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# Creating "Shelf Space": NAFTA's Experience with Cultural Protection

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**CREATING “SHELF SPACE”:  
NAFTA’S EXPERIENCE WITH CULTURAL PROTECTION**

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**ABSTRACT:** The relatively swift negotiation and implementation of the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (CCD) invites us to consider what came before it and what may follow. This article reviews experience with the creation of cultural “shelf space” under the *North American Free Trade Agreement* (NAFTA) through the use of a cultural “exception” and how this experience served as an important impetus for Canadian leadership in the negotiation and conclusion of the CCD. The article goes on to consider the CCD’s potential impact as custom and process in the creation of cultural “shelf space” internationally.

## CREATING “SHELF SPACE”: NAFTA’S EXPERIENCE WITH CULTURAL PROTECTION

By Chi Carmody<sup>1</sup>

1. INTRODUCTION
2. CANADA, INTERNATIONAL TRADE & CULTURAL PROTECTION
3. THE CCD AS A REALITY
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### 1. INTRODUCTION

This article is about the creation of “shelf space”. The term “shelf space” is used in colloquial English to denote the making of room for desirable things that one might want close at hand. The concept is an inviting one because it implies ready access to something that is otherwise hard to obtain.

In this instance, the term “shelf space” is used metaphorically to refer to a key debate arising in the intersection between international trade regulation and cultural protection. That debate is about making room for a variety of cultural products. The reason for doing so is relatively clear. Some cultural products would not survive if disciplines on free trade were to prevail in every instance. There would be a loss of cultural diversity. Creating “shelf space” is therefore about efforts to protect and promote cultural pluralism, and more generally, about the loss humanity would suffer in cultural effacement if these efforts did not take place.

The term “shelf space” is one that gained popularity in Canada in the late 1980s after Canada sought a measure of protection for Canadian culture in its free trade agreement with the United States of 1988.<sup>2</sup> This “cultural exception” was later carried over into the *North American Free Trade Agreement* of 1994.<sup>3</sup>

This article argues that the express exception for Canadian culture eventually embodied in NAFTA Art. 2106 was never formally invoked and instead served as a kind of “marker”, or symbol, for cultural protection – with important consequences. One was that the wording of the exception tended to focus debate about culture on a *single* legal provision, as if it possessed a talismanic quality. Once the exception was circumvented, however, it was exposed as having little real legal value. The second consequence was that the attention paid to the exception tended to highlight its strict terms. As a result, other sources of obligation in the field of cultural protection were neglected. The third consequence was that the exception itself was never formally invoked and was therefore something that could be regarded either negatively or positively. The outcome was ambiguity but also space within which to express a distinct voice.

The article also argues that the experience with a formal, defined exception for culture - far from being a failure – served as an impetus for Canadian leadership in the negotiation and conclusion of the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (CCD)<sup>4</sup> and may well shape the way in which the CCD is interpreted as a

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<sup>2</sup> 27 I.L.M. 281 (1988).

<sup>3</sup> 32 I.L.M. 605 (1993).

<sup>4</sup> 45 I.L.M. 269 (2006).

conventional *and* customary source of international law in the future. The CCD is similarly ambiguous, but it must be considered alongside the development of customary international law in the area and contains a number of process mechanisms that may permit the ambiguity to be shaped creatively over time. In that sense, the CCD can be seen as an attempt to secure cultural “shelf space” internationally.

This article is therefore about many things. It is, first and foremost, about the idea of shelf space and Canada’s efforts to protect its culture(s) internationally. Yet it is also about rights and obligations in relation to culture, and about the vital need for balance. That balance is unlikely to be achieved once and for all, particularly vis-à-vis culture, and so the CCD offers ways for the balance to be struck on an *ad hoc* basis by pointing to custom and process, thereby allowing for the emergence of shelf space. The outcome should be a more satisfying reconciliation of culture and trade disciplines.

## 2. CANADA, INTERNATIONAL TRADE AND CULTURAL PROTECTION

As many people who write in the field of cultural protection have observed, culture is difficult to discuss because of the problem of definition. Just what is “culture”, and how far do its boundaries extend?<sup>5</sup> There have been attempts to provide a definition in international instruments, but even here the plurality of definitions should alert us to the fact that culture is an exceedingly vague and nebulous concept, and therefore legally speaking, something to be contested. A kind of frustration easily sets in. Culture is maddening in its formlessness, and yet like the Cheshire Cat in *Alice in Wonderland*, somehow it always manages to leave its smile behind.

The *Universal Declaration of Human Rights* of December 1948 speaks of each person having “the economic, social and *cultural rights* indispensable for his dignity and the free development of his personality”<sup>6</sup> and the right “freely to participate in the *cultural life* of the community”.<sup>7</sup> Other rights expressed in the *Declaration* can be regarded as underpinning these entitlements.<sup>8</sup> These were later repeated, and to some extent amplified, in the *International Covenant on Economic, Social and Cultural Rights* of December 1966.<sup>9</sup> Nevertheless, the *Universal Declaration* and the ICESCR are broad-brush statements about many things. They do not say much about what the content of culture is, or about cultural diversity.

Instead, we have to look to UNESCO-sponsored documents such as the non-binding *Declaration of the Principles of International Cultural Cooperation* of 1966<sup>10</sup> which states that:

- 1) “each culture has a dignity and value which must be respected and preserved”
- 2) “every people has the right and the duty to develop its culture”
- 3) “in their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage of mankind”

<sup>5</sup> John A. Ragosta, *The Cultural Industries Exemption from NAFTA – It’s Parameters*, 23 CAN. – U.S. L.J. 165 (1997) (discussing the problem of definition in relation to culture and cultural industries).

<sup>6</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (III) (Dec. 10, 1948), Art. 22.

<sup>7</sup> *Ibid.*, Art. 27.

