

UNESCO and the WTO: A Clash of Cultures?

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The rights and obligations of Parties ... include a series of policies and measures aimed at protecting and promoting the diversity of cultural expressions, approaching creativity and all it implies in the context of globalization, where diverse expressions are circulated and made accessible to all via cultural goods and services.

UNESCO Press Release upon the adoption of the
Convention on the protection and promotion of the diversity of cultural expressions,
20 October 2005¹

[T]he Convention cannot properly and must not be read to prevail over or modify rights and obligations under other international agreements, including WTO Agreements. Potential ambiguities in the Convention must not be allowed to endanger what the global community has achieved, over many years, in the areas of free trade, the free flow of information, and freedom of choice in cultural expression and enjoyment.

United States Mission to UNESCO,
20 October 2005²

1. Introduction

In late October 2005, the General Conference of the United Nations Educational, Scientific and Cultural Organization ('UNESCO') adopted the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* ('UNESCO Convention'),³ which declares that 'cultural activities, goods and services have both an economic and a cultural nature ... and must therefore not be treated as solely having commercial value'.⁴ Of the 156 countries voting on the convention, 148 voted in favour, with opposing votes by Israel and the United States, and abstentions by Australia, Honduras, Liberia, and Nigeria.⁵ The convention will enter into force three months after its ratification by 30 States.⁶

UNESCO's 191 Member States and six Associate Members⁷ include all but a handful of the 149 Members of the World Trade Organization ('WTO').⁸ The UNESCO Convention is also

¹ UNESCO, 'General Conference adopts Convention on the protection and promotion of the diversity of cultural expressions', Press Release 2005-128 (20 October 2005).

² United States Mission to UNESCO, 'Explanation of Vote of the United States on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Statement delivered by Louise V Oliver, US Ambassador to UNESCO' (Paris, 20 October 2005).

³ UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, CLT-2005/CONVENTION DIVERSITE-CULT REV (20 October 2005).

⁴ UNESCO Convention, preamble [18].

⁵ Alan Riding, 'U.S. all but alone in opposing Unesco cultural pact', *International Herald Tribune* (20 October 2005).

⁶ UNESCO Convention, art 29.1.

⁷ See <<http://www.unesco.org/general/eng/about/members.shtml>> (accessed 27 March 2006).

⁸ <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (accessed 27 March 2006). Liechtenstein and Singapore are WTO Members but not UNESCO Member States. WTO Membership is

of particular importance for the WTO given the legitimacy and scope of UNESCO as an international organisation,⁹ the formality and speed of its operations on this question,¹⁰ and the possibility of a conflict with WTO rules. Of specific potential concern to WTO Members is the impact of the UNESCO Convention on the conduct of WTO Members in WTO negotiations and disputes, and the relationship between the UNESCO Convention and WTO laws. The broad scope of the UNESCO Convention could create difficulties for the WTO treatment of many arguably ‘cultural’ or culture-related goods and services such as audiovisual products; books and periodicals; food, wine and spirits (especially those subject to geographical indications or otherwise of regional significance); and tourism.

In this article, I first set out a brief background to the UNESCO Convention, including the circumstances of its conclusion and its key features. I then analyse the implications of the UNESCO Convention for the WTO, paying particular attention to the ongoing Doha Round of trade negotiations and the WTO dispute settlement mechanism.

2. Background to the UNESCO Convention

A. History of the UNESCO Convention

The issue of trade and culture has long been debated in the WTO and its predecessor the *General Agreement on Tariffs and Trade 1947* (‘GATT 1947’),¹¹ leading to a stalemate in the Uruguay Round of negotiations in connection with audiovisual products in particular.¹² From a ‘pro-culture’ perspective, some commentators have always contended that the best possibility for improving the current WTO rules in relation to cultural products would be to reach an agreement on trade and culture outside the WTO.¹³ In a non-WTO forum, the

not restricted to states: *Marrakesh Agreement Establishing the World Trade Organization* (‘Marrakesh Agreement’), arts XI:1, XII:1. The following WTO Members are not UNESCO Member States or Associate Members: the European Communities, Hong Kong, and Chinese Taipei. Macau is a WTO Member and a UNESCO Associate Member.

⁹ See Ivan Bernier and Hélène Ruiz Fabri, *Évaluation de la faisabilité juridique d’un instrument international sur la diversité culturelle* (2002) 22-23.

¹⁰ Hélène Ruiz Fabri, *Analyse et commentaire critique de l’avant-projet de convention sur la protection de la diversité des contenus culturels et des expressions artistiques dans la version soumise pour commentaires et observations aux gouvernements des Etats membres de l’UNESCO: Etude réalisée à la demande de l’Agence intergouvernementale de la Francophonie* (August 2004) [1].

¹¹ For an overview of the relevant issues see Mary Footer and Christoph Beat Graber, ‘Trade Liberalization and Cultural Policy’ (2000) 3 *Journal of International Economic Law* 115.

¹² See, eg, Council for Trade in Services, WTO, *Audiovisual Services: Background Note by the Secretariat*, S/C/W/40 (15 June 1998) [24, 30]; GATT, *Peter Sutherland Responds to Debate on Audiovisual Sector*, NUR 069 (14 October 1993); Karl Falkenberg, ‘The Audiovisual Sector’ in Jacques Bourgeois *et al* (eds), *The Uruguay Round Results: A European Lawyers’ Perspective* (1995) 429.

¹³ See, eg, Ivan Bernier, ‘Trade and Culture’ in Patrick Macrory *et al* (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (2005) (vol II) 747, 789, 791; Gilbert Gagné, ‘Une Convention internationale sur la diversité culturelle et le dilemme culture-commerce’ in Gilbert Gagné (ed), *La diversité culturelle: Vers une convention internationale effective?* (2005) 37, 51-53; Joost Smiers, *Artistic Expression in a Corporate World: Do we need monopolistic control?* (2004) 24-25, 33; UNCTAD, *Audiovisual Services: Improving Participation of Developing Countries - Note by the UNCTAD secretariat*, TD/B/COM.1/EM.20/2 (30 September 2002) 16-17.

underlying interests and objectives of negotiators may be less trade-focused or trade-biased,¹⁴ even though the countries involved may be WTO Members. However, it is evident from the outset that a culture-focused agreement outside the WTO is unlikely to provide a satisfactory resolution for all WTO Members.

