Diversity **2010**, *2*, 1059-1084; doi:10.3390/d2081059

OPEN ACCESS

diversity

ISSN 1424-2818

www.mdpi.com/journal/diversity

Article

Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects

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Received: 25 June 2010; in revised form: 22 July 2010 / Accepted: 23 July 2010 / Published: 5 August 2010

Abstract: "Cultural diversity" has become one of the latest buzzwords on the international policymaking scene. It is employed in various contexts—sometimes as a term close to "biological diversity", at other times as correlated to the "exception culturelle" and most often, as a generic concept that is mobilised to counter the perceived negative effects of economic globalisation. While no one has yet provided a precise definition of what cultural diversity is, what we can observe is the emergence of the notion of cultural diversity as incorporating a distinct set of policy objectives and choices at the global level. These decisions are not confined, as one might have expected, to cultural policymaking, but rather spill over to multiple governance domains because of the complex linkages inherent to the simultaneous pursuit of economic and other societal goals that cultural diversity encompasses and has effects on. Accounting for these intricate interdependencies, the present article clarifies the origins of the concept of cultural diversity as understood in global law and traces its evolution over time. Observing the dynamics of the concept and the surrounding political and legal developments in particular in the context of trade and culture, the article explores its justification and overall impact on the global legal regime, as well as its discrete effects on different domains of policymaking, such as media and intellectual property. While the analysis is legal in essence, the article is also meant to speak to a broader transdisciplinary public.

Keywords: cultural diversity; international economic law; trade and culture; intellectual property protection; media; World Trade Organization (WTO); United Nations Educational; Scientific and Cultural Organization (UNESCO)

1. Introduction

"Cultural diversity" has become one of the latest buzzwords in international policy and law-making. It is increasingly employed in various contexts—sometimes as a term close to "biological diversity" [1], at other times as correlated to the "exception culturelle" and most often, as a generic concept that is mobilised to counter the perceived negative effects of economic globalisation. While no one has yet provided a precise definition of what cultural diversity is, and perhaps fortunately so, what we can observe is the emergence of the notion of cultural diversity as incorporating a distinct set of policy objectives and choices at the global level. These decisions are not confined, as one might have expected, to cultural policymaking, but rather spill over to multiple governance domains because of the complex linkages inherent to the simultaneous pursuit of economic and other societal goals that cultural diversity encompasses and has effects on.

Accounting for these intricate interdependencies, it is the purpose of the present article to clarify the origins of the concept of cultural diversity as understood in global law and to trace its evolution over time. While considering the dynamics of the concept and the surrounding political and legal developments in particular in the context of trade and culture, we also contemplate the justifications of this notion and its overall impact on the global legal regime, as well as its discrete effects on different domains of policymaking, such as media and intellectual property.

2. Tracing the Origins of the Concept of Cultural Diversity

The immediate reason for the present prominence of the concept of cultural diversity and its positioning as one of those somewhat intuitively positive goals that humankind should pursue is in fact an act of international law—the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, often referred to as the *Convention on Cultural Diversity*. This legally binding document was adopted under the auspices of the United Nations Educational Scientific and Cultural Organization (UNESCO) and has been widely celebrated as a remarkable success of cultural proponents and human rights supporters, who despite their very varied motivations had the common and sufficiently strong will to offset the negative effects of economic globalisation through the adoption of this act. With the benefit of hindsight, it is fair to say that these highly positive voices are more subdued now and the Convention has been the subject of much critique too. The following sections will look at the structure and substance of the UNESCO Convention, as well as at its real and potential effects on the processes of governance at domestic, regional and international levels. First, however, we pay due attention to the political game that led to the Convention—a sort of historical flashback that appears very useful in understanding the real issues behind the cultural diversity doctrine rather than succumbing to the hype of good intentions that encases it.

2.1. The "Trade and Culture" Quandary: From Cultural Exception to Cultural Diversity

The "trade and culture" quandary, or to phrase it perhaps more revealingly as "trade *versus* culture", is a discussion that emerged in the forum of the World Trade Organization (WTO) and its institutional predecessor, the General Agreement on Tariffs and Trade (GATT). As it is well documented, the GATT came into being after World War II as a provisional agreement meant to eliminate trade

discrimination and reduce tariffs and other barriers to trade, and over the years grew into a *de facto* international organisation with substantial impact on trade-related issues [2-4]. The way the organisation advanced its goals of liberalising trade and opening domestic markets was through the so-called negotiation rounds [5], during which the GATT members agreed on making certain concessions and establishing certain rules to which they found themselves subsequently committed. The "trade and culture" debate became truly conspicuous during one of these rounds of trade negotiations—the Uruguay Round—which was launched in Punta del Este, Uruguay in 1986 and lasted until 1994. It was during this period that a number of countries with France and Canada prominently featuring at the forefront fought the so-called "exception culturelle" battle.

Although the idea of state protection of national cultural identity is not exceptional and has existed for many years, possibly reaching back as far as the origins of sovereignty [6], the real debates on the relationship between trade and culture began only after World War I. At that time, the initial predominance of European cinema had subsided and Hollywood had clearly become the new centre of global filmmaking exporting visual entertainment in vast amounts [7,8]. As a reaction to this shift of power and fearing both the economic and cultural impact of Hollywood, many European governments introduced measures to protect their domestic film industries, mostly in the form of import and screen quotas. These measures found an expression in the "Special Provisions Relating to Cinematograph Films" that became part of the GATT 1947. Article IV thereof permitted quotas for "the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time", while preserving GATT's general ban on quantitative restrictions of imports [9]. The screen quotas were ultimately short-lived but Article IV GATT is symptomatic of the sought-after (and accepted by the GATT Members) cultural exception as well as of its rather narrow focus on audiovisual media.

The idea that some measures protecting national cultural industries may be justified found reflection also in bilateral and regional fora. In 1988, the cultural proponents celebrated a major victory when Canadian negotiators introduced a "cultural exclusion" clause in the Canada-US Free Trade Agreement (CUSFTA) [10]. Five years later, such an exclusion also found its way into the North American Free Trade Agreement (NAFTA), which incorporated by reference CUSFTA in Annex 2106 [11]. It should be noted however that this cultural exception was coupled with a retaliation provision that limited by design its practical use: while cultural industries could be exempted from the provisions of the Agreement, either party could "take measures of equivalent commercial effect in response to [such] actions" [12].

