Policy Papers on Transnational Economic Law

No. 18

The UNESCO Convention on Cultural Diversity: Treacherous Treaty or Compassionate Compact?

Alan Brouder

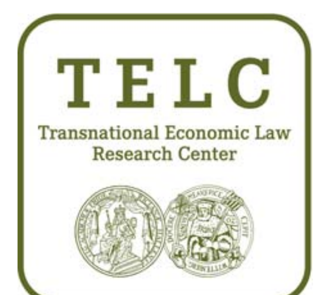
TRANSNATIONAL
ECONOMIC LAW
RESEARCH CENTER

Faculty of Law
Martin-Luther-University
Halle-Wittenberg
Universitätsplatz 5
06099 Halle (Saale)
Germany

Tel.: +49 345 / 55 23149
/ 55 23180
Fax: +49 345 / 55 27201

E-Mail: telc@jura.uni-halle.de
www.telc.uni-halle.de

November 2005



The UNESCO Convention on Cultural Diversity: Treacherous Treaty or Compassionate Compact?

1. Introduction

Twenty-five years after UNESCO's MacBride report called for the establishment of a New World Information and Communication Order (NWICO), built on respect for freedom of expression and cultural diversity, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions was adopted at the 33rd session of UNESCO's General Conference on October 20th, 2005. The convention reaffirms the rights of states to 'maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory'.

The two years of intensive negotiations leading to the convention's adoption were characterised by significant concerns over its potential interpretation and application (for details on the negotiations see *von Schorlemer*, Die UNESCO und der Schutz der kulturellen Vielfalt: die neue Konvention zum Schutz und zur Förderung der kulturellen Ausdrucksformen, forthcoming in: Vereinte Nationen 2005). For the wealthier northern states, the negotiations again raised the sensitive issue of the liberalisation of the audiovisual sector, an area that has seen sharp divisions between Europe and the United States, from the 1947 General Agreement on Tariffs and Trade (GATT) which allowed for quota restrictions on US film imports into Europe (Article IV), to the ongoing negotiations at the World Trade Organisation (WTO). Negotiations on audiovisual services have been deadlocked under the General Agreement on Trade in Services (GATS) at the WTO since they began in 1993 during the Uruguay Round. For the US, the new convention goes too far, authorising states parties to impose what the US believes could amount to protectionist trade measures in the guise of protecting culture. Similar concerns during the NWICO negotiations led the US to withdraw from UNESCO in 1984, only rejoining in 2003. Furthermore, the US argues that any attempt by states to restrict the flow of information also violates the right to freedom of expression enshrined in the International Bill of Rights, regional human rights treaties, and national constitutions.

2. Protectionism in Disguise?

Of the 154 UNESCO member states who voted, only the United States and Israel voted against the adoption of the convention (with Australia, Nicaragua, Honduras and Liberia abstaining). The primary fear of the US arises from paragraph 2 of Article 8 (measures to protect cultural expressions), which states

that '[p]arties may take all appropriate measures to protect and preserve cultural expressions in situations referred to in paragraph 1 in a manner consistent with the provisions of this Convention'. The US has expressed its fear that States Parties might 'misinterpret the convention as a basis for impermissible new barriers to trade in goods, services, or agricultural products that might be viewed as being related to "cultural expressions"'. They argue that such misinterpretations may arise from 'vague definitions as to the scope of the convention, potentially sweeping provisions as to measures that parties may take to defend ill-defined cultural objectives,' and 'an ambiguous provision on the relationship between the convention and other international agreements, including those related to trade' (Fact Sheet, US Department of State, http://usinfo.state.gov).