In 2002, the Cultural Industries Sectoral Advisory Group in International Trade put forward, for consideration by the Canadian Minister for International Trade, a 'proposed new instrument on cultural diversity ... to serve as a code of conduct for all those States that consider the preservation and promotion of distinct cultural expression and of cultural diversity itself as an essential component of globalization'.¹⁵ Two other Canadian-based organisations have also developed draft instruments on cultural diversity. The International Network on Cultural Policy ('INCP') provides an informal forum for ministers responsible for cultural matters to discuss and 'develop strategies to promote cultural diversity'.¹⁶ At the Sixth Annual Ministerial Meeting in October 2003, ministers from member countries reviewed a second draft 'International Convention on Cultural Diversity'¹⁷ prepared by the Working Group on Cultural Diversity and Globalization and agreed that the INCP should bring its work into the UNESCO discussions on a new cultural diversity instrument.¹⁸ The International Network for Cultural Diversity¹⁹ ('INCD') describes itself as a worldwide 'network of artists and cultural groups dedicated to countering the homogenizing effects of globalization on culture'.²⁰ In February 2003, the INCD presented to UNESCO²¹ for its consideration a 'Proposed Convention on Cultural Diversity'.²²

In March 2003, a 'Preliminary study on the technical and legal aspects relating to the desirability of a standard-setting instrument on cultural diversity' prepared by the UNESCO Secretariat was placed on the agenda of the Executive Board '[o]n the initiative of Canada, France, Germany, Greece, Mexico, Monaco, Morocco and Senegal, supported by the French-speaking group of UNESCO'.²³ This study took note of international initiatives such as those of the INCP and INCD, as well as existing international instruments relating to cultural rights and cultural diversity.²⁴ On 17 October 2003, based on a recommendation by

¹⁴ Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15(3) *Leiden Journal of International Law* 553, 572, 574.

¹⁵ Cultural Industries Sectoral Advisory Group on International Trade, Canadian Department of Foreign Affairs and International Trade, *An International Agreement on Cultural Diversity: A Model for Discussion* (September 2002) 9.

¹⁶ <http://incp-ripc.org/about/index_e.shtml>, (accessed 27 March 2006).

¹⁷ International Network on Cultural Policy, *Draft International Convention on Cultural Diversity* (29 July 2003).

¹⁸ International Network on Cultural Policy, *Sixth INCP Annual Ministerial Meeting: Ministerial Statement* (Opatija, 16-18 October 2003).

¹⁹ The INCD attended the WTO Ministerial Conferences in 2001 and 2003: <http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm> (accessed 27 March 2006).

²⁰ <<http://www.incd.net/about.html>> (accessed 27 March 2006).

²¹ International Network for Cultural Diversity, *Advancing Cultural Diversity Globally: The Role of Civil Society Movements - Report from the Fourth Annual Conference of the International Network for Cultural Diversity in partnership with Culturelink Network/IMO* (Opatija, 13-15 October 2003) 17.

²² International Network for Cultural Diversity, *Proposed Convention on Cultural Diversity* (15 January 2003).

²³ UNESCO, *Preliminary study on the technical and legal aspects relating to the desirability of a standard-setting instrument on cultural diversity*, 166 EX/28 (12 March 2003) summary.

²⁴ UNESCO, *Preliminary study on the technical and legal aspects relating to the desirability of a standard-setting instrument on cultural diversity*, 166 EX/28 (12 March 2003) [3-10], annex.

the Executive Board,²⁵ UNESCO's General Conference decided that the protection of 'the diversity of cultural contents and artistic expressions shall be the subject of an international convention'.²⁶ The General Conference invited the Director-General of UNESCO to prepare a preliminary report regarding the proposed regulation of this subject, as well as a preliminary draft convention, and to submit these documents to the General Conference at its 33rd session.

Three meetings of 15 independent experts (in the fields of anthropology, international law, economics of culture, and philosophy)²⁷ took place between December 2003 and May 2004²⁸ to provide opinions and a draft text to the Director-General.²⁹ Subsequently, three intergovernmental meetings of experts were held between September 2004 and June 2005³⁰ to finalise the preliminary draft convention text. The first such meeting (including almost 550 experts from UNESCO Member States as well as representatives of intergovernmental and non-governmental organisations) established a drafting committee,³¹ which revised the draft convention taking into account comments from the UNESCO Member States, 15 NGOs, and three intergovernmental organisations: the United Nations Conference on Trade and Development ('UNCTAD'), the World Intellectual Property Organization ('WIPO'), and the WTO.³² The third intergovernmental meeting finalised and transmitted the text to the Director-General and recommended that the General Conference adopt the convention in October 2005 at its 33rd session.³³

B. *Key Features of the UNESCO Convention*

In this section, I outline some of the key features of the UNESCO Convention and their connection to certain WTO rules. One of the express objectives of the UNESCO Convention in particular highlights its relevance for the WTO. It is 'to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning'.³⁴ In pursuing this objective, the UNESCO Convention has a broad scope of application, covering those 'policies and measures adopted by the Parties [that are] related to

²⁵ UNESCO, *Decisions adopted by the Executive Board at its 166th Session*, 166 EX/Decisions (14 May 2003) 11.

²⁶ General Conference, UNESCO, *Resolution 34 adopted at the 32nd Session* (29 September 2003–17 October 2003) [1].

²⁷ UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Preliminary Report of the Director-General*, CLT/CPD/2004/CONF.201/1 (July 2004) [5, 7].

²⁸ The meetings were held at UNESCO Headquarters in Paris from 17–20 December 2003, 30 March–3 April 2004, and 28–31 May 2004.