The cultural proponents attempted to transplant these localised "successes" into the multilateral context. The reason for the particular intensity of the cultural exception battle fought by Canada and France during the Uruguay Round had to do with the round's special mandate and the gravity of its outcomes. The Uruguay Round was not one simply aimed at dismantling tariff barriers but was a much further reaching undertaking that ultimately led to the establishment of the WTO with a new structure and an impressively effective dispute settlement mechanism. The WTO, which became operational on 1 January 1995, included also domains previously unaffected by international trade regulation, such as most notably intellectual property (by means of the Agreement on Trade-related Aspects of Intellectual Property Rights, *TRIPs*) and services (by means of the General Agreement on Trade in Services; *GATS*).

While the proclaimed ultimate goal pursued by the EC and Canada was to exempt any product or service that is culture-related from the rules of the negotiated WTO Agreements [13] (hence "exception culturelle"), the main focus of their efforts was on the exclusion of audiovisual services [14]. Eventually, this agenda only partially attained its goals. On paper, when one looks at the text of the WTO Agreements, there is no cultural exception of any kind. Such a reading does not however reveal the practical reality of liberalised services markets. Pursuant to the so-called "Agreement to Disagree" that the EC and the US struck shortly before the adoption of the Marrakesh Agreement establishing the WTO, no services sector was excluded from GATS but a number of flexibilities were built-in allowing in effect the lesser opening of certain sectors, which were somehow sensitive to domestic constituencies [15]. Indeed, when compared to the GATT, which regulates trade in goods, the GATS offers substantially more wiggle room for national policymakers. While under the GATT, obligations regarding national treatment and quantitative restrictions apply across the board, the GATS framework adopted a "bottom-up" (or "positive list") approach, whereby Members can choose the services sectors and sub-sectors in which they are willing to make market access or national treatment commitments [16], and can define the modalities of these commitments. Even the most-favoured-nation (MFN) obligation, which is fundamental to the entire trade system, can be subject to constrictions in the framework of GATS [17].

As a result of these flexibilities in design and in spite of the considerable economic gains to be reaped from the liberalisation of audiovisual media services [18], almost all Members, with the notable exception of the US, Japan and New Zealand, have been reluctant to commit [19]. What is particularly interesting when looking at the Members' commitments for audiovisual services is that they reflect a resolute "all-or-nothing" approach. The substantial scheduling flexibility permitting a great variety of commitments between full liberalisation and absolute non-commitment is not made use of. This is odd because for sub-sectors, where government regulations and trade restrictions are not common, such as sound recording, there is still a ridiculously low level of commitment. In a more systemic sense, this is odd because the very goals of an international trade agreement are compromised: "Indeed, absence of commitment in a given sector, while it remains an option, means that a Member can, at any time, take whatever market-access or national treatment limitation […]. This absence of any guarantee of openness stands in stark contrast to the economic and trade importance of the [audiovisual] sector (and in particular its intensive use of technology and creativity) as well as the importance of the predictability and stability given by commitments—that is, the certainty that certain restrictions won't be maintained or introduced in the future" [18].

Despite the flexibility of GATS and the very few real commitments for audiovisual services, which accordingly allow almost indefinite possibilities for measures protecting domestic cultural industries and/or discriminating against foreign products and services, in political terms, the scope for domestic measures regarding trade in culture was *never* found sufficient. The Uruguay Round's "Agreement to Disagree" was a ceasefire but offered no real solution for the cultural proponents. The further liberalisation commitment incorporated in the GATS [20] was impending and the MFN exemptions made were at least theoretically limited in time [21]. The general exceptions available under Articles XX GATT and XIV GATS that could justify measures otherwise violating the WTO norms in the respective products and services trade domains were deemed insufficient to provide an appropriate consideration of the pursuit of cultural objectives. Article XX(f) GATT was the notable exception

because it was designed to exempt measures for protection of "national treasures of historic, artistic, or archaeological value". The provision's scope was however thought too limited and of little use when contemporary creative production, such as films or television programmes, was at stake. Furthermore, the norm had no counterpart under the GATS and could not help when services were affected. A particularly hard blow to the cultural exception backers was the *Canada–Periodicals* case [22,23], decided by the Panel and the Appellate Body to the benefit of the US and despite CUSFTA's cultural exception clause.

It must be stressed here that already at that time—in the late 1990s—the cultural proponents were in fact no longer really looking for solutions to the trade and culture predicament under the auspices of the WTO. The discussion was by no means pragmatic but politically and even emotionally charged. The usual line of argument was that cultural products are not just commodities but "reflect who we are as a people, […] shape our society, develop our understanding of one another and give us a sense of pride in who we are as a nation" [24]. And that arguably this "non-trade" quality of cultural goods and services could be better taken up in a "non-trade" forum.

It was precisely at that time, when the concept of "cultural diversity" was introduced into the trade and culture discourse and embraced by the former cultural exception advocates [25]. This re-conceptualisation had the potential for casting aside some of "the negativism and the latent 'anti-Americanism' of the 'cultural exception' rhetoric" [26,27] and gave the expressed cultural aspirations a more positive (but also a more proactive) connotation.

2.2. Outside the WTO

As already noted and worth bearing in mind throughout our discussion, is that the trade and culture discourse emerged during the negotiations on the future WTO and had not been transplanted from some other more "culturally-oriented" international venue. In fact, at that time, these issues were still in their infancy at UNESCO and it was only in the 1990s that it took a concrete interest in protecting cultural diversity from the alleged negative effects of economic globalisation. UNESCO's repositioning started off with the *World Decade for Cultural Development* (1988–1997), which had the goals of acknowledging the cultural dimension of development, affirming and enriching cultural identities, broadening participation in culture, and promoting international cultural co-operation [28,29]. One of the results of this initiative was the creation of a World Commission on Culture and Development, which published in 1995 the seminal report "Our Creative Diversity" [30], followed by two other world culture reports [31,32] and the UNESCO-sponsored 1998 Stockholm Conference on Cultural Policies for Development. All of them stressed the dangers of globalised markets for local cultures and linked culture with development.