<sup>8</sup> See, for instance, the right expressed in Art. 27(2) of the Universal Declaration to the protection of moral and material interests in intellectual property and the duty expressed in Art. 29(1) that “[e]veryone has duties to the community in which alone the free and full development of his personality is possible.”

<sup>9</sup> 6 I.L.M. 368 (1967). See for instance Art. 15(1) concerning the right “to take part in cultural life” and “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

<sup>10</sup> Nov. 4, 1966, *UNESCO Standard-Setting Instruments*, IV.C. (1994).

There are several notable aspects about culture in these statements. First, cultures are regarded as monolithic in their entitlement to dignity, respect and preservation. This runs contrary to the malleable nature of culture but was probably inevitable given the constraints of legal drafting. Second, cultures are inherent in a “people”, something which undercuts the state-centered nature of the international system. In UNESCO’s formulation, a people might have a culture distinct from that of the dominant national culture they are found within. Third, people have both rights *and* obligations in relation to cultural development, implicitly underlining the need for legal balance in cultural protection. No right is enjoyed absolutely. Fourth, culture is biotic, or in other words, something that is evolutionary and constantly changing.

Each of these characteristics identified in the UNESCO *Declaration* hints at how difficult it is to protect and promote culture, and is undoubtedly the reason why subsequent international instruments in the field of cultural protection have aimed at the concrete. These include the *Convention concerning the Protection of World Cultural and Natural Heritage* of 1972,<sup>11</sup> the *Convention on the Protection of Underwater Cultural Heritage* of 2001,<sup>12</sup> the *Convention for the Safeguarding of the Intangible Cultural Heritage* of 2003<sup>13</sup> and the *Declaration concerning the Intentional Destruction of Cultural Heritage* of 2003.<sup>14</sup> The instruments approach the question of cultural protection from different angles, yet they offer little in the way of protecting culture comprehensively, or in other words, as a living good.

More recently, some efforts have been made to get more directly at the complex issue of culture and cultural diversity, and this resulted in the *Universal Declaration on Cultural Diversity* of 2001 and the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (CCD) of 2005. The *Declaration* held cultural diversity to be “the common heritage of humanity”, “as necessary for humankind as biodiversity is for nature” and “indissociable from respect for the dignity of the individual”.<sup>15</sup> The *Declaration* was championed by France and Canada and it is Canadian experience with cultural protection that will be focused on here to explain the subsequent shape of the CCD.

Canada has always had difficulty distinguishing itself culturally from its more powerful neighbors. Despite the fact that it enjoys a high standard of living and sits at or near the top of the U.N.’s Human Development Index, its ability to define, and therefore to project, what is distinctively Canadian has been weak and subject to constant challenge. Canadian federal government intervention in the cultural sector began as early as 1849 with the establishment of a postal subsidy for newspapers, magazines and books, but in the years prior to the 1920s was limited to heritage institutions such as museums and archives, and to the regulation of wireless communication. In the 1920s and 1930s federal government involvement expanded to include broadcasting and the protection of copyright, arts and film.<sup>16</sup> Later in the 1940s and 1950s the federal government sponsored the Royal Commission on National Development in the Arts, Letters and Sciences, the Royal Commission on Broadcasting, the establishment of the Canada Council to fund the humanities, arts and social sciences, and founding of the National Library.

The 1960s witnessed the consolidation of the national museums and the establishment of new

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<sup>11</sup> 11 I.L.M. 1358 (1972).

<sup>12</sup> 41 I.L.M. 40 (2002).

<sup>13</sup> UNESCO Doc.MISC/2003/CLT/CH/14 (2003).

<sup>14</sup> UNESCO General Congress, 32nd Sess. (adopted by consensus Oct. 17, 2003).

<sup>15</sup> 41 I.L.M. 57. See Art. 1 and introductory note by UNESCO Director-General Koïchiro Matsuura.

<sup>16</sup> This synopsis of Canadian cultural policy in this paragraph and the three that succeed it has been adapted from M. Sharon Jeannotte, “Timeline of Canadian Federal Cultural Policy – 1849-2005” available at [www. http://culturescope.ca/policy-timeline](http://culturescope.ca/policy-timeline) (visited June 4, 2007).

federal cultural institutions, such as the National Arts Centre, as well as the creation of a *de facto* department of culture in the form of the Department of the Secretary of State. In the 1970s, the federal government began to expand its definition of “culture” to include bilingualism, biculturalism and multiculturalism. Canada is a historically bilingual country of English- and French-speaking peoples, but it also possesses a heritage of First Nations Peoples and more recently has been the destination for immigrants around the world. These changes required government in the 1960s and 1970s to confront, and try to define more directly, what Canadian culture was. Thus, the government intensified its focus on supporting Canadian cultural content and on the status of the artist, as well as taking the first steps to understand the impact of digital technologies on culture and society.

By the 1980s federal responsibility for cultural policy had been transferred, at least partially, to the federal Minister of Communications and efforts began to expand broadcasting and communications to Aboriginal communities in Northern Canada. During this period, a number of major cultural policy reviews were conducted. Canada also continued its membership in UNESCO, an organization it had been active in since 1945.

The 1990s were years of major change in federal cultural policy. Most of the legislation and responsibilities for cultural policy were transferred to the new Department of Canadian Heritage in 1993, and during this period the cultural sector experienced deep budget cuts as a result of a federal government-wide Program Review. At the same time, international pressures prompted major reviews of culture and trade and the establishment of culture as the “third pillar” of foreign policy. New technologies were also beginning to have a significant impact on the cultural sector, leading to changes in the *Copyright Act*, the *Broadcasting Act*, and licensing by the Canadian Radio-television and Telecommunications Commission (CRTC) of various new broadcasting services.

In the first decade of the new century, federal cultural policies continue to grapple with the many challenges of technological change, while dealing with new demands on both the domestic and international scene. Sharing of cultural content on the internet led to further re-examination of the *Copyright Act*, to the formation of federally sponsored rights collectives, and to Canadian governments’ moving aggressively to deliver services and content online.<sup>17</sup> On the international front, Canada became a leader in the development of the UNESCO CCD.