²⁹ UNESCO, *Report of the Third Meeting of Experts (Category VI) on the Preliminary Draft of the Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, CLT/CPD/2004/603/5 (23 June 2004).

³⁰ The meetings were held at UNESCO Headquarters in Paris from 20–24 September 2004, 31 January–11 February 2005, and 25 May–3 June 2005.

³¹ UNESCO, *First Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Report by the Secretariat*, CLT-2004/CONF.201/9 (November 2004) [2].

³² UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Text Revised by the Drafting Committee, 14–17 December 2004*, CLT/CPD/2004/CONF.607/6 (23 December 2004) [7]. See also Drafting Committee, UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Presentation of Comments and Amendments*, CLT/CPD/2004/CONF.607/1, partie IV (December 2004).

³³ Third Intergovernmental Meeting of Experts, UNESCO, *Recommendation* (3 June 2005) [2, 5].

³⁴ UNESCO Convention, art 1(g).

the protection and promotion of the diversity of cultural expressions',³⁵ which are expressions resulting from 'the creativity of individuals, groups and societies, and that have cultural content'.³⁶ In turn, 'cultural content' refers to 'the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities'.³⁷ Some WTO Members have expressed concern about these sweeping definitions, which could extend to an almost unlimited range of products including 'computer games, designer objects, architectural services, medical services, tourism services, automobiles, steel, textiles, copper, or even rice'.³⁸

The substance of the UNESCO Convention begins with certain 'Guiding Principles' in Article 2. These include: the '[p]rinciple of respect for human rights and fundamental freedoms';³⁹ the '[p]rinciple of sovereignty', which declares that 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory';⁴⁰ and the '[p]rinciple of openness and balance', whereby States adopting 'measures to support the diversity of cultural expressions ... should seek to promote ... openness to other cultures of the world'.⁴¹

These general principles are followed by a series of provisions setting out both rights and obligations of parties. An example of a 'right' is found in Article 6, which states that parties 'may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory',⁴² such as 'public financial assistance'⁴³ and 'opportunities ... for the creation, production, dissemination, distribution and enjoyment of ... domestic cultural activities, goods and services'.⁴⁴ Such measures could be inconsistent with national treatment obligations in the WTO,⁴⁵ (which, broadly speaking, require Members to treat foreign goods and services no less favourably than domestic goods and services). Another right that could be exercised contrary to national treatment is in Article 8, which could be described as a cultural safeguard. It states that a party 'may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding'.⁴⁶ In such a situation, parties 'may take all appropriate measures to protect and preserve cultural expressions ... in a manner consistent

³⁵ UNESCO Convention, art 3.

³⁶ UNESCO Convention, art 4.3.

³⁷ UNESCO Convention, art 4.2.

³⁸ See, eg, Drafting Committee, UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Presentation of Comments and Amendments*, CLT/CPD/2004/CONF.607/1, partie IV (December 2004) 24-25. See also Bonnie Richardson, 'Hollywood's Vision of a Clear, Predictable Trade Framework Consistent with Cultural Diversity' in Christoph Beat Graber *et al* (eds), *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services* (2004) 111, 115-16.

³⁹ UNESCO Convention, art 2.1.

⁴⁰ UNESCO Convention, art 2.2.

⁴¹ UNESCO Convention, art 2.8.

⁴² UNESCO Convention, art 6.1.

⁴³ UNESCO Convention, art 6.2(d).

⁴⁴ UNESCO Convention, art 6.2(b).

⁴⁵ See the concerns raised by WTO Members in Drafting Committee, UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Presentation of Comments and Amendments*, CLT/CPD/2004/CONF.607/1, partie IV (December 2004) 24.

⁴⁶ UNESCO Convention, art 8.1.

with the provisions of this Convention'.⁴⁷ The 'obligations' under the UNESCO Convention could also raise national treatment concerns in a WTO context. For example, Article 7.1(a) provides for parties to 'endeavour to create in their territory an environment which encourages individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expressions'.

Other UNESCO Convention provisions could conflict with most-favoured nation ('MFN') obligations under the WTO agreements, which essentially require WTO Members not to accord goods or services from any other country an advantage that is not accorded to all WTO Members. Article 12 requires parties to 'endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions, ... notably in order to ... encourage the conclusion of co-production and co-distribution agreements',⁴⁸ among other things. Similarly, Article 16 states:

Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.

The broad nature of this requirement could encourage WTO Members to impose measures that are inconsistent with the general MFN rule in the WTO, and not exempted by any WTO provisions for special and differential treatment of developing countries.

The UNESCO Convention also includes a dispute settlement mechanism in Article 25. This requires parties to 'seek a solution by negotiation' in the event of a dispute 'concerning the interpretation or the application of the Convention'.⁴⁹ Failing that, parties may jointly seek the good offices of or mediation by a third party.⁵⁰ The final option is non-binding conciliation conducted by a 'Conciliation Commission'.⁵¹

Finally, of interest is Part V of the convention, governing 'Relationship to Other Instruments'. Article 20.2 states that '[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties'. However, this apparently clear statement could conflict with certain other provisions in this part. Article 20.1 states that parties 'shall foster mutual supportiveness between this Convention and the other treaties to which they are parties' and that, 'when interpreting and applying other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention'. Article 21 states, furthermore, that parties 'undertake to promote the objectives and principles of this Convention in other international forums' and to consult each other as appropriate for this purpose. Perhaps these two requirements apply only to the extent that they do not involve modifying rights or obligations under other treaties.

⁴⁷ UNESCO Convention, art 8.2.

⁴⁸ UNESCO Convention, art 12(e).

⁴⁹ UNESCO Convention, art 25.1.

⁵⁰ UNESCO Convention, art 25.2.

⁵¹ UNESCO Convention, art 25.3.

