* note 27, at 16. The implication is that the freedom to utilize “any media” should not be hindered by the dominance of a few media conglomerates. *Id.* Thus, article 19 implies a “right of access to the channels of communication for as many people as possible” *Id.* (emphasis omitted).

In addition, article 27 supposedly addresses the role of culture in peoples’ lives. Article 27 states: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancements and its benefits.” Universal Declaration of Human Rights, *supra*, art. 27. Because the article’s emphasis is on the notion of community instead of individuals, “artistic

right could be denied.⁷¹ Therefore, under the VCLT, the WTO does not have the legal standing to deal with culture since the UDHR predates it.⁷² In contrast, a convention on cultural diversity derives its legal status directly from the UDHR because it concretely furthers the aims of the Universal Declaration⁷³ by giving member states the “right to regulate markets in such a way that access to the means of cultural communication is open to as many people as possible.”⁷⁴ The convention arguably has a “direct link” to the UDHR;⁷⁵ the same cannot be said of the WTO treaties, which means that any cultural obligations under the WTO should be subsumed to those of the convention on cultural diversity.⁷⁶

A more conciliatory conception envisions a widely accepted cultural diversity instrument influencing the interpretive approach of WTO dispute settlement bodies, which often refer to external principles and rules.⁷⁷ If a cultural diversity instrument were seen as representing the international community’s view that culture was important, WTO dispute bodies could no longer weigh decisions based solely on economic considerations; the bodies would also have to consider relevant cultural issues and concerns.⁷⁸ Given the differences in the goals and objectives of the draft conventions emanating from SAGIT, the INCP, and INCD,⁷⁹ supporters for a convention on cultural diversity needed to reach a consensus, and UNESCO would soon play a leading role.

enjoyment tells people who they are, what is their common pleasure, what are contradictory feelings and what they are dreaming of; it gives them their identity.” SMIERS, *supra* note 27, at 16. Therefore, the two articles together stand for the proposition that the cultural life of a community should not be controlled by detached, third-party conglomerates, which have little interest beyond purely monetary considerations, in participating in the “common daily life of society.” *Id.* at 16–17.

71. SMIERS, *supra* note 27, at 35.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 37. The WTO, for example, has referred to outside environmental treaties that were not ratified by all disputing parties. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 129, WT/DS58/AB/R (Oct. 12, 1998), available at http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf (last visited Feb. 28, 2007). In the *U.S.—Shrimp* case, the WTO relied on an “evolutionary” interpretation “in the light of contemporary concerns of the community of nations.” *Id.* ¶ 129–30. It is arguable that a convention on cultural diversity, which is an agreement by numerous countries that aims to protect cultural diversity, “amounts to an expression of such a contemporary concern of the community of nations.” Joost Pauwelyn, *The UNESCO Convention on Cultural Diversity and the WTO: Diversity in International Law-Making*, ASIL INSIGHTS (Am. Soc’y of Int’l Law, Wash., D.C.), Nov. 15, 2005, http://www.asil.org/insights/2005/11/insights051115.html#_edn1 (last visited Apr. 4, 2007) (internal quotations omitted).

78. SMIERS, *supra* note 27, at 37.

79. See *supra* note 63.

C. UNESCO and Cultural Diversity

In 1999, UNESCO started to focus⁸⁰ on the challenge of preserving cultural diversity in the face of an international legal regime that was designed to facilitate economic globalization and trade liberalization.⁸¹ After several symposiums and meetings,⁸² UNESCO strongly endorsed⁸³ the concept of a new cultural instrument by adopting the Universal Declaration on Cultural Diversity (UDCD) at the 31st session of the General Conference on November 2, 2001.⁸⁴

80. UNESCO's first involvement with the issue began with its release of a document in 1999 entitled "Culture, Trade and Globalization: Questions and Answers," <http://unesco.org/culture/industries/trade/index>. Bernier, *supra* note 3, at 72. In June 1999, a symposium dedicated to the theme "Culture, the Market, and Globalization" was held in Paris. *Id.* at 73. Participants urged UNESCO to weigh in on future discussions concerning cultural diversity and actively take part in the decision-making process. *Id.*