Despite these developments, the reality is that the average Canadian knows very little of the intricate legal apparatus that shapes the culture of the world in which they live. Life is different in Canada than it is in many countries, and it is identifiably so for many reasons, whether in the form of mandated Canadian content on the radio or television, the hefty annual subsidies bestowed to the Canadian Broadcasting Corporation and the National Film Board, the “Can Lit” that makes its ways into Canadian bookstores, and so forth. This web of cultural regulation is virtually invisible *inside* Canada.

The product of this cultural machinery also works in an opaque - and even hypocritical - way. Canada’s major cities are convenient stand-ins for major American and European cities and dozens of Hollywood film crews work on location in Canada each year. Canadian cultural icons like Margaret Atwood, Diana Krall, Avril Lavigne, Céline Dion, Atom Egoyan, Keanu Reeves, *The Tragically Hip*, *Our Lady Peace*, Sarah McLachlin and Gordon Pinsett continue to make

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<sup>17</sup> A collective society is an organization that administers the rights of several copyright owners. It can grant permission to use their works and set the conditions for that use. Collective administration is widespread in Canada, particularly for music performance rights, reprography rights and mechanical reproduction rights. Some collective societies are affiliated with foreign societies; this allows them to represent foreign copyright owners as well. See Copyright Board of Canada, [www.cb-cda.gc.ca/societies/index-e.html](http://www.cb-cda.gc.ca/societies/index-e.html).

their way on the world stage, but in the United States and elsewhere they generally do so without being identifiably Canadian. The television program *Anne of Avonlea* is a hit in Iran, the *Cirque du Soleil* continues to draw large crowds in Las Vegas, and Statistics Canada reports that Canadian cultural exports are higher than ever before, yet one would never know this speaking to most Canadians. A sense of cultural poverty subsists. Located as we are next to the largest and most dynamic cultural market in the world, it is easy for Canadians to see ourselves as under threat, hence the critical need to create “shelf space”.

The term “shelf space” is something that has entered into the Canadian cultural vocabulary in the last few decades to signify the making of conscious efforts to provide Canadian cultural content in a crowded and competitive world. It is not officially defined. Rather, shelf space is a term that has been used by both official and non-governmental sources to refer to the foregoing set of ideas. A recent statement from the Department of Canadian Heritage about the current state of film and video broadcasting in Canada observed:

With strong backing from the *Broadcasting Act* and under licensing rules set out by the Canadian Radio-television and Telecommunications Commission (CRTC), “shelf space” is guaranteed for Canadian content, including Canadian feature films. But in making the jump from the small screen to the big screen, Canadian filmmakers find themselves in a cinema market which has unfolded in a decidedly non-Canadian setting: only 2 percent of box office revenues in Canada are earned from Canadian movies.<sup>18</sup>

Of course, looked at from the perspective that this statement implies – one which recognizes the defensive *and* offensive aspects of Canadian cultural policy – one can understand something of the frustration felt by the United States about what has happened in recent years. Cultural protection is unfair, unless one buys the claim that protective measures are actually necessary to counter the still greater unfairness of a U.S. cultural industry whose returns to scale allow it to dominate global markets.

These were precisely the claims that Canada’s federal government had to answer to in negotiating a free trade agreement with the United States in the late 1980s. As is generally known, the “cultural exception” or “exemption” came into being in the *Canada-United States Free Trade Agreement* of 1988. In his memoirs Canada’s Ambassador to the United States at that time, Allan Gotlieb, relates that the exception came about at the last minute as a sop to cultural interests and was the subject of furious negotiation, hence the tempered and contradictory nature of the final result.<sup>19</sup> Article 2005 of the agreement reads as follows:

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<sup>18</sup> See Department of Canadian Heritage, *Our Story in Pictures: Film and Video Broadcasting*, available at [www.pch.gc.ca/pch/mindep/misc/culture/htm/3.htm](http://www.pch.gc.ca/pch/mindep/misc/culture/htm/3.htm).

<sup>19</sup> Gotlieb’s diary contains the following entry: “October 4, 1987: Around 9 p.m., just as we were nearing the end [of the free trade negotiations], we got into a furious argument with [James] Baker and [Clayton] Yeutter about the cultural exemption. They wanted some language that was totally inconsistent with the exemption, but after sharp words, bitter debate and acrimony, we settled on a formula that basically recognizes the U.S. right to retaliate for cultural measures in certain circumstances. A tempest in a teapot that will, alas, lead to a genuine tempest back home when people read the words and ask, “Was culture on the table?” It wasn’t. All we did was recognize that the United States reserves its rights. But that fine point will be difficult to get across.” ALLAN GOTLIEB, *THE WASHINGTON DIARIES 1981-1989* 494-495 (2006).

## Article 2005: Cultural Industries

1. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter.
2. Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.<sup>20</sup>

As Gotlieb predicted at the time, public reaction to this provision in Canada was mixed – and rightly so. *Black's Law Dictionary* defines an “exception” as “something that is excluded from a rule’s operation”, but as Gotlieb himself points out, the United States had reserved its rights in Art. 2005(2) and the reservation went to the very heart of the matter. There can be no true exception where a right to retaliate continues to exist. Consequently, the perception lingered that “culture was not in the agreement, but neither was it left out.”<sup>21</sup>

Despite such qualms the exception was carried over, with little amendment, into the *North American Free Trade Agreement* (NAFTA) five years later as NAFTA Art. 2106.<sup>22</sup> It did not apply directly to Mexico. For its part, the United States continued to maintain that if Canada wanted to protect culture “it had to pay for it”.<sup>23</sup>

A formal exception for cultural protection in NAFTA tended to emphasize certain things. One of these was the very fact of a formal exception, something which could be raised in law to derogate from liberalization obligations. There was a kind of talismanic quality to it, as though the exception was all that was keeping Canadians safe from the hordes south of the border. That was plainly not the case.