Yet, the idea of a legally binding instrument on cultural diversity did *not* emerge from UNESCO. Two organisations, neither of which directly related to the UN agency, were instrumental in the process—the International Network on Cultural Policy (INCP) and the International Network for Cultural Diversity (INCD). The INCP was created shortly after the WTO as a forum of the cultural ministers of member countries—fewer than 20 at the network's founding, now substantially more [33]. The INCP agenda has been shaped by a small core of members, organised in the so-called "contact group" and comprising Canada, Croatia, France, Greece, Mexico, Senegal, South Africa, Sweden and

Switzerland. The INCD, on the other hand, was set up at the initiative of the Canadian Heritage in 1998, as an international non-governmental organisation (NGO) intended to complement the efforts of the INCP. The INCD was meant to act as an umbrella group for individual artists, national cultural NGOs and activists. In reality, the INCP and the INCD worked actively side-by-side to provide similar but different drafts of a cultural diversity instrument and to promote it [34]. "Whereas the INCP represents a politically disciplined perspective on cultural diversity, the INCD looks at the same issue with a broad and more unpredictable 'civic' and 'participatory' view. The official side has kept a tight rein on the 'grass-root' input through funding its liaison office and various research initiatives, holding the INCD meetings concurrently with its own, and providing consultants or staff that develop themes, suggest speakers, write background papers and summary reports and proselytize. The intention is to release controlled 'soft power' to further the political agenda of the INCP" [34,35].

It was only in 2003 that these efforts at developing an international instrument on cultural diversity moved to the venue of UNESCO [36], where the idea of cultural diversity protection evolved in parallel, especially with the 2001 UNESCO Declaration on Cultural Diversity. Relatively swiftly, after two years of drafting and redrafting, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* was adopted by the 33rd UNESCO General Conference. The US was also active in this process but, as one might have expected, on the opposite side to the cultural exceptionalists. Indeed, it is often argued that the US rejoined UNESCO in 2003 specifically because of the alarming prospect of a legally binding instrument on cultural diversity "to be negotiated in a forum in which the United States had no formal input" [7,37]. The official explanation of President Bush that the US returned to UNESCO because it had "been reformed" [38] seems somewhat less plausible.

In the following section, we take a closer look at the Convention in order to understand the impact of this act of shifting cultural issues from the WTO to UNESCO and see whether it has in fact contributed to advancing the objective of a vibrant culturally diverse environment.

2.2.1. The UNESCO Convention on Cultural Diversity

The Convention on Cultural Diversity was adopted by an overwhelming majority of 148 states with only the US and Israel voting against it [39]. After a rapid ratification process, the Convention entered into force on 18 March 2007 and more than 100 countries have now ratified it [40], thus effectively committing themselves to implementing it into their domestic law. The UNESCO Convention can be seen on the one hand as the culmination of some previous, mostly exhortatory acts in the fields of culture and trade [41] and cultural heritage [42,43]. On the other hand, and as we stress in the present context, the Convention is a clear reaction to economic globalisation and to the emergence of enforceable multilateral trade rules through the WTO. In both of the above respects, the UNESCO Convention is often said to be a significant success for those state and non-state actors advocating the "cultural exception" doctrine. Yet, the odd thing about the Convention is that when one looks at it closely and construes it as a treaty basis for any future undertaking aimed at protecting and promoting cultural diversity, most of the highly optimistic labels do not stick. The Convention's drawbacks can be grouped into three categories relating to (i) the lack of binding obligations; (ii) its substantive incompleteness and (iii) its ambiguous relationship with other international instruments.

Although the UNESCO Convention was meant to be a legally binding instrument and as a "Convention" has at least on paper this legal status, in fact it has precious few obligations and these are formulated as mere stimuli for the Parties to adopt measures protecting cultural diversity at the national [44] and international [45] levels, rather than as genuine duties. There are only two provisions that can be said to be of binding nature, involving the stronger wording of "shall" rather than "should". The first relates to the preferential treatment that developed countries must grant to cultural workers and cultural goods of developing countries [46]. The second, formulated in Article 17, creates an obligation for international cooperation in situations of serious threat to cultural expressions, construed in particular as assistance from developed to developing countries. Even these two "real" obligations are rather vague and unlikely to bring about radical change; they appear also somewhat marginal to the proclaimed core goal of protecting cultural diversity [47,48]. The glamour of the Convention as an international legally binding act is thus seriously impaired, especially if one considers that lack of action to achieve any of the obligations could at worst result in a state being criticised by the Intergovernmental Committee or the Conference of Parties on the basis of the state's own report [49].

Despite the extremely limited obligations on the Parties to take action to protect and promote cultural diversity, the Convention formulates an extensive block of rights to that end. Article 6(2) of the UNESCO Convention provides a non-exhaustive list of measures that the Parties may adopt [50], depicting basically all known cultural policy measures that states put in place, ranging from any "regulatory measures aimed at protecting and promoting diversity of cultural expressions" [51] to the concrete example of public service broadcasting [52,53]. This "all inclusive" approach signals that the Convention's objective has been "to endorse forms of market intervention rather than to preclude them" [54]. Adding up to the extremely broad and fuzzy definition of "cultural diversity" provided by the Convention [55], under which an indefinitely vast number of activities can be subsumed, it opens the door to state activism in a wide range of economic sectors that affect culture in one way or another.

Admittedly, non-exhaustive lists are not a rare phenomenon in intergovernmental treaty-making. They allow, through some vagueness and constructive ambiguity, the bringing together of an array of (at times diverging) interests and the actual closing of the deal. Yet, what makes the UNESCO Convention peculiar in this regard is the complete lack of criteria and/or ex post mechanisms that would make these definitions workable—separating the licit from the illicit cultural policy measures. This normative incompleteness is a staggering feature of the UNESCO Convention and has been much criticised both by prominent negotiating Parties, notably the US [56], and by a host of scholars [57-59], who warn against protectionism. It is indeed odd that while the Convention clearly acknowledges the dual nature of cultural goods and services and celebrates their cultural side [60], no attempt is made to provide guidance on how states might reduce the trade-distorting effects of cultural policy measures. While striking a balance between the economic and cultural nature of goods, services and activities is undoubtedly complex, the UNESCO Convention could have at least made "reference to principles such as proportionality or effectiveness, which could guide the application of these measures and serve to prevent more blatant forms of protectionism" [54]. This innate defect of normative incompleteness is aggravated by the lack of institutional or adjudicatory mechanisms that could procedurally clarify and complete the contract [61].