81. *Id.* at 72. At the end of World War II, UNESCO initially concentrated its energies on preventing misunderstandings and conflicts between nation-states by promoting education and knowledge. CHIMENE KEITNER, UNESCO AND THE ISSUE OF CULTURAL DIVERSITY 3 (Katerina Stenou ed., 2004) (2000), available at <http://www.unesco.org> (click "Culture," then "Cultural Diversity," then "Reflections on Cultural Diversity," then the title of the article) (last visited Apr. 4, 2007). Culture at this point in time was primarily viewed in terms of "artistic production and external practices." *Id.* This view of culture subsequently changed when many colonized countries gained their independence. *Id.* Granting independence to colonized nations was justified, in part, because these nations had unique cultural identities. *Id.* The concept of culture had changed; it now included the notion of "identity," an internalized source that guided a people's thoughts, feelings, and perceptions of the world. *Id.* In the late 1960s, culture became linked with endogenous development. Bernier, *supra* note 3, at 72. The possession of unique cultural identities meant that newly independent and developing countries did not have to rely on the paternalistic policies of their former colonists; rather, they were entitled to freely choose their own methods for achieving full political and economic independence. *Id.* During the 1980s and 1990s, culture was linked to democracy, which stressed the importance of tolerance within societies, not just between nations. KEITNER, *supra*, at 4.

82. Bernier, *supra* note 3, at 73. Following the first expert symposium in June 1999, a second symposium commenced in June 2002. *Id.* Its theme was "Cultural Diversity in the Light of Globalization: the Future of the Cultural Industries in East and Central Europe." *Id.* Participants urged UNESCO to "help develop a 'global framework' for the promotion of cultural diversity." *Id.*

In late September of 2000, an Experts Committee met to determine how to bolster UNESCO's role in the cultural diversity movement. *Id.* Ultimately, they asked the Director-General of UNESCO "to envisage the preparation of a Declaration which would be submitted to the General Conference for approval in order to confer a solemn nature upon the text . . ." *Id.* (internal quotations omitted).

On December 11, 2000, culture ministers from fifty-nine nations gathered in Paris for a round table event entitled "2000–2010 Cultural Diversity: Challenges of the Marketplace." *Id.* Here, the Expert Committee's call for the strengthening of "UNESCO's role in promoting cultural diversity in the context of globalization" was heeded by the ministers, who proceeded to examine "preliminary items" for a draft declaration on cultural diversity. *Id.*

83. GRANT & WOOD, *supra* note 2, at 388.

84. *Id.*

The UDCD was important for several reasons.⁸⁵ First, it recognized that there were two essential freedoms associated with culture: the freedom to access culture and the freedom to express culture.⁸⁶ Second, article 8 of the UDCD declared that cultural products and services should be treated not as “mere commodities or consumer goods” but as “vectors of identity, values, and meaning.”⁸⁷ Third, the UDCD insisted that the demands of globalization for the free flow of ideas and works be made compatible with “the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level.”⁸⁸ Because the UDCD recognized that “market forces alone” could not “guarantee the preservation and promotion of cultural diversity,”⁸⁹ member states had a legitimate reason for defining and implementing their own cultural policies.⁹⁰

The UDCD did not make reference to the possibility of an international convention on cultural diversity. However, the UNESCO action plan to implement the UDCD urged member states to look for an opportune time to establish a convention on cultural diversity.⁹¹ Gradually, supporters for an instrument on cultural diversity agreed that the instrument should be housed within UNESCO,⁹² and the drafting process commenced in 2003.⁹³

85. See generally Francioni, *supra* note 1, at 1227. Additional aspects of the UDCD worth mentioning include article 1, which elevated cultural diversity to the status of “common heritage of humanity.” *Id.* at 1226. The importance of cultural diversity “as a source of exchange, innovation, and creativity” was so great that UNESCO’s Director-General declared that “its protection [was] an ethical imperative, inseparable from respect for human dignity.” Bernier, *supra* note 3, at 73. In addition, article 4 of the UDCD forbids countries from invoking cultural diversity as an excuse “to infringe upon human rights guaranteed by international law, nor to limit their scope.” Francioni, *supra* note 1, at 1227 n.69 (internal quotations omitted).

86. Article 6 of the Universal Declaration on Cultural Diversity states: “While ensuring the free flow of ideas by word and image care should be exercised so that all cultures can express themselves and make themselves known.” UNESCO Universal Declaration on Cultural Diversity, G.C. Res. 31/25, art. 6, UNESCO Doc. 31C/Res.25 (Nov. 2, 2001), available at <http://unesdoc.unesco.org/images/0012/001246/124687e.pdf> (last visited Feb. 28, 2007) [hereinafter Universal Declaration on Cultural Diversity].

87. *Id.* art. 8.

88. *Id.* art. 9. See also Francioni, *supra* note 1, at 1227.