The provisions of the UNESCO Convention dealing with dispute settlement and the relationship to other instruments were among the most controversial in finalising the text.⁵² They were modified in successive versions and ultimately watered down. For example, an earlier draft included the possibility of referring disputes to the International Court of Justice ('ICJ') for resolution,⁵³ and an option whereby the UNESCO Convention would prevail over existing international instruments (other than those relating to intellectual property) where the exercise of rights and obligations under such instruments 'would cause serious damage or threat to the diversity of cultural expressions'.⁵⁴

3. Implications for the WTO

This section considers the formal role of WTO Members leading up to the adoption of the UNESCO Convention, followed by the possible effect of the UNESCO Convention (should it enter into force) on the conduct in WTO negotiations and disputes of WTO Members that are also UNESCO Convention parties. The section ends with a discussion of the potential significance of the UNESCO Convention in interpreting WTO provisions and as a defence to a WTO violation.

A. WTO Members' Views on the UNESCO Convention

The Director-General of UNESCO sought feedback from the WTO Secretariat on the UNESCO Convention, and the WTO Director-General put this request to the WTO Members through the relevant bodies.⁵⁵ The WTO Members responded to UNESCO in an informal discussion with UNESCO's Director of the Division of Cultural Policies and Intercultural Dialogue on 11 November 2004.⁵⁶ This provided a unique opportunity for Members such as Singapore, who are not also UNESCO Member States or Associate Members, to put forward their positions on the UNESCO Convention.⁵⁷

⁵² See Hélène Ruiz Fabri, *Analyse et commentaire critique de l'avant-projet de convention sur la protection de la diversité des contenus culturels et des expressions artistiques dans la version soumise pour commentaires et observations aux gouvernements des Etats membres de l'UNESCO: Etude réalisée à la demande de l'Agence intergouvernementale de la Francophonie* (August 2004) [8-9].

⁵³ UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Preliminary Report of the Director-General*, CLT/CPD/2004/CONF.201/1 (July 2004) art 24.

⁵⁴ UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Preliminary Report of the Director-General*, CLT/CPD/2004/CONF.201/1 (July 2004) art 19 (option B).

⁵⁵ UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Preliminary Report of the Director-General*, CLT/CPD/2004/CONF.201/1 (July 2004) [13]; General Council, WTO, *Annual Report 2004*, WT/GC/86 (12 January 2005) 20; General Council, WTO, *Minutes of Meeting Held on 20 October 2004*, WT/GC/M/88 (11 November 2004) [64-85].

⁵⁶ Drafting Committee, UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Presentation of Comments and Amendments*, CLT/CPD/2004/CONF.607/1, partie IV (December 2004) 23; General Conference, UNESCO, *Preliminary Report by the Director-General Setting out the Situation to be Regulated and the Possible Scope of the Regulating Action Proposed, Accompanied by the Preliminary Draft of a Convention on the Protection and of the Diversity of Cultural Contents and Artistic Expressions*, 33 C/23 (4 August 2005) [17].

⁵⁷ General Council, WTO, *Minutes of Meeting Held on 20 October 2004*, WT/GC/M/88 (11 November 2004) [69].

The vast majority of WTO Members, who were also involved in the drafting of the UNESCO Convention, would ideally present the same views on the draft within UNESCO and the WTO.⁵⁸ However, the need to seek WTO Members' views separately may have stemmed in part from the fact that different government representatives, from different ministries, may be involved in these two contexts. Normally one would expect a representative from a ministry dealing with culture to attend UNESCO meetings and a representative from a ministry dealing with international trade to attend WTO meetings.⁵⁹ Australia has therefore emphasised the need for 'appropriate inter-agency coordination to guarantee a whole-of-government approach' in relation to the UNESCO Convention.⁶⁰

It seems that, generally speaking, WTO Members agree that the UNESCO Convention and the WTO should be 'mutually supportive'.⁶¹ However, Members have expressed quite different opinions regarding the relationship between trade and culture, and the application of WTO disciplines to cultural products, in connection with the UNESCO Convention. In addition to the discussion with UNESCO in November 2004, Members have aired their views in various informal sessions organised at the WTO while the UNESCO Convention was being drafted. The WTO delegations of Chile, Chinese Taipei, Hong Kong, Japan, Mexico, and the US organised an informal seminar in September 2004 on trade and culture 'to facilitate the exchange of views among WTO Members on the role of trade in enhancing cultural diversity and to explore the relationship between WTO instruments, UNESCO instruments and cultural diversity'.⁶² These Members typically seek liberalisation in relation to cultural products, and particularly audiovisual services. Other Members are more closely aligned with the position of the INCD, which organised a seminar relating to the UNESCO Convention as part of the WTO's public symposium in April 2005.⁶³

B. *Conduct of UNESCO Convention Parties in the WTO*

A WTO Member that was also a party to the UNESCO Convention might wish to refrain from making offers in the ongoing negotiations under the *General Agreement on Trade in Services* ('GATS') regarding audiovisual services. The Member could point to the need to promote the principles of the UNESCO Convention, under Article 21, as a multilateral basis for this negotiating stance, as well as the recognition under GATS of the legitimacy of

⁵⁸ See Hélène Ruiz Fabri, *Analyse et commentaire critique de l'avant-projet de convention sur la protection de la diversité des contenus culturels et des expressions artistiques dans la version soumise pour commentaires et observations aux gouvernements des Etats membres de l'UNESCO: Etude réalisée à la demande de l'Agence intergouvernementale de la Francophonie* (August 2004) [4].

⁵⁹ See, eg, Keith Acheson and Christopher Maule, 'Convention on Cultural Diversity' (2004) 28 *Journal of Cultural Economics* 243, 245, 251; Gilbert Gagné, 'Une Convention internationale sur la diversité culturelle et le dilemme culture-commerce' in Gilbert Gagné (ed), *La diversité culturelle: Vers une convention internationale effective?* (2005) 37, 61.

⁶⁰ General Council, WTO, *Minutes of Meeting Held on 20 October 2004*, WT/GC/M/88 (11 November 2004) [65].

⁶¹ Drafting Committee, UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Presentation of Comments and Amendments*, CLT/CPD/2004/CONF.607/1, partie IV (December 2004) 23.