Next to the almost entirely missing obligations and implementation criteria, one should note that the framework of the UNESCO Convention is not comprehensive enough to secure the protection and

promotion of cultural diversity, leaving some critical elements outside its otherwise generously defined scope of application. Some of these missing elements are related to the centrality of state sovereignty, which is intrinsic to the UNESCO Convention: the sovereignty of the State Parties in the cultural field is one of the eight guiding principles underpinning the Convention and all rights and obligations stemming from the Convention are attributed to states. While this is understandable for an intergovernmental treaty, cultural rights do not correspond to national boundaries [62,63]. Quite the contrary, it needs to be acknowledged that many of the processes of cultural homogenisation have occurred precisely because of state-led policies aimed at cultural standardisation and an overlap between state and culture, whereby the goal has frequently been to impose the culture of dominant elites on the rest of the citizenry [64].

The fact that the Convention subscribes to the respect for and safeguarding of human rights and fundamental freedoms [65] may remedy this situation to some extent but it is nonetheless disappointing that specific cultural rights, which states must respect (such as access to education or use of language of choice) did not make it into the text, in particular since they were acknowledged by the earlier but non-binding UNESCO Declaration on Cultural Diversity [66]. Furthermore, while the Convention does mention indigenous peoples and traditional cultural expressions a few times [67], the relevant provisions remain declarative in nature and again address not the rights of the indigenous peoples themselves but those of the states whose territory is affected. Besides this ethnocentricity in the formulation of the rights, the UNESCO Convention establishes no specific rights for media organisations, journalists or individuals. Their interests are to be realised only through state action, if at all, again with no means of control or sanction available.

A vital element omitted from the regulatory domain of the UNESCO Convention, except for the brief remark in the preamble [68], is intellectual property rights (IPR). This omission is particularly awkward since IPR protection has long been secured at the international level and the contemporary IPR system [69] has evolved over time and elaborated a broad palette of sophisticated and flexible intellectual property (IP) tools to protect diverse forms of symbolic value circulating in global commodity markets. When talking about trade and culture, IPR are vital for (at least) two reasons: the first has to do with the foremost rationale for IP protection—to foster creativity—which is also the most essential prerequisite for a flourishing and diverse cultural environment. The second reason has to do with the way IP protection is granted, whereby authors receive a temporary monopoly over their creations thus excluding the rest of the public from having access to the protected works. Within both of these rationales, which are essentially interrelated, a series of critiques from the perspective of protecting and promoting cultural diversity can be formulated.

First, the IP system is far from perfect. Some of its deficiencies relate to the centrality of authorship, originality and mercantilism inherent to the "Western" IP model, which leaves numerous non-Western, collaborative or folkloric modes of production outside the scope of IP protection [70]. As a result, many expressions of traditional and indigenous culture are without a protective shield leaving them open to misappropriation and abuse, and leaving the communities that created them without an appropriate economic reward. In a contemporary context, under the conditions of the digital environment, very often are efforts of commons-based production of information, knowledge and entertainment, where "individuals band together, contributing small or large increments of their time and effort to produce things they care about" [71] not protected by copyright. For instance, in online

games and virtual worlds, the existing IP models cannot adequately capture the modes of collaborative production (such as game upgrades, maps or original video and film material) and leave them at the mercy of the commercial companies owning the platform, which may extract substantial financial benefit out of the individuals' and communities' creative work, or may even ban the production and distribution of their expressions [72]. Following on this point, it should be noted that it is generally uncertain whether the existent IP model appropriately reflects the precarious balance between the private interests of authors and the public interest in enjoying broad access to their productions [73], and whether this balance offers the best incentives to promote creativity. While IP protection certainly fulfils essential economic functions in production and distribution of cultural materials [74], evidence of a direct correlation between IPR and creativity is equivocal [75]. The balance between authors' rights and the public interest in having access to information becomes all the more fragile as it is now common that authors' rights are "assigned away to the distributor of the work in order to gain access to the channels of distribution and their audience" [76] and these distributors (normally big media conglomerates) have been the ones, who set the terms and determine which works are made available to the public, thus exercising substantial control over existing cultural content. In addition, under the conditions of digital media, intermediaries have strived to keep perfect control over "their property" by means of Digital Rights Management systems (DRM) and other technological protection measures, which under the guise of shielding digital content from uncontrolled distribution and unlawful use, have had pernicious effects, eroding some fundamental rights of consumers and restricting usages traditionally allowed under (analogue/offline) copyright [77].

The content industries have also been very successful in their political efforts to expand the scope and extend the duration of copyright, effectively convincing most governments that strong and enforceable IPRs are the *sine qua non* for a vibrant culture. Through race-to-the-top strategies, this augmented protection has been emancipated to the international level in the framework of the TRIPs Agreement and in the even further-reaching (the so-called TRIPs+) free trade agreements (FTAs) [78].

To wrap up the above argument, the initial *raison d'être* for IP protection, *i.e.*, "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" [79], may need to be restated and this is not simply a matter of yielding to the media industries' lobbying, but of weighing anew the private interests against the public values [80]. Ensuring sustainable access to cultural goods and sustainable production of culturally diverse content through appropriate IP design is absolutely critical. The World Intellectual Property Organization (WIPO) itself has admitted that certain amendments to the present IP architecture and a search for new forms are necessary: (i) to preserve and safeguard intangible cultural heritage; (ii) to promote cultural diversity; and (iii) to promote creativity and innovation, including tradition-based forms [81]. The WIPO Development Agenda, adopted by the WIPO General Assembly in September 2007 [82], thus rejects a purely IP-centric view. "It posits that strong intellectual property protection does not consistently promote creative activity, facilitate technology transfer, or accelerate development" and "places the benefits of a rich and accessible public domain, national flexibilities in implementing IP treaty norms, access to knowledge, UN development goals, curbing of IP-related anti-competitive practices, and the need to balance the costs and benefits of intellectual property protection firmly within WIPO's central mission" [83].

It is in this sense particularly odd that the UNESCO Convention has not taken up any of the strands of criticism of the present IP system and has not sought any way in which the latter can be adapted to serve the goal of a diverse cultural environment more appropriately. The explanation for this "omission" is however simple: the political will for any changes was clearly not there as the countries leading the cultural exception battle are also the ones at the forefront of the efforts to expand copyright's scope and duration and to more aggressively enforce it [84]. The presently negotiated Anti-Counterfeiting Trade Agreement (ACTA), among other TRIPs+ initiatives [85], is a clear sign of this hypocrisy and the strength of the entertainment industries' lobbies [86].