89. Universal Declaration on Cultural Diversity, *supra* note 86, art. 11.

90. GRANT & WOOD, *supra* note 2, at 389.

91. Specifically, the UNESCO action plan stated: “Member States commit themselves to taking appropriate steps to disseminate widely the ‘UNESCO Universal Declaration on Cultural Diversity’ . . . in particular by cooperating with a view to achieving the following objectives: . . . taking forward notably consideration of the advisability of an international legal instrument on cultural diversity.” Universal Declaration on Cultural Diversity, *supra* note 86, Annex II.

92. For example, in an October 2002 communiqué, an international network of culture ministers asserted that “UNESCO is the appropriate international institution to house and implement an International Instrument on Cultural Diversity.” GRANT & WOOD, *supra* note 2, at 397.

III. THE CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS

A. *The Elaboration of the UNESCO Convention*

The process⁹⁴ of submitting a first preliminary draft started with a meeting of fifteen independent experts.⁹⁵ The experts first tried to clarify,

93. *Id.* On October 17, 2003, UNESCO adopted Resolution 32C/34, which required the Director-General to develop a new “standard-setting instrument” that would protect “the diversity of cultural contents and artistic expressions.” See Desirability of Drawing Up an International Standard-setting Instrument on Cultural Diversity, G.C. Res. 32/34, (Oct. 17, 2003), available at <http://unesdoc.unesco.org/images/0013/001331/133171E.pdf> (last visited Aug. 24, 2007) [hereinafter Drawing Up an Instrument]. The resolution required the Director-General of UNESCO to present a first draft of a “convention on the protection of the diversity of cultural contents and artistic expressions” in the fall of 2005. *Id.*

94. The elaboration of the legal instrument was comprised of two stages: (1) meetings of independent experts for preliminary deliberations; and (2) a series of intergovernmental meetings of experts to finalize the preliminary draft of a convention. The chronology of events in the elaboration process is as follows. From December 2003 to May 2004, the Director-General held three meetings in which independent experts brainstormed ideas in preparation for the first preliminary draft of the convention. UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, http://portal.unesco.org/culture/en/ev.php-URL_ID=26320&URL_DO=DO_TOPIC&URL_SECTION=201.html. In accordance with Resolution 32C/34, the Director-General submitted a preliminary report to member states in July 2004. *Id.* The report updated member states as to the progress of the independent experts. *Id.* This was also the occasion where member states got their first look at the preliminary draft of the convention. They submitted comments and observations to the Secretariat through mid-November 2004. *Id.*

The First Session of the Intergovernmental Meeting of Experts convened from September 20 to September 24, 2004. The purpose of the meeting was to discuss the participants’ initial impressions of the first preliminary draft of the convention. *Id.* A subsidiary organ of the Intergovernmental Meeting of Experts, known as the Drafting Committee, met between December 17 and 20. *Id.* The Drafting Committee first synthesized the numerous comments and suggestions offered by member states, intergovernmental organizations, and nongovernmental organizations. *Id.* Then, from July to November 2004, it incorporated some of the suggestions and produced a revised text of the preliminary draft. *Id.* The work of the Drafting Committee was further refined by the Second Session of the Intergovernmental Meeting of Experts, which met from January 31 to February 11, 2005. *Id.*

In March 2005, the Director-General presented another preliminary report to the member states, keeping them abreast of the progress made since 2003. *Id.* In addition, the Director-General attached two preliminary drafts of the convention to the report. *Id.*

The Third Session of the Intergovernmental Meeting, which met at UNESCO headquarters in Paris from May 25 to June 3, 2005, approved commencement of the last phase of intergovernmental negotiations. *Id.* The experts met one last time to put the finishing touches on the text of the preliminary draft convention. *Id.* As required by Resolution 32C/34, the Director-General presented the preliminary draft convention, along with a report, to the UNESCO General Conference during its 33rd session in October 2005. *Id.*

95. The Director-General, *Preliminary Report By the Director-General Setting Out the Situation To Be Regulated and the Possible Scope of the Regulating Action Proposed, Accompanied By the Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions 1, delivered to the UNESCO General Conference, 33C/23* (Aug. 4, 2005), available at http://portal.unesco.org/culture/en/file_download.php/2962532f35a06baebb199d30ce52956233C23_Eng.pdf (last visited Apr. 4, 2007) [hereinafter The Director-General, *Preliminary Report*]. This initial

and in some cases condense, the terms found in the title and text of the Convention.⁹⁶ For example, the experts thought that the term “protection,” found in the Convention’s title, should not be interpreted to mean that states could “turn in on themselves or close themselves off from others.”⁹⁷ “Protection” should be understood in a positive light,⁹⁸ in that it can create the conditions necessary for cultural expression to develop and flourish rather than merely preserve the current forms of cultural expression.⁹⁹ For purposes of the Convention, the experts recommended that the terms “culture” and “cultural diversity” should not be given their broadest definitions.¹⁰⁰ The Convention would focus on protecting and preserving “expressions” of culture that are transmitted by means of “cultural goods and services.”¹⁰¹