⁶² Council for Trade in Services, WTO, *Report of the Meeting Held on 23 September 2004: Note by the Secretariat*, S/C/M/74 (10 November 2004) [74].

⁶³ WTO, *Information Note from the Director-General, WTO Public Symposium - 'WTO After 10 Years: Global Problems and Multilateral Solutions'*, 20 to 22 April 2005, WT/INF/87 (13 April 2005) 5.

‘national policy objectives’.⁶⁴ This could support the Member’s position that cultural policy objectives are not simply disguised protectionism. Indeed, Acheson and Maule suggest that the UNESCO Convention may have been ‘designed to improve the bargaining position of its members in WTO negotiations’.⁶⁵

Such conduct would be unlikely to violate any WTO obligations. The design of GATS is intentionally flexible, so that no WTO Member is legally bound under the WTO agreements to make commitments in any particular service sector, whether or not they have committed to do so or to refrain from doing so under another international instrument. However, the Member would likely have to ‘pay’ for its refusal to improve commitments in relation to cultural products as part of its overall negotiating package.⁶⁶ Any negotiating trade-off could affect other Members with interests in the sectors concerned. Moreover, for the WTO as an institution, and the WTO Members as a whole, widespread reliance on the UNESCO Convention in WTO negotiations would be contrary to the WTO objective of pursuing progressive liberalisation under GATS and the WTO more generally.⁶⁷ Accordingly, in response to UNESCO’s request for comments on the draft UNESCO Convention, several WTO Members expressed concern about this potential impact on WTO negotiations.⁶⁸

A WTO Member that was also a party to the UNESCO Convention might wish to challenge a trade measure of another WTO Member and party to the UNESCO Convention on the basis that it violated rights and obligations contained in the UNESCO Convention. In these circumstances, the question would arise whether the WTO Member could choose to bring the dispute within the dispute settlement mechanism established by the UNESCO Convention, rather than within the WTO dispute settlement system. Indeed, some Members have raised concerns about the potential for conflict between dispute settlement in these two settings.⁶⁹

Article 23.1 of the WTO’s *Understanding on Rules and Procedures Governing the Settlement of Disputes* (‘DSU’) states:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

⁶⁴ GATS, art XIX:2.

⁶⁵ Keith Acheson and Christopher Maule, ‘Convention on Cultural Diversity’ (2004) 28 *Journal of Cultural Economics* 243, 251. See also Ivan Bernier and Hélène Ruiz Fabri, *Évaluation de la faisabilité juridique d’un instrument international sur la diversité culturelle* (2002) 42; Gilbert Gagné, ‘Une Convention internationale sur la diversité culturelle et le dilemme culture-commerce’ in Gilbert Gagné (ed), *La diversité culturelle: Vers une convention internationale effective?* (2005) 37, 60; Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd ed, 2005) 640.

⁶⁶ See Lelio Iapadre, ‘Comment’ (2004) 28 *Journal of Cultural Economics* 267, 269.

⁶⁷ GATS, art XIX:1; Marrakesh Agreement, preamble.

⁶⁸ Drafting Committee, UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Presentation of Comments and Amendments*, CLT/CPD/2004/CONF.607/1, partie IV (December 2004) 25.

⁶⁹ Drafting Committee, UNESCO, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Presentation of Comments and Amendments*, CLT/CPD/2004/CONF.607/1, partie IV (December 2004) 26.

This suggests that a Member that chooses to 'seek the redress' of a violation of a WTO agreement cannot do so through any means other than the WTO dispute settlement system. This is confirmed by Article 23.2(a), which states that, '[i]n such cases', Members shall 'not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with' the DSU. One WTO panel has described Article 23 as incorporating the 'fundamental principle' that the WTO dispute settlement system provides 'the exclusive means to redress any violations of any provisions of the WTO Agreement'.⁷⁰

To date, these provisions have been raised in WTO disputes in response to unilateral actions by Members.⁷¹ However, the 'exclusive' nature of Article 23 could also restrict a WTO Member from pursuing a dispute in another forum, such as under the UNESCO Convention. Marceau, for example, considers that Article 23 precludes Members from taking 'their WTO-related disputes ... to another forum'.⁷² In my view, this would depend on the nature of the dispute and the steps taken by the complaining Member towards its resolution. If the Member was challenging a measure on the basis that it violated the UNESCO Convention, it would arguably not be seeking the redress of a 'violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements' within the meaning of Article 23.1 of the DSU. It could therefore pursue the dispute pursuant to the UNESCO Convention without violating any WTO obligations.

What if a WTO Member decided, in view of its commitments under the UNESCO Convention, to refrain from pursuing a WTO dispute in relation to a cultural policy measure imposed by another WTO Member and party to the UNESCO Convention because the measure pursued the objectives of the UNESCO Convention, even though it appeared to be inconsistent with the WTO agreements? Instead, the first Member might simply consult with the other Member, as envisaged under Article 21 of the UNESCO Convention. If the purpose of the consultations was to raise concerns about WTO violations, this might involve 'seek[ing] the redress' of a WTO violation other than through the WTO dispute settlement system, contrary to Article 23.1 of the DSU. On the other hand, it would seem to go too far to interpret Article 23.1 of the DSU as preventing WTO Members from resolving WTO disputes amicably, without resorting to formal consultations within the WTO dispute settlement system.⁷³ This would also be unrealistic. In practice, Members frequently engage in informal consultations before commencing formal proceedings. To preclude such an avenue of dispute resolution would be contrary to the aim of the dispute settlement system, which is to resolve disputes, preferably through a 'mutually agreed solution'.⁷⁴ Accordingly, as long as WTO Members do not seek to resolve disputes regarding the WTO-consistency

⁷⁰ Panel Report, *US – Certain EC Products*, [6.13].

⁷¹ See Panel Report, *US – Certain EC Products*, [2.21-25, 7.1(a)].

⁷² Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) *Journal of World Trade* 1081, 1101. On overlaps between WTO disputes and international disputes in other fora, see Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: the WTO-NAFTA "Spaghetti Bowl" is Cooking' (2006) 9(1) *Journal of International Economic Law* 197.