A significant drawback of the Convention in terms of the critical role it was supposed to play as a counterforce to economic globalisation (as epitomised by the WTO) is its "conflict of laws" provision. This crucial norm, as provided by Article 20 of the UNESCO Convention, fails to ensure any meaningful interface with the rules of the WTO (or any of the other existing international agreements) in case of a conflict between them. Article 20 provides simultaneously 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", and that, "without subordinating this Convention to any other treaty", Parties shall foster mutual supportiveness between the Convention and the other treaties to which they are parties. Even without lengthy deliberations on the possible interpretation scenarios, it is evident that this rather paradoxical formulation involves no modification of rights and obligations of the Parties under other existing treaties. Interestingly in this context, Garry Neil has shown that the outcome of *Canada-Periodicals* would have been identical even if the UNESCO Convention had been in force at the time the decisions were taken, and even if the US had ratified the Convention [87].

Many observers had nonetheless hoped that when a new "trade *versus* culture" case emerges, the WTO jurisprudence will provide a final resolution to the conflict, possibly also clarifying the status of the UNESCO Convention and its relationship with the WTO rules. However, if one glances at the practice of the WTO adjudication so far, such a scenario seems unlikely: the Panel and the Appellate Body tend not to disrupt the existing "delicate and carefully negotiated balance" [88] of the WTO Agreements and it is sensible to expect that the adjudicative bodies would follow the conventional (less imaginative but solid) analysis, which justifies the legal expectations and concentrates on the core trade-related questions that fall within their authority [89]. Accounting for the vagueness of the UNESCO Convention's provisions, Acheson and Maule note in addition that, "Panels of the WTO cannot take into account fuzzy concepts of cultural diversity without losing their legitimacy and ultimately their effectiveness" [34].

These lines of scepticism have been in fact corroborated by the recent Appellate Body Report *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* [90,91]. In this particular case, China tried to justify diverse measures in the media domain by invoking the UNESCO Convention and the related UNESCO Declaration on Cultural Diversity. The Panel was however not sympathetic to this attempt and recalled that "the UNESCO Convention expressly provides: 'Nothing in this Convention shall be interpreted as modifying the rights and obligations of the parties under any other treaties to which they are parties'". The Panel went on to say that, "[i]n any event, nothing in the text of the WTO Agreement provides an exception from WTO disciplines in terms of 'cultural goods', and China's Accession Protocol likewise contains no such exception" [90, para 4.207]. Thus, China's desire to apply the UNESCO Convention

as a shield remained without much ado fruitless—a position that was also supported by the Appellate Body and despite China's request to the Appellate Body to be "mindful" [91, para 25] of the specific dual nature of cultural goods and services. Having gained nothing from the sought connection to and alleged protection by the UNESCO Convention, China attempted to make use of the flexibilities given within the WTO law itself by invoking Article XX(a) GATT, which justifies measures violating rules of the WTO Agreements when these measures serve the protection of public morals. China argued in this context that "… reading materials and finished audiovisual products are so-called 'cultural goods'" and these are "of a unique kind with a potentially serious negative impact on public morals" [90, para 7.751]. While the Panel was generous in what would qualify as public morals, it found that "none of the relevant measures has been demonstrated to be 'necessary' within the meaning of Article XX(a) to protect public morals" [90, para 7.913]. As such, these measures could not be justified under Article XX(a) GATT. It is still however noteworthy that the Panel and the Appellate Body allowed the use of the public morals exception for cultural goods—an opportunity that the cultural advocates have until now easily dismissed as unrealistic and which again questions their argument of WTO's failing flexibility.

Ending our critical glimpse of the UNESCO Convention, we concur with Craufurd Smith in saying that, what we have "is a document that evades controversy, which establishes general objectives and frames them in purely exhortatory terms. As a political manifesto, with little legal substance, it is hardly an advance on the international declarations on cultural diversity which preceded it" [54]. Alternatively, one can plainly say that what made the adoption of the UNESCO Convention possible also emptied it of some of its valuable content. This shows on the one hand the complexity of the issues that arise whenever cultural diversity is to be addressed and on the other hand, in a political context, the starkly different sensibilities and motivation of the Parties when drafting a legally binding international instrument on cultural matters [92]. The role of the US in diluting the substance of the UNESCO by ingeniously making it broader, elusive and less binding is also to be acknowledged. Some purely practical issues, such as the failing or poor communication between the different departments of government (e.g., between the ministry of culture and education and the ministries of finance and trade) may have also been detrimental to formulating clear objectives and appropriate means to achieve them. The example of the EU, where the Union has different competences in the fields of economic and external affairs as compared to the cultural domain, is also fitting in this context and helpful in understanding some of the existent discrepancies.

2.2.2. The UNESCO Convention's Impact on the International Regime Complex

Thinking beyond a critique of the Convention's textual basis, it is important to ask what its impact may be? Despite the impressive number of states that have ratified the Convention, and thus have committed to the objective of protecting and promoting cultural diversity, it is highly unlikely that a negotiating bloc would form within the WTO to push for more "cultural" solutions (such as including an express exception for culture in the GATT and GATS general exception clauses; including a waiver for culture or including cultural diversity as one of the objectives in the Preamble of the WTO Agreement) [58]. This is because when one looks at the political economy behind the adoption of the Convention, there is not only one voice. Different states have ratified it for very different

reasons [92,93] and although these states have been successfully mobilised by the very proactive Canadian and French delegations [94], which have also spun a network of assisting NGOs, this mobilisation is not strong enough to go beyond the weak regulatory charge of the Convention and matter when "real" trade interests are at stake. The fragility of the pro-cultural front is also related to the inherent "fuzziness" of the concept of culture and to the fairly convoluted (and often flawed) understandings of the effects of economic globalisation on cultural production, distribution and consumption. As Craufurd Smith notes in this context: "Arguably, the Convention was never intended by its promoters to be an innovative measure; it was primarily designed to maintain the status quo in the field of trade and culture. In particular, developed countries such as Canada and France promoted the Convention on the basis that it would provide high level political endorsement for their culturally motivated trade restrictions. It serves to justify not only their existing measures but also their refusal to make commitments in new and developing communications sectors in the future" [54]. In this sense, the major impact of the Convention is likely to become perceptible in the WTO negotiations and can be described as a "forced freeze" [95] of the inherent to the WTO processes of further liberalisation and refinement of rules and obligations. The impact is at its strongest clearly in the field of audiovisual media services but diverse spillover effects are felt in other sectors, such as telecommunications services [96] and in other negotiation themes, such as e-commerce, as evident during the ongoing Doha Round of trade negotiations [97].