The second thing that Art. 2106 tended to do was to focus all attention on the terms of the exception itself as opposed to seeing the exception as a manifestation of an internationally recognized norm of cultural diversity. By the mid-1990s a number of international instruments articulated rights concerning culture, yet few efforts were made to link it to those norms. The exception was construed as “all”.

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<sup>20</sup> The term “cultural industries” was given the following definition: “cultural industry means an enterprise engaged in any of the following activities: a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing, b) the production, distribution, sale or exhibition of film or video recordings, c) the production, distribution, sale or exhibition of audio or video music recordings, d) the publication, distribution, or sale of music in print or machine readable form, or e) radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.”

<sup>21</sup> The quote paraphrases Graham Carr, who observed in 1991 that “culture may be exempted from the agreement, but ‘it most assuredly has not been left out’”. Graham Carr, *Trade Liberalization and the Political Economy of Culture: An International Perspective*, 6 CANADIAN-AMERICAN PUBLIC POLICY 7-8 (June 1991). John Rogosta also describes the ambiguity of the situation as follows: “The system to date actually has worked quite well to avoid disputes on this issue and on culture in general, because there has been a quiet status quo or a sort of ‘No Man’s Land’”. Both governments have disagreed about exactly how the cultural terms should be interpreted, but both governments have been loathe to really force the issue.” John A. Ragosta, *The Cultural Industries Exemption from NAFTA – It’s Parameters*, 23 CAN. – U.S. L.J. 165, 169 (1997).

<sup>22</sup> The text of NAFTA Annex 2106 reads as follows: “Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access - Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada - United States Free Trade Agreement*. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.” The definition of “cultural industries” is the same as in the previous footnote.

<sup>23</sup> See John A. Ragosta, *The Cultural Industries Exemption from NAFTA – It’s Parameters*, 23 CAN. – U.S. L.J. 165, 167 (1997).



The third thing that a formal exception did was to emphasize the uniqueness of the exception, when in fact there were at the time several other international economic instruments with cultural protection clauses in them, most notably the EC treaties, and that these could be jointly regarded as embodying custom.<sup>24</sup> It was as if Canada had a first on its hands – a confirmation of its uniqueness and something to assert its distinctiveness about – when that was far from true.

The *Periodicals* dispute between Canada and the United States in the World Trade Organization in 1996 laid to rest any illusions that Canadians may have had about the validity of the exception.<sup>25</sup> The dispute itself involved restrictions on split-run advertising that effectively prohibited American publications from launching Canadian editions with a mix of Canadian and recycled U.S. editorial content. The WTO Appellate Body agreed that Canadian and U.S. periodicals were “directly competitive or substitutable products” notwithstanding the difference in content and therefore subject to the non-discrimination obligation in GATT Art. III:2, second sentence. From an economic perspective, the panel had observed that “cultural identity was not at issue” and the Appellate Body did nothing to contradict this view.<sup>26</sup> NAFTA Art. 2106 was not invoked in the dispute, probably because of uncertainty about whether a NAFTA provision could be successfully applied under the WTO Agreement, but the case was nevertheless regarded as a kind of cultural Waterloo for Canada, a loss.

In the wake of *Periodicals* the idea of a formal cultural exception to NAFTA or WTO obligations lost much of its attraction. In 1998 an advisory panel on cultural policy to Canada’s Minister of International Trade concluded that the exception was not working and that therefore the country should move in the direction of developing a multilateral instrument with other like-minded countries. This led to Canada’s championing of efforts in this direction at UNESCO beginning with the *Declaration on Cultural Diversity* in December 2001<sup>27</sup> and promoting the eventual conclusion of the CCD in October 2005.

The swift conclusion of the CCD was assisted by the absence of the United States from UNESCO for at least part of its drafting, but it also has to be regarded as part of a larger diplomatic effort by Canada in the post-Cold War period.<sup>28</sup> In this context Canada championed the conclusion of the

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<sup>24</sup> See Delia Ferri, *EU Participation in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Some Constitutional Remarks*, European Diversity and Autonomy Papers 3/2005. Ferri observes that the original European treaties “did not recognize any legal area for actions in favour of culture, but the interaction between culture and European Union law is of course more long-standing.” See Ferri, *supra*, at 11. See also RACHEL CRAUFURD SMITH, *CULTURE AND EUROPEAN UNION LAW* (2004).

<sup>25</sup> Bruce Jamieson, *Trade Liberalization: Culture, Identity and Social Cohesion* 125-129 (2000) available at [www.international.gc.ca/eet/pdf/06-en.pdf](http://www.international.gc.ca/eet/pdf/06-en.pdf) referring to the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT) position paper *Strategies for Culture and Trade: Canadian Culture in a Global World* (Feb. 1999).

<sup>26</sup> *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R, para. 5.45 (March 14, 1997).

<sup>27</sup> 45 I.L.M. 269 (2006).

<sup>28</sup> Jennifer Welsh summarized the rationale behind Canada’s position as follows:

“There is also a more hard-headed case against conceiving of foreign policy solely as trade policy. While Hart’s argument may have had some resonance during the 1990s, when the west had won the Cold War and was enjoying an unprecedented level of security, the post-9/11 era presents a host of new threats to international peace and security for all states that make up the so-called west. Canadian foreign policy must actively address these threats, in collaboration with other actors on the international stage. In short, Canada must do more than buy and sell. It must contribute to the creation of new rules and structures to manage global problems. It must build capacity in other members of the international community so that they too can contribute, economically and politically. And if the Canadian view on how to address new threats and problems differs from that of the United States, as it did during the recent campaign to unseat Saddam Hussein, it must be willing to go its own way.