⁷³ See Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) 183-85.

⁷⁴ DSU, art 3.7.

of their measures through formal dispute settlement under the UNESCO Convention, Article 23.1 would not appear to preclude them from consulting each other to resolve a dispute taking into account the objectives of that convention.⁷⁵

In this way, the UNESCO Convention could assist Members in resolving disputes about cultural policy measures without resorting to formal dispute settlement.⁷⁶ If both Members were party to the UNESCO Convention, the terms of the UNESCO Convention could provide a useful background for consultations, as a set of principles and objectives on which they agree. However, from an institutional perspective, mutually agreed solutions are not always ideal. Thus, Article 3.7 of the DSU states that a 'solution mutually acceptable to the parties to a dispute *and consistent with the covered agreements* is clearly to be preferred'.⁷⁷ A mutually agreed solution to a dispute that has been formally raised in the WTO system must be consistent with the covered agreements and must be notified to the WTO Membership through the DSB.⁷⁸ However, where Members resolve their disputes amicably without taking any formal steps towards resolution within the WTO (specifically through a formal request for consultations), other Members may be unaware of the existence of the dispute and the way in which it is resolved. This lack of transparency and focus on WTO-consistent dispute resolution could conflict with the objective of the WTO dispute settlement system as 'a central element in providing security and predictability to the multilateral trading system'.⁷⁹

C. *The UNESCO Convention in Interpreting WTO Provisions*

I now consider the relevance of the UNESCO Convention in interpreting WTO provisions in WTO disputes. Under Article 3.2 of the DSU, WTO Members recognise that the WTO dispute settlement mechanism:

serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 3.2 imposes two key requirements in connection with the use of international law in WTO disputes. First, public international law clearly plays a part, at least to the extent that it provides 'customary rules' regarding the 'interpretation' of WTO agreements. Second, public international law cannot be used to replace or supplement the WTO agreements if this would amount to increasing or diminishing the 'rights and obligations' provided under those agreements. In Howse's view, these two principles fit neatly together: 'when the AB is interpreting existing provisions in accordance with the customary rules (including their dynamic dimension) it is not, impermissibly, adding [to] or diminishing ... existing

⁷⁵ See also Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003) 317-18.

⁷⁶ A comparable situation may arise under multilateral environmental agreements. See, eg, Committee on Trade and Environment, WTO, *Report (1996) of the Committee on Trade and Environment*, WT/CTE/1 (12 November 1996) [178].

⁷⁷ Emphasis added.

⁷⁸ DSU, arts 3.4, 3.6.

⁷⁹ DSU, art 3.2.

obligations'.⁸⁰ Similarly, the Appellate Body itself has stated that it has 'difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements'.⁸¹

In its first appeal, in 1996, the Appellate Body identified Article 31(1) of the *Vienna Convention on the Law of Treaties* ('VCLT') as expressing 'a fundamental rule of treaty interpretation' that had 'attained the status of a rule of customary or general international law' and was, therefore, a rule to be applied in interpreting the WTO agreements in accordance with Article 3.2 of the DSU.⁸² The Appellate Body confirmed that GATT 1994 'is not to be read in clinical isolation from public international law'.⁸³ Since then, the Appellate Body has confirmed the status of the interpretative rules in the VCLT on several occasions.⁸⁴ The Appellate Body appears to have used international law in interpreting WTO provisions primarily based on Article 31(1) of the VCLT, and in particular in determining the 'ordinary meaning' of particular words.⁸⁵ In addition, the Appellate Body has sometimes referred to international law in apparent reliance on Article 31(3)(c) of the VCLT.⁸⁶

International laws outside the WTO framework, including the UNESCO Convention upon its entry into force, might assist in clarifying various exceptions to core WTO disciplines such as national treatment and MFN treatment in connection with cultural products. For example, Article XX(f) of GATT 1994 provides an exception to core WTO disciplines such as national treatment for measures 'imposed for the protection of national treasures of artistic, historic or archaeological value', subject to compliance with the *chapeau*. This provision has not yet been subject to interpretation in WTO dispute settlement, but the UNESCO Convention might have some influence on the ordinary meaning of 'national treasures' (which is likely to evolve over time)⁸⁷ and whether the exception should be seen as extending to measures imposed by one WTO Member to protect national treasures of other WTO Members. Similarly, the UNESCO Convention might be used to buttress a Member's claim that 'public morals' under the exceptions in GATS Article XIV(a) and GATT Article XX(a) include cultural concerns. However, provisions of the UNESCO Convention are likely to apply at most to the disputing parties and not to the WTO Membership as a whole, such that it would be difficult to bring the UNESCO Convention in through

⁸⁰ Robert Howse, 'The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power' in Thomas Cottier and Petros Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (2003) (vol 4) 11, 15.

⁸¹ Appellate Body Report, *Chile – Alcoholic Beverages*, [79].

⁸² Appellate Body Report, *US – Gasoline*, 16-17.

⁸³ Appellate Body Report, *US – Gasoline*, 17.

⁸⁴ See, eg, Appellate Body Report, *EC – Computer Equipment*, [84]; Appellate Body Report, *EC – Sardines*, [200]; Appellate Body Report, *India – Patents (US)*, [46]; Appellate Body Report, *Japan – Alcoholic Beverages II*, 10; Appellate Body Report, *US – Carbon Steel*, [61]; Appellate Body Report, *EC – Chicken Cuts*, [176].

⁸⁵ Appellate Body Report, *US – Shrimp*, [129-32]. See also Appellate Body Report, *EC – Tariff Preferences*, [163]; leaked interim Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293 (7 February 2006) [7.92] at <http://www.foe.co.uk/resource/press_releases/leaked_wto_report_us_misle_28022006.html> (accessed 27 March 2006).

⁸⁶ Appellate Body Report, *US – Shrimp*, [158]. See also Appellate Body Report, *US – FSC*, [166]; Appellate Body Report, *Brazil – Desiccated Coconut*, 15; Appellate Body Report, *Canada – Patent Term*, [71].