The question of whether such a "freeze" is beneficial, including for those state actors supporting the cultural exception doctrine, cannot be answered in the positive. The mentioned example of e-commerce indeed reveals rather grave repercussions for the whole system of multilateral rules, which due to the trade and culture conflict cannot adapt to appropriately address the nascent digital trade. The issue remains unsettled because of the starkly different positions of the key negotiation drivers, the EC and the US, which also reflect their pro-culture/pro-trade stances. The EC zealously argues that, "[e]lectronic deliveries consist of supplies of services which fall within the scope of the GATS" [98] and seeks to ensure that all digital media fall within the category of audiovisual services, thus retaining its flexibility for MFN exemptions and limited commitments. The US takes the opposite position and has sought the deepest mode of liberalisation available, *i.e.*, that of GATT (coupled with the Information Technology Agreement, which provides for a zero tariff level for IT products, such as computers and microchips, and covers more than 90% of global trade in these products) [99,100].

The digital trade instance is also symptomatic of the intensified power-plays leading to intensified fragmentation of negotiation themes and of negotiation fora through a transfer from multilateral to regional and bilateral venues. The lack of solutions within the multilateral context of the WTO has led and will continue to drive Members to take other, bilateral or regional, paths to advance their policy priorities. The US particularly has made substantial efforts to ensure implementation of its digital agenda [101,102] through multiple FTAs. The agreements struck since 2002 with Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore and the Central American countries contain only minimal restrictions for digital products applying a negative scheduling approach and tackle some "deep" e-commerce regulatory issues.

Very interesting and noteworthy is the fact that in this exercise, the US has shown deference to the culturally inspired measures of its FTA partners in the field of audiovisual services and given the policy space needed for these. These measures are however "frozen" at their present level and could

relate to conventional offline technologies only. Furthermore, the leeway given to the US partners with respect to trade in cultural products varies and "reflect[s] quite accurately the negotiating capacity of the states involved": acting under the enormous economic gravity of the US, the smaller the country, the more concessions it admits [103,104]. Policy space is thus often substantially reduced and countries (especially the poorer) may not be able to appropriately cater for diverse public interests in the field of media, and may in fact be completely helpless in the field of digital media.

The EU has in the meantime expanded the scope of application of its media regulation through the 2007 Audiovisual Media Services Directive (AVMS), which added on-demand audiovisual services to its regulatory field, signalling the EU's desire "to retain its competence to introduce culturally motivated measures across the electronic communications field and […] not [to] accept the US 'standstill' agenda" for digitally delivered products and services [54]. Notably, the AVMS also includes a soft-law rule, which creates an obligation for the EU Member States to ensure that media service providers under their jurisdiction "*promote*, where practicable and by appropriate means, production of and access to European works" [105]. On the bilateral and regional tracks, the EU has sought exclusion of cultural services from trade commitments (including content-related implications of e-commerce), while promising intensified cultural co-operation without any sizeable concrete commitments [106,107].

At the domestic level, what we have observed so far in the Convention's State Parties is preservation of the status quo of media regulation with efforts paying merely lip service to the goal of cultural diversity, as recent studies prepared for the European Parliament reveal [108-110]. While this may change as the UNESCO Convention's institutions elaborate their guidelines and possibly strengthen the monitoring, transformations are likely to remain constricted to co-operation efforts and soft-law initiatives.

2.2.3. Looking into the Future of the "Trade and Culture" Pair

Looking into the future and contemplating the possible evolution of the trade and culture quandary, it is plausible that the conflict will lose its charge. Although the cultural exception advocates will win their short-term battle and the status quo will be preserved during the Doha trade talks, the "higher" goals of regime shifting and having a serious impact on the overall system of international trade rules will remain unattained. The Convention on Cultural Diversity endorsed under the auspices of UNESCO will remain a mere exercise of forum shopping without any longer term consequences beyond the present freezing of commitments in the WTO [111,112].

In the mid- to long-term however, as Galt prognosticates, "… consumer sovereignty, technological change, and perhaps another dominant voice within the European Union will prove too powerful to keep in check. The collective hand of EU negotiators will be forced to make further concessions and jumpstart GATS negotiations in the audiovisual sector, perhaps extracting valuable concessions from the United States in other sectors. However, if the 'trade and culture' linkage is not squarely addressed soon, the European Union may find itself in a position whereby its concessions in the audiovisual sector are of little value at the negotiating table" [15], especially if we bear in mind that the US has already found comfortable solutions for digital media trade in its FTAs.

Pressure on the "cultural exception" exponents is also likely to be exerted by developing countries, who have played along so far but their interests have only been addressed rhetorically and never in practice. Indeed, and this should be particularly accentuated, in contrast to other anti-globalisation movements pursuing better balance between economic and non-economic values and interests (such as access to essential drugs or access to knowledge [A2K]), the trade and culture dilemma stands out as the demandeurs are not developing nations but industrialised countries. Developing countries have only followed on in the hope for some financial benefit but never expressed a strong or unified voice in this regard. As the cultural cooperation promises under the UNESCO Convention [113] and the aid flowing from the International Fund for Cultural Diversity [114] may not be satisfactory for developing countries, these may turn to the "trade" side of the trade and culture pair and actively search for real market access concessions. Such an aspiration would not be misplaced, since "even a cursory look at international trade in cultural products shows" that, "developed countries at the forefront of efforts to 'protect' cultural diversity are at the forefront of cultural trade as well" [115].

3. Thinking about the Concept of Cultural Diversity in Global Law

The preceding analysis of the concept of cultural diversity as coined and evolved in the framework of international standard-setting leads to several critical conclusions. The first one regards the fact of the origin of the notion that has been born in the dawn of international trade with cultural products and services after World War I and gained particular prominence after World War II. In this sense, the concept was meant above all to act as a counterforce to economic globalisation, and in more concrete terms as a policy tool against the newly structured and enforceable trade rules under the umbrella of the WTO. It should be stressed that the scope of the notion of cultural diversity in this particular context is very limited and relates almost exclusively to audiovisual services, *i.e.,* films, TV programmes, video and sound recordings—a situation that may be counterintuitive to someone unacquainted with the heavily political and path dependent dilemma of trade *versus* culture, as we sketched it briefly above.