Above all, Canadian policy-makers must dare to entertain the notion that the United States will not be the world’s only superpower forever. This is not to invite decline or ruin for the US. Rather, it is to do some prudent long-term planning. Canada’s interests are best served if future superpowers are firmly embedded in

*Ottawa Landmines Convention* in 1998,<sup>29</sup> the *Rome Statute of the International Criminal Court* in 1999,<sup>30</sup> and forwarded documents such as *The Responsibility to Protect*, all initiatives that could be seen as distinctive Canadian contributions to the rule of international law. All were laudable, if somewhat visionary, undertakings. They evidently staked out for Canada a position very different from that of the United States, differentiating us from our southern neighbour in our commitment to multilateralism and speaking to an idealized vision of international relations that many countries, particularly smaller ones, could rally around.

The outcome of all of this diplomatic effort has borne mixed fruit. All of the above mentioned conventions have entered into force with remarkable speed. The pattern could be regarded as a confirmation of the essential correctness of Canada's position. At the same time, all have also come into existence in the face of U.S. opposition and it remains to be seen how successful they can be given the influence that the most powerful nation in the world continues to exert.

It should also be noted that Canada has not placed all of its cultural protection "eggs" in the multilateral basket. Notwithstanding the *Periodicals* debacle, Canada has continued to conclude bilateral free trade and foreign investment protection agreements with cultural protection clauses in them.<sup>31</sup> It is against this background that a realistic assessment of the CCD needs to be conducted.

### 3. THE CCD AS A REALITY

Rights and obligations are the foundation of any modern system of law, including international law, and so it seems entirely appropriate to focus on their relationship under the CCD as a means of conducting the analysis.<sup>32</sup>

In international law states may assume *obligations* that are either conventional or customary in origin. In addition, they may assume obligations to one other country *bilaterally*, to the international community as a whole (*erga omnes*) or to a subset thereof (*erga omnes partes*).<sup>33</sup> Once assumed, the tenor of obligations may be either *reciprocal*, *interdependent* or *integral* depending on the consequences arising from their breach.<sup>34</sup>

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international institutions and have been "socialized" to co-operate with others in the management of common problems."

See Jennifer M. Welsh, *Canada in the 21<sup>st</sup> Century: Beyond Dominion and Middle Power*, 16:4 BEHIND THE HEADLINES 13 (2004).

<sup>29</sup> 36 I.L.M. 1507 (1997).

<sup>30</sup> 37 I.L.M. 999 (1998).

<sup>31</sup> Canada's bilateral free trade agreements with Chile, Costa Rica and Israel all contain cultural protection clauses, as do many of Canada's bilateral foreign investment protection agreements. A list is available at [www.international.gc.ca/tna-nac/fipa\\_list-en.asp](http://www.international.gc.ca/tna-nac/fipa_list-en.asp).

<sup>32</sup> The correspondence of rights and obligations as a hallmark of international law has been recognized in many instances. It is implicit in the International Law Commission's *Draft Declaration on the Rights and Duties of States*, which the U.N. General Assembly "commended to the continuing attention of [U.N.] Member States", G.A. Res. 375 (IV) (Dec. 6 1949). It has also been pivotal in a number of disputes before the International Court of Justice: see *Case Concerning Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Jurisdiction and Admissibility), [1994] ICJ Rep. 12 (discussing the fact that a document between the parties "was not a simple record of a meeting" but something which "enumerat[ed] the commitments to which the Parties have consented. They thus create *rights and obligations* in international law for the Parties." (emphasis added)). For a case where the absence of rights and obligations precluded the creation of an international agreement see *Anglo-Iranian Oil Co. Case (U.K. v. Iran)*, [1952] ICJ Rep. 93. It is also true that international obligations may be incurred without any corresponding rights: see *Nuclear Tests (Australia v. France)*, [1974] ICJ Rep. 253.

<sup>33</sup> This is recognized in Arts. 38(1)(a)-(b) of the Statute of the International Court of Justice and by virtue of the *Barcelona Traction Case* [1970], I.C.J. Rep. 4. Article 33(1) of the International Law Commission's Articles on State Responsibility recognize that obligations may be owed either bilaterally or collectively, and that in the latter case, collective obligations may be owed to the international community as a whole or to a subset thereof. Furthermore, Art. 33(2) makes clear that the ASR are without prejudice to "any right . . . which may accrue directly to any person or entity other than a State." Thus, states may owe obligations to individuals, groups and affiliations.

<sup>34</sup> The distinction between reciprocal, interdependent and integral obligations originates in the work of Gerald Fitzmaurice on the law of treaties in the 1950s. Fitzmaurice posited that bilateral treaty obligations would be bilateral and that multilateral treaties could be

The position of international law with respect to *rights* is somewhat different. The classical conception of rights is that states are free to do what is not otherwise prohibited,<sup>35</sup> although this conception has changed in recent years with the proliferation of international law, the work of international organizations, and the need to persistently object to emerging customary developments.

In general we tend to think of rights and obligations as correspondent, but what is immediately noteworthy about the CCD is that it is primarily a regime of *rights*. Thus, in CCD Art. 5(1) “countries have the sovereign right to formulate and implement their cultural policies and to protect and promote the diversity of cultural expressions”, in CCD Art. 6(1) countries “may adopt measures aimed at protecting and promoting the diversity of cultural expressions within [their] territory”, and in CCD Art. 8(2) a country has the right to “take all appropriate measures to protect and preserve cultural expressions” where “cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.”

Obligations in the CCD are less well-defined. Many are exceedingly vague and inconsequential. Thus, in CCD Art. 12 it states that “[p]arties shall endeavour to strengthen their bilateral, regional and international cooperation” regarding the promotion of cultural diversity – in essence, a best efforts approach. In CCD Art. 18 an International Fund for Cultural Diversity is established, but under Art. 18(7) countries shall merely “endeavour to provide voluntary contributions”. Dispute settlement under the CCD is optional and by means of conciliation.<sup>36</sup>

The particular orientation in the CCD has to be contrasted with the WTO legal order, which is primarily *a law of obligations*. Under the WTO Agreement the chief obligation is GATT Art. I:1, the MFN obligation, which provides in relevant part that:

“any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like products originating in or destined for the territories of all other contracting parties.”