⁸⁷ See Appellate Body Report, *US – Shrimp*, [130]; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16, [53].

Article 31(3)(c) of the VCLT.⁸⁸ The Appellate Body's approach to this question may be revealed in the coming months should the decision in the EC biotech case be appealed.⁸⁹

D. *The UNESCO Convention as a Defence to a WTO Violation*

A WTO Member might wish to challenge a cultural policy measure taken by another Member in applying or implementing the UNESCO Convention. A Member arguing that the convention provides a defence to a WTO violation independently of any of the express exceptions mentioned above would need to overcome two hurdles. First, it would need to establish that panels and the Appellate Body are entitled (or obliged), in resolving WTO disputes, to apply international laws not specifically set out in the WTO agreements. Second, it would need to show that the relevant conflict rules mean that, to the extent of inconsistency, the provision of the UNESCO Convention requiring or permitting the challenged measure prevails over the WTO provision prohibiting that measure. I consider these issues in turn below.

If the Appellate Body accepted a provision of the UNESCO Convention or a similar instrument as an independent defence to a WTO violation, it would be applying that instrument in a WTO dispute, rather than merely using it as an aid to interpretation in the manner discussed in the previous section. The application of public international law in WTO disputes is more controversial and problematic than its use in interpreting WTO provisions. The DSU makes fairly clear that panels and the Appellate Body are restricted to hearing claims under WTO agreements.⁹⁰ However, the DSU does not clearly specify whether panels and the Appellate Body may apply international law in resolving WTO claims.

The second sentence of Article 3.2 of the DSU states that the dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. Commentators such as Marceau and Trachtman regard this sentence, as well as other DSU provisions, as precluding resort to customary international law rules other than interpretative rules.⁹¹ In contrast, Pauwelyn maintains that

⁸⁸ See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003) 257-58, 261; Michael Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5(1) *Journal of International Economic Law* 17, 35-38. But see Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) *Journal of World Trade* 1081, 1087.

⁸⁹ See leaked interim Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293 (7 February 2006) [7.68-7.71] at <http://www.foe.co.uk/resource/press_releases/leaked_wto_report_us_misle_28022006.html> (accessed 27 March 2006).

⁹⁰ See DSU, arts 1.1, 11, 17.6, 19.1. See also Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) *Journal of World Trade* 1081, 1107; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003) 444. But see Joel Trachtman, 'Review of Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*' (2004) 98 *American Journal of International Law* 855, 857.

⁹¹ See, eg, Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) *Journal of World Trade* 1081, 1102-04; Joel Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40(2) *Harvard International Law Journal* 333,

WTO law is merely one branch of public international law and that, except to the extent that the covered agreements exclude other international law rules, panels and the Appellate Body may apply these rules in deciding claims properly before them.⁹² In the absence of explicit direction, it seems possible to interpret various DSU provisions to support both of these approaches.

The Appellate Body's generally cautious attitude to the application of international law in previous cases⁹³ is consistent with the weight it typically accords to the text in interpreting WTO provisions, from which one might infer a desire to accord considerable deference to the will of the Members as reflected in the agreements they negotiated.⁹⁴ This desire may be revealed in the Appellate Body's own description of the WTO agreements as containing 'carefully negotiated language'⁹⁵ reflecting, variously, a 'carefully drawn balance of rights and obligations of Members',⁹⁶ a 'delicate and carefully negotiated balance',⁹⁷ a 'carefully negotiated compromise',⁹⁸ or a 'carefully negotiated balance of rights and obligations'.⁹⁹ Such caution suggests the Appellate Body would be unlikely to apply the UNESCO Convention as an independent defence in a WTO dispute with no textual anchor. The likely criticism by WTO Members of such a move would be increased by the controversy surrounding cultural products in the WTO.

A brief aside: Article XX(d) of the GATT 1994 (and perhaps the equivalent provision in GATS, Article XIV(c)) provides one possible avenue for raising obligations under the UNESCO Convention as a defence to a WTO violation. Subject to the chapeau, this exception extends to measures that are 'necessary to secure compliance with laws or

342; Joel Trachtman, 'The Jurisdiction of the World Trade Organization' (2004) 98 *American Society of International Law Proceedings* 139, 140-41. See also John McGinnis, 'The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO' (2003) 44 *Virginia Journal of International Law* 229, 255, 266-68; Debra Steger, 'The Jurisdiction of the World Trade Organization' (2004) 98 *American Society of International Law Proceedings* 142, 143-44.

⁹² Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003) 25-40, 465, 466, 469; Joost Pauwelyn, 'The Jurisdiction of the World Trade Organization' (2004) 98 *American Society of International Law Proceedings* 135, 138. See also Pieter Jan Kuijper, 'The Law of GATT as a Special Field of International Law' (1994) *Netherlands Yearbook of International Law* 227; Lorand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35(3) *Journal of World Trade* 499, 518; Panel Report, *Korea – Procurement*, [7.96].

⁹³ See, eg, Appellate Body Report, *EC – Hormones*, [123-124]; Appellate Body Report, *Argentina – Textiles and Apparel*, [13, 69]; Appellate Body Report, *EC – Poultry*, [2, 78-79, 81]; Appellate Body Report, *EC – Export Subsidies on Sugar*, [310-313]. See also Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of "Self-Contained Regimes": International Law and the WTO' (2006) 16(5) *European Journal of International Law* 857, 876-877.

⁹⁴ '[T]he method of literal interpretation is relatively safe, and ... its results are more easily accepted than results reached by other interpretative tools': Claus-Dieter Ehlermann, 'Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization' (2002) 36(4) *Journal of World Trade* 605, 617. On the gradual evolution of the Appellate Body's approach, see Federico Ortino, 'Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling*: A Critique' (2006) 9(1) *Journal of International Economic Law* 117.

⁹⁵ Appellate Body Report, *US – Underwear*, 15.

⁹⁶ Ibid. See also Appellate Body Report, *US – Wool Shirts and Blouses*, 16.