Another conclusion relates more specifically to the UNESCO Convention on Cultural Diversity, the international legal act that had the initial ambition to bring about balance in the complex regime of trade and culture and allow for the states parties to the Convention to sustain a diverse cultural environment. Yet, the rather weak binding power of the Convention and its substantive and normative incompleteness show no real advance in this regard but spreading a manifesto with mere rhetorical charge. Exploring the interface between the UNESCO Convention and other regimes, while some have suggested that the Convention would influence the existing international agreements indirectly in the process of their interpretation [116], the *China-Publications and Audiovisual Products* case shows very little (if no) influence of the Convention as far as the WTO Agreements and the obligations of the WTO Members are concerned. The preservation of the status quo in the WTO, in particular in terms of further committing in the field of audiovisual services, is also of dubious value: while it allows Members to maintain and even heighten their present level of measures protecting national entertainment industries, it is uncertain whether these measures really contribute to the attainment of the objective of cultural diversity. (At least) two arguments can be formulated in this regard: (i) the first has to do with concept of cultural diversity and its rather problematic situating in the

globalisation/anti-globalisation discourse; (ii) the second argument relates to the changing exogenous factors, especially to the advent and wide spread of digital media, which strongly impact on the processes of cultural content production, distribution and access, as well as on the efficiency of the applied regulatory toolboxes.

(i) The debate on trade and culture has been defined by a deeply convoluted (if not to say flawed) understanding of the effects of trade, and more broadly of economic globalisation, on culture. While it is indubitable that "trade generates complex and often contradictory effects" [117], it is equally certain that trade is not a "zero-sum" game [118], and there are a number of ways in which trade enhances cultural flows and exchanges. In the trade and culture discourse however the common (and particularly loud) statements are that cultural diversity is becoming impoverished and almost extinguished as the globalised flow of easy entertainment coming from Hollywood dominates and homogenises [119]. This (mis)conception [120,121] is difficult to put right or to soften at least. The discussion on "trade" and "non-trade" values is extremely politicised and often resembles a clash between two religions that find no channel of communication between them.

In the specific sense of cultural policymaking, the debate is additionally burdened with notions of cultural and national identity that lead to national sovereignty susceptibilities. In the sub-context of policymaking in audiovisual media, the discussion is further complicated since "one's view on the role of media in society is intimately bound up with one's view of democracy and the proper bounds of governmental power" [7]. Ultimately, all these interrelated discourses are in a profound state of transition: within the nation state, "as the audiovisual sector moves from being a separable and quarantined domain of governance to its enactment as part of a whole-of-government modelling in which it emerges as a service industry in a 'digital economy'" [122], and outside the nation state, as liberalisation, migration and other forces of globalisation [123] induce sweeping societal shifts that make modern society increasingly homogeneous *across* cultures and heterogeneous *within* them.

Under these circumstances, it is becoming outdated and increasingly inappropriate to apply notions of cultural diversity, which "tend to favour 'billiard ball' representations of cultures as neatly bounded wholes whose contents are given and static. These understandings downplay 'the ways in which meanings and symbols of culture are produced through complex processes of translations, negotiation and enunciation', as well as by contestation and conflict" [124]. To be sure, these are precisely the perceptions of the UNESCO Convention, whose premise is that it is cultural diversity between nations and not within nations that needs to be protected and promoted, and this stance shapes the cultural policy measures taken by the Convention's State Parties.

(ii) Admittedly, political decisions in the field of culture are not easy and neither is regulatory design. Some exogenous changes, and we mean here above all the profound changes in the digital media environment, may however enable apt regulatory solutions.

It is clear that the above-described system of institutional and substantive relationships between issues of trade and culture emerged under the conditions of analogue/offline media. The media landscape has however not remained static and in the past two decades has experienced far-reaching changes, which together have led to a decidedly different information and communication environment [125]. We argue that under these new conditions, whose salient features will only be sketched here, there is a need to broaden the trade and culture debate and seek a new focal point of these deliberations that more appropriately reflects the changed reality of media. Translating this into

the policy space, this may also demand a re-evaluation of the policy tools for the achievement of the objective of cultural diversity.

At the core of the transformations in media is the process of digitisation, which enables any type of information (be it text, audio, video, or image) to be expressed in a line of zeroes and ones. This coded data can also be easily stored and transported instantaneously, and this, as the experience of the past twenty years shows, takes place at an ever decreasing price. This basic matrix combined with the wide spread of optical fibre networks and exponentially increasing computational power, has led to a variety of transformations in the information environment, which have become palpable in different facets of societal practices. Filtering in context these transformations, we can identify as particularly relevant: (i) the proliferation and diversity of content; (ii) its accessibility; (iii) the empowerment of the user; and (iv) the new modes of content production, where the user is not merely a consumer but is also an active creator, individually or as part of the community. While some of these developments are still in their infancy, they are already entering a phase that permits observations of immediate relevance for the discussion on protecting and promoting cultural diversity. Some of these observations hint at opportunities for better, more efficient and flexible accommodation of the goal of cultural diversity, while others are to be viewed as challenges, perhaps calling for additional regulatory intervention.

In the latter category, one may list the anticipated drastically fragmented media environment, as content consumption moves from a "push" to a "pull" mode (*i.e.*, from broadcasting to on-demand). The split between digital and analogue households, which is already a reality, will also be exacerbated, and while this widening gap between the digital "haves" and "have-nots" is noticeable within developed societies, it is all the more striking between the developed and the developing and least developed societies. In terms of competition, the effects of the digital environment are multi-directional. On the positive side, it is conceivable that the reduced barriers to entry will allow new market players to position themselves and make use of niche markets, which have become economically viable in the digital ecosystem due to the dramatically falling storage, distribution and search costs (the so-called "long tail" effect [126,127]). The digital setting may also have reduced the significant entrepreneurial risk inherent in launching new cultural goods and services (at least for some of them), while making the visibility of cultural goods and services greater and empowering the consumer in terms of choice and actual consumption.

On the other hand, a concentration among the diverse players in media markets, both horizontally and vertically, may also be expected, because of their pursuit of better utilisation of all available channels and platforms [128] and the related benefits from economies of scale worldwide. The development of truly ubiquitous global market players may have a number of grave effects on cultural diversity, among others, certainly leading to magnified importance of a very small number of languages (in particular English). Nonetheless, the digitally facilitated abundance of content, its dissemination and accessibility without real location restrictions undoubtedly lead to more content and to new content [129], being generated and spread individually or by groups. Some of this user created content (UCC) reflects the key media policy components of diversity, localism and non-commercialism [130] and in this sense harnessing the UCC processes could be critical for achieving cultural diversity objectives. Beyond these "amateur" creations, the digital environment has also had a strong impact on how artists and culture-makers express themselves, how they communicate with one another and with the public, how cultural content is presented and made accessible and how it

is consumed. In short, digitisation, both as a tool of expression and as a new cultural communication space "affects the entire spectrum of culture production, distribution and presentation […] [and] brings with it the promise of cultural renewal" [131].