Next, the experts determined that the Convention should be more than a mere declaration of principles.¹⁰² To give the Convention additional force, the experts instilled the Convention with rights and obligations¹⁰³ for state parties to honor, thereby implicitly charging nation-states with the responsibility for protecting and preserving cultural expressions on behalf of all social groups in their territories, including minority groups and other underrepresented peoples.¹⁰⁴

At the national level, states had an obligation to “protect vulnerable forms of cultural expression.”¹⁰⁵ In essence, states could intervene in cultural markets when certain forms of cultural expression were vulnerable, supposedly due to market failure. The justification for assisting vulnerable forms of cultural expression was that it helped preserve the

group of experts simply made their own suggestions and lent their legal expertise in preparation for drafting an outline of the UNESCO Convention. *Id.*

96. The experts agreed that the title of the Convention needed to be shortened. They proposed to change the title from “Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions” to “Convention on the Protection and Promotion of the Diversity of Cultural Expressions.” *Id.* at 2. The experts emphasized that the change was purely cosmetic and had no effect on the scope of the Convention. *Id.* The term “cultural expressions” was simply meant to include both “cultural contents” and “artistic expressions.” *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* Several experts, however, were uneasy about using the term “cultural goods and services” because the language resembled that of international trade agreements. *Id.* But in the end, the experts concluded that this usage was appropriate because it acknowledged the dual cultural-commercial nature of these products. *Id.*

102. *See id.* at 3.

103. The rights and obligations were divided into two categories: “rights and obligations at the national level!” and the “rights and obligations relating to international cooperation.” *Id.*

104. *Id.*

105. *Id.*

diversity of cultural expressions.¹⁰⁶ At the international level, the experts emphasized the need for international cooperation so that all countries could access each other's cultural contents and artistic expressions.¹⁰⁷ To ensure all countries would have an opportunity to contribute to the diversity of cultural expressions, the experts called for international assistance to support developing countries so they could establish viable, competitive cultural industries.¹⁰⁸

Eventually, the independent experts submitted a preliminary draft of the Convention, which was then refined through subsequent meetings with government experts from the member states of UNESCO. During these debates and discussions, the United States made several objections to specific provisions in the text. As a preliminary matter, the United States objected to the way several terms were defined in the Convention.¹⁰⁹ The

106. *Id.*

107. *Id.*

108. *Id.*

109. Article 4 of the Convention defines eight important terms. See The Director-General, *Preliminary Report. By the Director-General Setting Out the Situation to the Regulated and the Possible Scope of the Regulating Action Proposal, Accompanied By the Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, annex V at 5–6, delivered to the UNESCO General Conference, 33C|23 (Aug. 4, 2005), available at http://portal.unesco.org/culture/en/file_download.php/2962532f35a06baebb199d30ce52956233c23_En_g.pdf [hereinafter The Director-General, *Preliminary Report Annex V*]. The United States objected to five of the definitions: cultural expressions, cultural activities, goods and services, cultural industries, cultural policies, and protection. The Director-General, *Preliminary Report*, *supra* note 95, at 13. For the purposes of the Convention, “cultural diversity” is defined in article 4 as follows:

[T]he manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.

The Director-General, *Preliminary Report Annex V*, *supra*, at 5. “Cultural expressions” is defined as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.” *Id.*

Article 4 broadly, and perhaps ambiguously, defines the expression “cultural activities, goods and services” as follows:

[T]hose 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. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services.

Id. The term “cultural industries” is defined simply as “industries producing and distributing cultural goods or services.” *Id.*

“Cultural policies” is given a broad definition:

[T]hose policies or measures related to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.

United States also opposed one of the Convention's core tenets, which recognized the dual, commercial-cultural nature of cultural goods and services.¹¹⁰ Another central component of the Convention that the United States opposed was article 6, which gave states the right to adopt policy measures in the name of protecting and promoting the diversity of cultural expressions.¹¹¹ In addition, the United States objected to the independent experts' calls for international cooperation to help developing countries build their own cultural industries.¹¹²

There was intense debate over article 20, which stated the Convention's relationship to other treaties.¹¹³ On the one hand, article 20 required member states to "perform in good faith their obligations under this Convention and all other treaties to which they are parties." Paragraph 2 even emphasized that "[n]othing in this Convention shall be interpreted

Id. "Cultural content" is defined in article 4 as the "symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities." *Id.* "Protection" means the "adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions." *Id.* Finally, "interculturality" embodies the notion of the "existence and equitable interaction of diverse cultures and the possibility of generating shared cultural expressions through dialogue and mutual respect." *Id.* at 6.