⁹⁷ Appellate Body Report, *EC – Hormones*, [177].

⁹⁸ Appellate Body Report, *US – Carbon Steel*, [90].

⁹⁹ Appellate Body Report, *Brazil – Aircraft*, [139]. See also Appellate Body Report, *EC – Bananas III*, [136], quoting the panel with approval.

regulations which are not inconsistent with the provisions of this Agreement'. The respondent could argue that the offending measures are necessary to secure its own compliance with the UNESCO Convention. The Appellate Body seemed to leave this possibility open in *Mexico – Taxes on Soft Drinks*. It found that a respondent cannot rely on Article XX(d) to defend measures designed to secure compliance by another WTO Member with its obligations under international agreements.¹⁰⁰ However, it recognised that the words 'laws or regulations' under Article XX(d) encompass 'rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system'.¹⁰¹ Thus, the exception could cover measures necessary to secure compliance with the respondent's own international obligations to the extent that they were incorporated in the respondent's domestic law. The difficulty here would be establishing that the measures were 'necessary' to secure compliance with the UNESCO Convention and that the UNESCO Convention was not inconsistent with the WTO agreements.

Similar questions arise in determining whether the UNESCO Convention could be a defence independent of Article XX(d). Assuming that a WTO panel or the Appellate Body agreed to apply the UNESCO Convention directly in a WTO dispute in the absence of a specific defence in the text of the WTO agreements, the next question would be whether the UNESCO Convention could prevail over WTO rules by providing a defence to a WTO-inconsistent measure.

On a narrow view, no conflict arises between two international agreements unless they impose mutually exclusive obligations; in other words, it is not possible to comply with both agreements at once.¹⁰² If, for example, one agreement prohibits behaviour that another permits, the two agreements do not conflict because a country may comply with both agreements simply by refraining from engaging in the behaviour in question. A WTO Member could presumably comply with its WTO obligations and its obligations under the UNESCO Convention by taking measures to protect cultural diversity but doing so in a manner that involves no WTO-inconsistency. Thus, the respondent would not need to use the UNESCO Convention as a defence. This interpretation would likely prevent the Member from taking certain measures that are envisaged in the UNESCO Convention. For instance, a minimum domestic content requirement could fall within the rights recognised in Article 6.2(b) of the UNESCO Convention while conflicting with the national treatment obligation under GATT 1994 or GATS.

Taking a broader view, a conflict does arise in these circumstances because it is not possible to exercise the right granted in the second agreement without violating the first: '[i]f not, one would consistently elevate obligations in international law over and above rights in international law'.¹⁰³ According to this view, a conflict arises between the UNESCO

¹⁰⁰ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, [69].

¹⁰¹ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, [79].

¹⁰² See, eg, Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) *Journal of World Trade* 1081, 1084.

¹⁰³ Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535, 551. See also Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003) 329.

Convention and the WTO agreements if the WTO agreements prohibit a measure that is permitted or encouraged by the UNESCO Convention. As a result, a respondent relying on the UNESCO Convention would need to show that the conflict should be resolved in favour of the UNESCO Convention.

Regardless of the precise definition of ‘conflicts’, they are easiest to resolve where one of the two apparently conflicting provisions is contained in an instrument that specifies that it is subordinate to another instrument. In that case, pursuant to Article 30(2) of the VCLT, the other instrument prevails. Article 20.2 of the UNESCO Convention specifies that it does not modify rights and obligations of the parties under any other treaties to which they are parties. This indicates that the UNESCO Convention as currently drafted could not provide a defence to a WTO violation, even though Article 20.1 of the UNESCO Convention states that it is not subordinate to any other treaty.

Some doubt could arise as to whether Article 20.2 means that the UNESCO Convention does not modify the rights or obligations of the parties under only existing WTO agreements as they stand upon the entry into force of the UNESCO Convention, or also under WTO agreements as amended or concluded in future. However, the absence of any reference in Article 20.2 to the time when such other treaties are concluded suggests that this provision is not limited to existing treaties. The drafters of the UNESCO Convention appear to have deliberately removed such a limitation: a precursor to Article 20.2 stated that ‘Nothing in this Convention shall affect the rights and obligations of the States Parties under any other *existing* international instruments’,¹⁰⁴ whereas the current Article 20.2 states that the UNESCO Convention does not modify ‘rights and obligations of the Parties under *any* other treaties to which they are parties’.¹⁰⁵ At most, one might read Article 20.2 as leaving open the relationship between the UNESCO Convention and future WTO agreements. In that case, the general international law rules on successive treaties would likely mean that the UNESCO Convention could not modify rights or obligations of WTO Members under future WTO agreements.¹⁰⁶

4. Conclusion

The decision to consult WTO Members in finalising the UNESCO Convention was laudable, given that countries do not always attain seamless coordination in their trade and cultural affairs. Moreover, the assertion in the UNESCO Convention that it does not affect rights or obligations of parties under other international treaties may be a positive sign for the WTO, since the convention addresses the trade/culture problem from primarily a cultural perspective and might not adequately take into account the positive effects of trade liberalisation. Nevertheless, if the UNESCO Convention comes into force, parties may rely on the principles set out in the convention to restrict their offers in the current GATS negotiations and to attempt to resolve disputes regarding WTO-inconsistent cultural policy measures outside the WTO. This raises concerns for other WTO Members, as well as the

¹⁰⁴ See, eg, UNESCO, *Preliminary Report of the Director-General Containing Two Preliminary Drafts of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, CLT/CPD/2005/CONF.203/6 (3 March 2005) appendix 1 (composite text), art 19 (option B) (emphasis added).

¹⁰⁵ Emphasis added.

¹⁰⁶ See VCLT, art 30(4).

WTO as an institution. The UNESCO Convention is also likely to affect the interpretation of WTO provisions, whether Members like it or not. The greatest achievement of the UNESCO Convention in connection with trade in cultural products would be if it jolts WTO Members into paying more attention to this area and making better efforts to negotiate a solution within the WTO that better meets the trade and cultural objectives of all Members.