The new dynamics of the markets for digital cultural content may also impact on the market failures conventionally associated with analogue media markets, mostly because of the changed notion of scarcity in the digital space. In this context, the idea of protecting some "shelf-space" for culturally or nationally distinctive productions makes little sense since the "shelf-space" is virtually unlimited. Furthermore, it may also become *im*possible to "reserve" space for a certain purpose, since it is the consumer herself who decides about the content, its form and time of delivery.

The modified market mechanisms for content and the changed conditions for creativity, as well as for production, distribution and consumption of cultural content in the digital networked environment, can be viewed as an opportunity in this regard, allowing (if not indeed demanding) a re-evaluation. It is first necessary to acknowledge that we are now faced with a situation that is "significantly different from the audiovisual sector of the Uruguay Round when negotiations focused primarily on film production, film distribution, and terrestrial broadcasting of audiovisual goods and services" [132] and that is even different from the conditions prevailing at the outset of the Doha Round in 2001, when the Internet was in its infancy and the implications of this network of networks were largely unknown. The acknowledgement of this different situation does not however suggest that cultural policy measures should be abandoned and that the free flow of goods and services alone will cater for a diversity of expressions in the newly formed environment. What it suggests is that the benefits of the existing trade restrictions may very well prove not to outweigh their costs and may even be detrimental to the goal of cultural diversity.

The concept of cultural diversity should be disentangled from the narrow and increasingly inappropriate corset of trade *versus* culture and of plain protectionism of domestic audiovisual sectors. Sustainable diverse cultural environment is absolutely critical and its attainment must go beyond the short-term interests of the entertainment industries and respond to the needs of the broader citizenry. While the achievement of this objective is undoubtedly a daunting task for any policymaker at any level of governance, there may be some pragmatic ways of approaching it, especially under the conditions of digital media. We think that *access*, taken broadly as access to infrastructure, media literacy, applications and cultural content, offers an adequate focus for such efforts [109]. These would probably call for multiple actions outside the extremely constrained domain of audiovisual services and require adjustments in other regulatory fields, most notably that of intellectual property protection, but also a number of measures of non-legal nature.

Acknowledgements

The author would like to thank the editorial team of the special issue on "Ethnic Diversity and Cultural Pluralism" for the kind invitation to participate and for launching this topical and very timely endeavour. The insightful comments of the three anonymous reviewers are also gratefully acknowledged.

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11. North American Free Trade Agreement, 32 ILM 289, 1993. The cultural exception exists only between Canada and both the US and Mexico, but not between the US and Mexico.
12. Article 2005 Canada-US Free Trade Agreement, 27 ILM 281, 1988.
13. The law of the WTO is contained in several agreements, attached as annexes to the Marrakesh Agreement establishing the WTO. The GATT, GATS and TRIPs are contained in Annex 1 of the WTO Agreement [1867 UNTS 154; 33 ILM 1144 (1994)]. Other Annexes organise additional aspects of liberalisation such as the dispute settlement procedure (Annex 2), trade policy review mechanism (Annex 3) and certain plurilateral agreements (Annex 4).
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65. Articles 2(1), 2(3) and 7 UNESCO Convention. UNESCO, Paris, France, 15 October–3 November 2001.
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67. Recitals 8, 13 and 15 of the preamble; Articles 2(3) and 7(1)(a) UNESCO Convention. UNESCO, Paris, France, 15 October–3 November 2001.
68. Recital 17 of the UNESCO Convention's preamble. UNESCO, Paris, France, 15 October–3 November 2001.
69. Under IPR as a general category, one understands the rights granted to creators and inventors to control the use made of their productions. They are traditionally divided into two main branches: (i) copyright and related (or neighbouring) rights for literary and artistic works and (ii) industrial property, which encompasses trademarks, patents, industrial designs, geographical indications and the layout designs of integrated circuits. In the following, we deal primarily with copyright.
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73. Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone 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 (Article 15(1)(c)), UN Doc. E/C.12/2005, 21 November 2005, para 35.
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89. Article 3(2) DSU reads: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it 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 [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements".
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93. For instance, Brazil, Japan and India have all ratified the Convention but remain equally willing to engage in further liberalisation of the audiovisual sector.
94. Supported by Germany, Greece, Mexico, Monaco, Morocco and Senegal, and a number of Francophone UNESCO member states.
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104. Australia, as the most affluent of these states, managed to preserve existing quotas for commercial television and commercial radio. Singapore and Chile were also able to include relatively significant reservations, as did Costa Rica, the Dominican Republic and Morocco. On the other hand, Guatemala, Honduras, El Salvador and Nicaragua left their audiovisual sectors in practice open to imports.

105. Article 3(i)(1) Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive) (codified version), OJ L 95/1, 15 April 2010 (emphasis added).
106. See e.g., EC-Chile Association Agreement (2002), Part III, Title II "Culture, Education and Audio-visual" and Part IV "Trade and Trade-related Matters".
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110. For the ongoing implementation initiatives at UNESCO. Available online: http://www.unesco.org/culture/en/diversity/convention/ (Accessed 30 March 2010).
111. As Laurence Helfer had observed "complexity enables a strategy of 'regime shifting' whereby states and non-state actors relocate rulemaking processes to international venues whose mandates and priorities favor their concerns and interests". Regime shifting, Helfer argues, is also different from "forum shopping", which involves a change of venue to achieve a single favourable decision. Regime shifting is in contrast a longer-term, iterative strategy that "seeks to create outcomes that have feedback effects in other venues".
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114. The International Fund for Cultural Diversity is established under the Convention (Article 18). Use of the Fund's resources is decided by the Intergovernmental Committee in accordance with the guidelines provided by the Conference of Parties. The resources of the Fund consist, in particular, of voluntary contributions made by the Parties and gifts or bequests by other States, other regional or international organizations, public or private bodies and individuals. Until end of 2009, only slightly over 2 million USD were collected in the Fund Available online: http://www.unesco.org/culture/en/ev.php-URL_ID=38235&URL_DO=DO_TOPIC&URL_SECTION=201.html/ (Accessed on 30 March 2010).
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127. The name "long tail" has to do with the image of a demand curve that gets longer and longer and covers more and more niche "non-hit" products.
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