110. See The Director-General, *Preliminary Report*, *supra* note 95, at 13. The United States submitted a formal objection to paragraph 18 of the Preamble, which stated that "cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value." *Id.*; The Director-General, *Preliminary Report Annex V*, *supra* note 109, at 2. In a similar vein, the United States objected to paragraph (g) of article 1, which stated that one objective of the Convention was "to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning." The Director-General, *Preliminary Report*, *supra* note 95, at 13; The Director-General, *Preliminary Report Annex V*, *supra* note 109, at 3.

111. Article 6 of the Convention lists the rights of parties at the national level. The United States formally objected to subparagraphs 2(b) and 2(c). The Director-General, *Preliminary Report*, *supra* note 95, at 13–14. Subparagraph 2(b) declared that member states could "provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for their creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services." The Director-General, *Preliminary Report Annex V*, *supra* note 109, at 3. Subparagraph 2(c) enabled states to adopt "measures aimed at [1] providing domestic independent cultural industries and activities in the informal sector [2] effective access to the means of production, dissemination and distribution of cultural activities, goods and services." *Id.*

112. The United States objected to the expression "cultural industries" contained in the fourth guiding principle listed in article 2. The Director-General, *Preliminary Report*, *supra* note 95, at 13. That principle stated, "International cooperation . . . should be aimed at enabling countries, especially developing countries, to create and strengthen their means of cultural expression, including their cultural industries, . . . at the local, national and international levels." The Director-General, *Preliminary Report Annex V*, *supra* note 109, at 4.

113. The Director-General, *Preliminary Report*, *supra* note 95, at 13–14. As an example of how article 20 defined treaty relationships, subparagraph 1(b) specified that parties had to "take into account the relevant provisions of this Convention" when interpreting and applying other treaties or when entering into other international obligations. The Director-General, *Preliminary Report Annex V*, *supra* note 109, at 11.

as modifying rights and obligations of the Parties under any other treaties to which they are parties.” And yet, in the process of fostering “mutual supportiveness between this Convention and the other treaties,” states could not subordinate the Convention to any other treaty.¹¹⁴ The inherent tension in article 20 left countries in disagreement as to how the Convention would affect existing trade agreements and legal regimes like the WTO.¹¹⁵ The United States tried to alleviate the tension by submitting two options for consideration by the General Conference; however, the options failed to win support.¹¹⁶ Dissatisfied with the adopted language of article 20, the United States ultimately made a formal objection to the text of the entire article.¹¹⁷

B. The Final Text of the Convention and the Potential Ramifications for Hollywood

The final version of the Convention was greeted in the U.S. with disappointment.¹¹⁸ The Chairman of the Motion Picture Association of

114. *Id.*

115. *UNESCO Overwhelmingly Approves Cultural Diversity Treaty*, BRIDGES WKLY. TRADE NEWS DIG. (Int’l Ctr. for Trade and Sustainable Dev., Geneva, Switz.), Oct. 26, 2005, at 6–7, available at <http://www.ictsd.org/weekly/05-10-26/BRIDGESWeekly9-36.pdf> (last visited Aug. 24, 2007).

Some countries have argued that [article 20’s] clause that “nothing in this convention shall be interpreted as modifying rights and obligations of the parties under any other treaties means that the treaty will not take precedence over trade agreements including the WTO.” However, the same article also stipulates that countries “shall take into account” the UNESCO treaty “when interpreting and applying the other treaties to which they are parties or when entering into other international obligations.” France says that the latter clause bolsters the legal case of countries that are resisting pressure in future trade negotiations to open their cultural sectors to foreign imports.

Id. (some internal quotations omitted).