MFN is pivotal in the sense that it does away with conditionality and any attempt at preference. Substantively speaking, it creates a level playing field. MFN’s requirement of non-discrimination reflects through the rest of the treaty’s text.

However, MFN does much more than establish a norm of non-discrimination. By virtue of its broad wording it creates a legal regime which is generalized and plenary. Thus, in order to establish wrongdoing country needs only demonstrate that another country has failed to observe

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composed of obligations that were either *bilateral* (or what he termed “reciprocal”), *interdependent* (conditional upon the performance of other parties) or *integral* (unconditional) in character. See G. Fitzmaurice, ‘Third Report on the Law of Treaties’, UN Doc. A/CN.4/115 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1958 II) at 20. Fitzmaurice’s ideas later served as the basis for the scheme of the *Vienna Convention on the Law of Treaties*, 8 I.L.M. 679 (1969). While Fitzmaurice’s typology is neat and therefore attractive, it overlooks the fact that a single *treaty* may be composed of different types of *obligations* and therefore more recent work, like the International Law Commission’s Articles on State Responsibility, has rightly focused on the nature of *obligations*. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 233 (2002).

<sup>35</sup> The classic statement of international law is taken from *The Case of the S.S. Lotus*, P.C.I.J. Ser. A, No. 10 at 15 (1927) where the PCIJ stated: “Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules . . . .”

<sup>36</sup> See CCD Art. 25(3).

its obligations. A presumption of injury operates; there is no requirement of proof.<sup>37</sup> There are other features of the law in this mode too. Because WTO law is generalized, it is in some sense constitutive and it deals essentially with public property, a property that arises when a single WTO member makes a commitment that is extended “immediately and unconditionally” to the rest of the WTO membership.<sup>38</sup> The nature of justice is therefore different from what we might normally expect. Rather than concern itself with who has been harmed by wrongdoing, the treaty recognizes that in the dense pattern of interaction such obligations give rise to, all countries are injured and so the aim of justice is to re-establish the *distribution* of expectations, nothing more.

At the same time, it is also evident there is something else that is taking place in WTO law. This is what can be referred to as the adjustment to “realities”. The WTO’s legal order may be predominantly about obligations, but there is also something else that is occurring at the same time: this is more evidently *a law of rights*. What is being referred to here is the *right* of a country to *do* something – for instance, to invoke a safeguard or a countervailing or anti-dumping duty – a right that can be exercised to deal with situations that are *actually encountered in the course of trade*. These rights arise at different points in the treaty interstitially and present a stark contrast to the character of WTO law as a law of obligations. Where WTO law in the first mode is generalized and plenary, WTO law in this second mode is specialized and exceptional. Moreover, in most instances there is a need to demonstrate proof in order to exercise the right in question. Thus, many WTO disputes have been about whether a country has met the requisite evidentiary burden in order to invoke its rights.<sup>39</sup>

There are substantive consequences to this distinction as well. The law of realities is more evidently contractual in the sense that a country’s invocation of its rights is more likely to be regarded as harming *one* other country, and so the law’s impulse subtly becomes more corrective. Countries seek to recover for harm done.<sup>40</sup> The law is specific and retrospective, and naturally becomes concerned with “trade”.

It is then possible to discern a substantive divide at the heart of the WTO Agreement, a divide which aligns the law of expectation-obligation-distribution on one side against the law of reality-right-correction on the other. From such an identification it is possible to observe what Philip Allott has referred to as “idea complexes”<sup>41</sup>, or offsetting clusters of norms which function as the basis of a legal order. Together, they animate the workings of the WTO

<sup>37</sup> See Art. 3.8 of the WTO Dispute Settlement Understanding, which provides that “In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment.”

<sup>38</sup> See discussion in Chios Carmody, *WTO Obligations as Collective*, 17:2 E.J.I.L. 419, 425-431 (2006).

<sup>39</sup> See for example Safeguards Agreement Art. 6 (provisional safeguard possible “in critical circumstances” and pursuant to a preliminary determination based on “clear evidence”), Subsidies Agreement Art. 17.1(b) (provisional measures possible where preliminary affirmative determination that “subsidy exists and that there is injury to a domestic industry”) and Antidumping Agreement Art. 7.1(ii) (provisional measures possible where preliminary affirmative determination of “dumping and consequent injury to a domestic industry”). See also the standard for threatened injury: SAF Art. 4.2(a), SCM Arts. 15.7-8; AD Art. 3.7. In this respect see also *U.S. – Lamb Safeguards*, WT/DS177,178/AB/R, para. 125 (May 1, 2001) (where in interpreting the phrase “threat of serious injury” the Appellate Body emphasized the phrase “clearly imminent” which it considered to mean “that there must be a high degree of likelihood that the anticipated serious *injury* will materialize in the very near future.”).

<sup>40</sup> Compensation is only available as a voluntary remedy and temporarily until the return to compliance: see DSU Art. 22.2. As of early 2007 compensation had only been negotiated in one case under the WTO DSU, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000). For commentary see Bernard O’Connor & Margareta Djordjevic, *Practical Aspects of Monetary Compensation: The U.S. Copyright Case* 8:1 J. INT’L ECON. L. 127 (2005). However, there are also other indications in the WTO Agreement of a subtle corrective impulse, as in, for instance, the requirement to “withdraw” a prohibited subsidy in Art. 7.8 of the WTO Subsidies Agreement (“the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.”). This provision was at issue in *Australia – Subsidies provided to Producers and Exporters of Automotive Leather* (21.5), WT/DS126/RW (Jan. 21, 2000).

<sup>41</sup> PHILIP ALLOTT, *THE HEALTH OF NATIONS* 47 (2002).