Korean cultural organizations, for one, believe that the Convention “will buttress the country’s case for maintaining a quota system that requires cinemas to dedicate 40 percent of shows to domestically produced films.” *Id.* at 7. On the other hand India has argued that the Convention ultimately pertains to culture, not trade. *Id.*

One person described article 20 as “a safety valve at best,” indicating that it might be helpful to countries such as France, Canada, and Korea, but perhaps not to smaller countries engaged in bilateral trade negotiations with the United States. *Id.*

Trade analysts, in particular, believe the Convention is more symbolic than anything else. *Id.* They argue that the Convention’s dispute settlement mechanism, which consists of non-binding mediation and conciliation without sanctions, is weak and will not have a devastating impact on U.S. trade in cultural goods. *Id.*

116. The Director-General, *Preliminary Report*, *supra* note 95, at 14. The U.S. attempted to insert the phrase “consistent with international obligations,” however the proposal was rejected. *Infra* note 118.

117. The Director-General, *Preliminary Report*, *supra* note 95, at 14.

118. See U.S. Ambassador to UNESCO Louise Oliver’s Roundtable Discussion with Foreign

America, Inc. (MPAA),¹¹⁹ Dan Glickman, expressed concern that the Convention could be used by some governments “to undermine commitments made in the WTO or in other international agreements.”¹²⁰ He further stated:

[O]ne of the most counter-productive steps the international community can take towards achieving the promotion of cultural diversity—a goal the MPAA and its member companies support strongly—is excluding the single largest source of cultural diversity in the world, the country in which more different and divergent cultures flourish than anywhere else.¹²¹

But perhaps the most troubling aspect of the Convention to U.S. critics is the Convention’s vagueness and ambiguity.¹²² In particular, there is concern that the Convention grants each party member the discretionary power to individually (1) “determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under

Journalists, <http://www.state.gov/p/io/rls/rm/56586.htm> (providing a general discussion about the United States’ objections to the Convention and dissatisfaction with the negotiating process).

119. The Motion Picture Association of America, Inc. (MPAA) serves as the “voice and advocate of the American motion picture, home video, and television industries” from its offices in Los Angeles and Washington, D.C. These members include: Buena Vista Pictures Distribution, Paramount Pictures, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal Studios, and Warner Bros. Entertainment Inc. See Motion Picture Association of America, <http://www.mpa.org/AboutUs.asp>; Motion Picture Association of America, <http://www.mpa.org/AboutUsMembers.asp> (last visited Apr. 7, 2007).

120. Press Release, MPAA Panel Discussion at the Beaune Cinema Encounters Film Festival, October 21, 2005, available at http://www.mpa.org/press_releases/2005_10_21.pdf (last visited Aug. 24, 2007).

121. *Id.* This notion of the United States as attracting talented artists from around the world, who then produce culturally diverse works of art and transmit them to the world, is eloquently articulated by Richard Pells. GRANT & WOOD, *supra* note 2, at 145.

The United States was, and continues to be, as much a consumer of foreign intellectual artistic influences as it has been a shaper of the world’s entertainment and tastes. . . . As a nation of immigrants . . . and as a haven . . . for refugee scholars and artists, the United States has been a recipient as much as an exporter of global culture.

Id. According to Pells, Hollywood “has functioned as an international community, drawing on the talents of actors, directors, writers, cinematographers, editors, and costume and set designers from all over the world. . . . In effect, Americans have specialized in selling the dreams, fears, and folklore of other people back to them.” *Id.*

122. For example, in an October 17, 2005 letter to UNESCO, the U.S. Ambassador to UNESCO, Louise Oliver, objected to several ambiguities in the text. United States Opposes Draft U.N. Cultural Diversity Convention, <http://usinfo.state.gov> (search terms: “United States Opposes Draft U.N. Cultural Diversity Committee”). One concern was the seemingly broad discretion afforded to states to determine when diversity was being threatened: “We are particularly troubled by provisions of the Convention that seem to provide undue scope for interference by governments with freedom of expression, information and communication. . . . We believe the goal of this convention should not be to create a situation of exclusion, of pitting one culture against another.” *Id.*

serious threat, or otherwise in need of urgent safeguarding”;¹²³ and (2) “take all appropriate measures to protect and preserve cultural expressions”¹²⁴ Because the Convention does not specify which situations pose “serious threats” or require “urgent safeguarding” to protect and preserve cultural expressions, individual countries seemingly have broad discretion in determining when the diversity of cultural expressions is threatened.¹²⁵

It is unlikely, however, that countries will be allowed to go so far as to make purely arbitrary determinations. What will most likely happen is that party members or the Intergovernmental Committee, which submits “operational guidelines for the implementation and application of the provisions of the Convention,”¹²⁶ will adopt some standard to help countries make non-arbitrary, if not reasonable, decisions. The challenge then is to decide how diversity in a particular cultural industry should be determined or measured.

With respect to the movie industry, the diversity standard most likely to be adopted will be based on some notion of “national identity,” which treats movies as expressions of a particular country’s culture.¹²⁷ This will probably happen because many countries already employ some sort of test to distinguish “domestic” films from “foreign” films.

However, due to the collaborative nature of the movie-making process,¹²⁸ countries have in the past utilized a variety of standards. Some

123. Convention on the Protection and Promotion of the Diversity of Cultural Expressions art. 8, para. 1, Oct. 20, 2005, <http://unesco.org> (Click “Culture,” then “Cultural Diversity,” then “Diversity & Cultural Expressions,” then the Convention’s title, then “Text of The Convention,” then “English”) (last visited Aug. 24, 2007) [hereinafter Convention on Diversity of Cultural Expressions].

124. *Id.* art. 8, para. 2.

125. The United States contends that governments could abuse the Convention by willfully misinterpreting its provisions to erect trade barriers that have nothing to do with preserving or promoting cultural diversity. For example, governments may decide to impose arbitrary trade restrictions on purported “cultural items,” such as coffee, textiles, or *foie gras*. *Supra* note 118.

126. Convention on Diversity of Cultural Expressions, *supra* note 123, art. 23, para. 6(b).

127. Some have argued that a focus on nationality is the wrong standard with which to judge cultural diversity. Culture cannot be attributed to one nation. *See* GRANT & WOOD, *supra* note 2, at 140. It makes little sense to artificially cabin culture into distinct geographical borders when one of the central tenants of the Convention is interculturality, the dynamic notion that cultures share and interact with each other. *Supra* note 109. In addition, an emphasis on nationality may obscure the cultural contributions of minority groups. *See* GRANT & WOOD, *supra* note 2, at 140.

128. The following example demonstrating the collaborative nature of film is taken from GRANT & WOOD, *supra* note 2, at 139–40. In the film “The Bridge on the River Kwai,” the Hollywood studio Columbia Pictures provided most of the financing. Part of the screenplay was written by U.S. citizens. The highest-paid actor in the film was an American. But on the other hand, the film was directed by the legendary British director, David Lean. A British company produced the film and partially financed the project. The star of the movie was British actor, Sir Alec Guinness. Most of the supporting roles were played by British actors. In addition, the film was based on a novel, *Le pont de la rivière Kwai*, which was written by the Frenchman Pierre Boulle.

standards determine whether a film is closely linked to a particular country's cultural identity, that is whether a film embodies a country's "history, images, archetypes, beliefs, and heroes."¹²⁹ Other standards rely less on subjective measures and more on objective criteria such as "the location of technical, creative, or financial inputs."¹³⁰ Thus, the national identity of a film could be determined, for instance, by the citizenship of a film's creators, the chief financier of the project, the physical location of the shoot, or the film's subject matter.¹³¹

Although basing a film's identity entirely on the citizenship of its creators has the twin benefits of transparency and encompassing all films regardless of content,¹³² difficulties arise when screenwriters, directors, or actors have dual national identities¹³³ or move from one country to another.¹³⁴ Alternatively, a nationality standard based solely on a film's subject matter might be ideal in theory but may prove even harder to implement in practice. For example, do the James Bond films represent British values and culture because the hero is a British agent or do these films more accurately reflect Hollywood's penchant for good-versus-evil, action and adventure pictures? In addition, judging films by their subject matter can make it difficult to formulate uniform and transparent standards.¹³⁵ Finally, subjecting films to content analysis may tempt governments to determine which ideas, notions, and opinions in movies represent the "official" cultural values and ideas of a country, thereby implementing a form of censorship against filmmakers who express dissenting or minority viewpoints in their movies.¹³⁶

Historically, larger countries that possessed their own film industries tended to favor standards that tracked either financial presence¹³⁷ or the level of involvement by their countrymen in the movie-making process.¹³⁸

129. GRANT & WOOD, *supra* note 2, at 150.

130. *Id.*

131. *Id.* at 141.

132. *Id.*

133. *Id.* at 142–43. For example, if the *Lord of the Rings* trilogy is deemed to reflect British values based on the nationality of its author, J.R.R. Tolkien, is it reasonable to dub him an "English writer" even though he was born in South Africa? *Id.* at 143

134. Should famous Hollywood actors from Canada, such as Michael J. Fox, William Shatner, Mike Myers, and Dan Aykroyd, be considered American or Canadian? *Id.* at 142–43.

135. *Id.* at 144.

136. *Id.*

137. For example, Great Britain's system focuses on the location of a film's production. The British system requires at least seventy percent of a film's production budget to be spent in the United Kingdom for the film to possess a British identity. *Id.* at 160.