## Agreement.

The structure of rights and obligations in the WTO Agreement alternately constrains and enables national behaviour in important ways, and is given further momentum by the WTO's binding system of dispute settlement.<sup>42</sup> The obligations to resolve disputes in accordance with Art. 23 of the WTO Dispute Settlement Understanding are "particularly important since they radiate on to all substantive obligations under the WTO."<sup>43</sup> This contrasts sharply with the non-binding nature of dispute settlement under the CCD.

The greater point to be taken away from the analysis is that this structure provides a substantive "balance" in the WTO Agreement. Panels and the Appellate Body have frequently referred to the idea of balance in WTO dispute settlement and attempted to link it to trade, but the truth is much more subtle.<sup>44</sup> The treaty is an enforceable balance of rights *and* obligations, or if we are being totally honest, of obligations countered occasionally by rights. That balance tilts in one direction.

In the CCD, by comparison, the balance tilts in the opposite direction. This is because, as noted, the treaty is primarily a law of rights, but also because those rights are relatively unconstrained. Unlike the WTO Agreement, rights under the CCD are lightly conditioned.<sup>45</sup> They do not have many requirements attached to their exercise. There also appears to be little awareness of mutuality, or the idea that rights must be exercised with rights of others in mind.

Why is this the case? The answer is found in the history and consideration of what the CCD is designed to do. Many commentators have observed that the *Convention* came into being as a direct response to the perception that the WTO Agreement was too onerous.<sup>46</sup> While the WTO Agreement may have been acceptable as a balance of trade obligations, when viewed in the larger context of international law, there was something "unbalanced" about it. A correction was required. The CCD aims to achieve this. The question then becomes how it might do so.

## 4. THE CONVENTION AS CUSTOM

The rapid conclusion and entry into force of the CCD suggests that many countries were dissatisfied with the WTO Agreement's protection of culture and decided to do something about it *en masse* elsewhere. What has been engineered in the CCD is directly contrary to the dominant tendency in WTO law. That is the tendency to recognize the WTO Agreement as the pre-eminent source of the rights and obligations of WTO member countries, and to relegate of most other sources of international law to the status of interpretative assistance. To start then,

<sup>42</sup> Jutta Brunnée and Stephen Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, COLUM. J. TRANSNAT'L L. 19, 31 (2000).

<sup>43</sup> *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.94 (Dec. 22, 1999).

<sup>44</sup> See for instance *U.S. – Underwear*, WT/DS24/AB/R, p. 15 (Feb. 25, 1997) (referring to ATC Art. 6 as reflecting "carefully negotiated language ... which reflects an equally carefully drawn *balance* of rights and obligations of Members ..."); *U.S. – Hot-Rolled Steel*, WT/DS184/AB/R, para. 102 (July 24, 2001) ("We, therefore, see paragraphs 2 and 5 of Annexes II of the Anti-Dumping Agreement as reflecting a careful *balance* between the interests of investigating authorities and exporters."); *Brazil – Aircraft*, WT/DS46/AB/R, para. 139 (Aug. 2, 1999) ("paragraphs 2 and 4 of Article 27 contain a carefully negotiated *balance* of rights and obligations for developing country Members.").

<sup>45</sup> Note, for instance, the way in which the following limitation on rights is phrased in CCD Art. 2(1): "No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law or to limit the scope thereof." This statement is followed, however, by CCD Art. 2(2) entitled the "Principle of sovereignty" which provides 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."

<sup>46</sup> See for instance Christoph Beat Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO*, 9 J.I.E.L. 533 (2006).

the CCD may well fulfill such a secondary role.

An example of this interpretative approach occurred in the *U.S. – Shrimp* case. In that case the Appellate Body used several sources of international law *outside* the WTO Agreement, including the *Rio Declaration on the Environment and Development* and the *Convention on International Trade in Endangered Species* (CITES), to assist in interpreting the term “exhaustible natural resource”. Referring to those documents the Appellate Body was able to find that exhaustible natural resources included living biological resources such as sea turtles. This was important for the conclusion that the U.S. law at issue fell within the terms of the GATT Art. XX(g) general exception. The Appellate Body was therefore able to find that while the U.S. met the specific terms of the exception, its laws ran afoul only of the non-discrimination requirements of GATT Art. XX’s preamble.

While it is relatively clear that CCD obligations will not *automatically* override those of the WTO Agreement, the fact that they are given expression and formally confirmed in the CCD implies that the treaty may be used in the same way that the *Rio Declaration* or CITES was in *Shrimp* to bolster a culturally sensitive form of WTO interpretation. The *Convention* will give “color, texture and shading” to WTO obligations.<sup>47</sup> It would indeed be strange if a treaty system which is prepared to protect biological diversity is not likewise prepared to be sensitive to human cultural diversity.

There is, of course, the fact of the United States’ (and several other countries’) failure to sign on to the CCD, particularly in light of the panel’s statement in the *GMOs* dispute. There, the panel backed away from applying the *Cartagena Biosafety Protocol* on the basis that not all of the disputants had ratified the *Protocol*.<sup>48</sup> Three observations may be made in this regard. First, the statement in *GMOs* was the statement of a *panel*, not the *Appellate Body*, which is superior in the WTO’s interpretative hierarchy. In any event, the panel in *GMOs* did *not* purport to overrule the Appellate Body in *Shrimp*. Second, rather than see the differences of opinion expressed in *GMOs* and *Shrimp* as a contest among diametrically opposed positions, it may be possible to reconcile them by reasoning that the WTO dispute settlement system is gradually developing a more nuanced approach to interpretative use of non-WTO norms. The difference in treatment exhibited in these cases could be regarded as consistent if one considers the case of CITES, where there was no record of non-ratification, with that of *Cartagena*, where there was. It should be noted that even in *GMOs* the panel was careful to qualify itself, observing: “the mere fact that one or more disputing parties are not parties to a convention does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty term to be interpreted.”<sup>49</sup> Third, the U.S. decision not to sign the CCD has consequences for the U.S. *alone*. The Convention could well serve as interpretative assistance in disputes among the 63 states that have ratified as of July 2007.