138. *Id.* at 166. In Italy, films that are judged to be "of national production" qualify for public funds through a combination of "proofs." *Id.* at 163. The proofs include showing, among other things,

Some of these larger countries utilized “point” systems that assigned different weights to input factors to determine the national identity of a movie.¹³⁹ Smaller countries, on the other hand, usually placed greater emphasis on a film’s use of language or visuals.¹⁴⁰ Naturally, some countries incorporated both methods.¹⁴¹

The nationality standard that would probably be most favorable to Hollywood studios is one based on financial presence. Co-producing and shooting movies in foreign locales is nothing new to Hollywood studios.¹⁴² Under a standard of financial presence, Hollywood studios, in the short run, could shoot their movies overseas, avoid having their movies tagged as “American” or “foreign,” and lessen the possibility that access to foreign markets will be restricted. On the other hand, a standard based on cultural content, such as a language test, would probably make it nearly impossible for Hollywood movies to avoid being labeled “American” or “foreign.”

Regardless of which metric is used to measure the level of diversity in a country’s particular film industry, countries will eventually have to determine the minimum level of diversity needed to preserve and promote diversity in movies, which can only be achieved through future rounds of negotiations and debate. How these issues ultimately get resolved will

that the film’s director, author of the original story, scriptwriter, music composer, director of photography, editor, art director, or costume designer is Italian. *Id.* at 163–64.

139. *Id.* at 150. In order for a film to be considered “European” in France, a film must earn a total of fourteen points based on a scale where points are awarded if a European is employed in a key role in the film-making process. The points scale is as follows: director (3 points), scriptwriter (2 points), other “authors” (1 point), first lead performer (3 points), second lead performer (2 points), cameraman (1 point), sound engineer (1 point), editor (1 point), art director (1 point), European lab or studio (2 points). *Id.* at 159–60.

140. *Id.* at 166–67. For example, to qualify as a “Norwegian” film, a movie must be shot in either the Norwegian language or the language of Norway’s aboriginal population. There are no requirements for the film’s creators to be Norwegian; the cast and crew can be foreigners. *Id.* at 161. In the Netherlands, for a film to be “Dutch,” it must be shot in the Dutch language. *Id.* The film’s creators, cast, and key production members do not have to be Dutch nationals; however, they must “belong to the Netherlands’s cultural domain.” *Id.*

141. France, for example, places great emphasis on the use of the French language in film. *Id.* at 162. However to qualify for funding as a film of “French original expression,” a film must not only be shot in French (dubbed films and French actors speaking in another language do not count), but it must also be co-produced with a French studio. *Id.* In addition, the film must earn a certain number of points. Points are awarded based on those qualifying individuals, who must either be a French national, a French resident, or some other qualifying national, who play important roles in the movie-making process. *Id.*

142. For example, principal photography for the *Lord of the Rings* trilogy, which was co-produced by the American company New Line Cinema and the New Zealand company WingNut Films, was shot in New Zealand. See generally *The Lord of the Rings: The Fellowship of the Ring* (2001), <http://www.imdb.com/title/tt0120737/combined>.

determine the frequency and severity with which foreign countries will restrict Hollywood's access to their markets.¹⁴³

IV. CONCLUSION

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions is the result of a long process with roots tracing back over fifty years. For all of its ambiguities and unresolved issues, the Convention, at the very least, serves notice to the international community that cultural issues must be taken seriously in trade negotiations, whether done under the auspices of UNESCO or the WTO.

Much work still needs to be done to lay out the operational parameters for enforcing the Convention: how will the Convention interact with other trade agreements; what standards will be adopted to measure cultural diversity in particular industries; how much discretion should be granted to individual countries to invoke protection measures to preserve their threatened forms of cultural expression. Ratification of the Convention would not necessarily signal a death-blow to Hollywood. Depending on the standard that will be used to identify American movies, as well as the number of Hollywood films that individual countries must accept under the restraints of the Convention, Hollywood's ability to show its films to global audiences could still be considerable. Only with the passage of time will we be able to tell what the Convention's true impact is on Hollywood and the global film industry.

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143. These issues do not have to be resolved if the Convention never comes into force. The U.S. could try to dissuade countries from adopting the Convention, or it could negotiate bilateral trade agreements with individual countries. See generally Ivan Bernier, *The Recent Free Trade Agreements of the United States as Illustrated of Their New Strategy Regarding the Audiovisual Sector*, available at <http://www.mediatrademonitor.org/note/146> (updated link) (last visited Apr. 5, 2007).

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