So far almost all of the substantive discussion concerning the CCD has paid attention to it as a *treaty* and to its relationship with other *treaties*, but the International Court’s dictum in the *Nicaragua Case* “that customary international law continues to exist and to apply separately from international treaty law, even where the two categories of law have an identical content”<sup>50</sup> leads to the question of the CCD’s potential impact as customary international law. This is a vital matter, not only because it is analytically more complete but because we may discern in

<sup>47</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 153 (Oct. 12, 1998).

<sup>48</sup> *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, para. 7.94 (Sept. 29, 2006).

<sup>49</sup> *Ibid.*, para. 7.53.

<sup>50</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, I.C.J. Rep. 1986, p. 14, 96.

the CCD something more calculated in its conclusion and entry into force - something which recalls Canada's experience with the creation of "shelf space" under NAFTA.

The classic requirements of custom are 1) consistent state practice and 2) *opinio juris*. These requirements have traditionally been problematic: in the case of practice because it is difficult to determine what the practice of states as a whole really is, and in the case of *opinio juris* because it is possibly even more difficult to determine whether states have acted out of a sense of legal obligation. The problems with custom have led to innumerable debates about what custom really is.<sup>51</sup>

With the growing importance of international organizations like UNESCO, however, commentators have begun to observe the creation of "new" or "modern" custom.<sup>52</sup> This new custom is "the product of a deliberative and deliberate process" in international organizations and is increasingly composed of "intertwined forms of treaty and custom."<sup>53</sup> Drawing on the work of Abraham and Antonia Chayes, José Alvarez has written that international organizations "encourage iterated cooperation; promote pooling of information, expertise and resources; reduce transaction costs, uncertainty and free-riders; and facilitate path dependencies."<sup>54</sup> In this way "IO venues make possible what would otherwise be increasingly difficult in a world of nearly 200 nation states: finding concrete, preferably written, evidence that virtually all states accept a rule as one of custom."<sup>55</sup>

The substantive results of this custom-as-process are noteworthy. IO constitutions and treaties "embedded in a broader institutional framework for elaboration ... anticipate a continuous legislative enterprise by the political organs charged with interpretation. Such treaties, no less than environmental framework agreements, institutionalize change rather than reify stability."<sup>56</sup> Their impact is catalytic. Alvarez observes:

The distinction between hard treaty and soft law obligations is no longer as clear cut as it was, and it is no longer easy to tell whether states are complying because of a treaty or customary law obligation, or merely because they are dutifully following organizational expectations. This means as well that it is sometimes difficult to tell whether certain institutional products ... impose obligations only for those who have notified particular treaties and are therefore a species of contractual obligation, or are general obligations on all and therefore a new phenomenon, namely, a species of international legislation."<sup>57</sup>

Perhaps the most important consequence of this "new" custom is that it subtly shifts the burden of proof. The onus is placed on any state attempting to *deny* the legal status of such rules.<sup>58</sup>

UNESCO's work on the CCD can be regarded as an illustration of the "new" custom in action. The work of an international organization is providing a shortcut to finding custom. The shortcut might be regarded as "a relatively more egalitarian approach to finding this source of

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<sup>51</sup> For discussion see Jack L. Goldsmith and Eric Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Andrew Guzman, *Saving Customary International Law*, UC Berkeley Public Law Research Paper No. 708721 (April 2005).

<sup>52</sup> Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 A.J.I.L. 757 (2006); José Alvarez, *International Organizations: Then and Now*, 100 A.J.I.L. 324 (2006).

<sup>53</sup> JOSE ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAWMAKERS 589 (2006).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, 593.

<sup>56</sup> *Ibid.*, 599.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

law, even if it comes .... at the expense of sometimes elevation the rhetoric of states over their deeds.”<sup>59</sup> That conclusion is fortified by the relatively rapid way in which the CCD was concluded.

There is, of course, considerable difficulty in determining what custom is, but that problem will will undoubtedly be resolved over time through process. The CCD establishes a number of process mechanisms. The *Convention* is based on a “principle of international solidarity and cooperation” (CCD Art. 2); it establishes an obligation of consultation and coordination (CCD Art. 21); a biannual Conference of the Parties (CCD Art. 22) and an annual Intergovernmental Committee (CCD Art. 23). These are not exceptional in themselves. Many framework-type agreements contain similar provisions, but they do imply a commitment to work with the aim of cultural diversity more squarely in mind in future.

## 5. CONCLUSION

An alternative to thinking about the CCD is to contemplate a world *without* a CCD-type instrument, and here it is clear that the pre-existing situation – one of little express protection for cultural diversity in the international trading regime – was inadequate. There was a sense of concern about the threat that untrammelled trade presented to cultural diversity. A deep vein of apprehension erupted in the form of the CCD, which now seeks to rebalance the landscape of international law.

The lingering issue in the debate about shelf space, now transposed to the global stage, is what will be permitted and protected. And here North American experience is apposite because quite apart from the treaty’s validity as hard law – and we can legitimately wonder just how “hard” the law emanating from the CCD will ever be - the CCD is perhaps best placed to serve a “marker”, or sign, of something else. The contours of what that is, however, will remain undefined. Consequently, the CCD’s impact is likely to be diffuse and indirect.

We also have to recognize that values of diversity are already recognized in existing WTO commitments, whether this is in the form of the exception for “public morals” or possibly human health. An ethos of respect for other interests is there. The aim of the trading system is not to debase the individual, to view him or her solely as *homo economicus*. It is to uplift people in order to ensure meaningful choice and to promote transformative possibilities so that life can be lived as it is envisioned in the U.N. Charter - that is, as “life in larger freedom”. The CCD should help to achieve this goal.

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<sup>59</sup> *Ibid.*, p. 592.