The US is correct in arguing that the scope of the convention is vaguely defined. While Section III attempts to define difficult concepts like cultural diversity, interculturality, cultural activities, goods and services, these definitions aim to be as broad and inclusive as possible and may therefore be open to misinterpretation. 'Cultural expressions,' for example, are defined as 'those expressions that result from the creativity of individuals, groups and societies, and that have cultural content' (Article 4.3). 'Cultural content' is defined as 'the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities' (Article 4.2). However, notwithstanding the problems associated with unspecific definitions in a legal treaty, it appears unlikely that the convention could be used to justify the kind of sweeping provisions that the US fears. Paragraph 1 of Article 8 states that 'a Party may determine those special situations where cultural expressions on its territory are at risk of *extinction, under serious threat,* or otherwise in need of *urgent safeguarding*' (emphasis added). Given this wording, attempts to justify measures such as agricultural subsidies by reference to the UNESCO convention would blatantly violate the spirit of the treaty and lack credibility.

While the content of the convention itself may not justify the fears of the US and its dominant audiovisual industry, it could strengthen the position in the GATS negotiations of states and trading blocs that currently maintain quotas on domestic broadcasting and film projection. Under the EU's 1989 Television Without Frontiers (TWF) Directive, for example, broadcasters must reserve a majority proportion of their transmission time for European works (excluding the time allocated to news, sports, games, advertising, teletext, and teleshopping services). Also, South Korea operates a screen quota system, which requires that Korean films must be shown in cinemas for a minimum of 146 days per year. The US had

hoped that the GATS negotiations would eventually eliminate these measures, and may have a legitimate concern that the door may be now permanently closed to future WTO negotiations, particularly as the nature of the audiovisual sector is changing. New technologies are allowing an increasing number of people to broadcast and access information over the internet, including traditional audiovisual content. It is possible that the UNESCO convention may place obstacles to legitimate liberalisation issues related to the communications sector, including telecommunications, electronic commerce, and other issues that should not fall within the scope of the Convention on Cultural Diversity.

One of the core principles of GATS is the commitment by members to progressively liberalise their service sectors (Articles XIX-XXI). The principle of 'universal cover' of all service sectors (Article I:3 lit. b) means that the audiovisual sector is also covered by the provisions. Under Article XX of GATS, however, members are permitted to set out individual schedules of specific commitments, and to include terms, limitations and conditions on market access, as well as conditions and qualifications on national treatment. The EU did not undertake any specific commitments on the audiovisual sector and thus has no obligations for market access and national treatment in this sector. These exceptions and limits are an important reminder that liberalisation is not an end in itself, but a means to an end where conditions are suited to it, and where timing and sequencing of liberalisation are carefully coordinated. The GATS agreement itself clearly states that the negotiation process shall take place with a view 'to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations' (Article XIX). Indeed, the GATS agreement provides for exceptions to the Most Favoured Nation (MFN) principle, upon which the entire multilateral trading system rests. The MFN principle (Article II in GATS, Article I in GATT) states that advantages allocated to one trading partner shall apply immediately and unconditionally to all other members. The GATS agreement includes an annex on Article II exemptions that allows members to draw up their own list of exemptions to the MFN principle. Under its MFN obligations, the European Union has excluded the audiovisual sector, justifying this measure for cultural reasons. Thus, neither the EU nor any of its member states are obliged to observe the MFN principle with respect to the audiovisual sector. The UNESCO convention, therefore, does not conflict with existing international trade law.

Furthermore, the UNESCO convention includes a 'savings clause,' a regular feature of international treaties, which states that '[n]othing in this Convention shall be interpreted

as modifying rights and obligations of the Parties under any other treaties to which they are parties' (Article 20.2). In the event of a future conflict between the Convention on Cultural Diversity and the GATS agreement, only the WTO has an effective dispute resolution mechanism; the UNESCO convention provides for dispute settlement by negotiation, good offices, mediation, or conciliation. The decision of the Conciliation Commission is not binding, and a state party may declare that it does not recognise the conciliation procedure at the time of ratification (Article 25.4). It is thus the Dispute Settlement Body of the WTO that will adjudicate any conflict between the two treaties; this fact, coupled with the savings clause in the UNESCO convention, should assuage US fears over the implications of the new treaty.

3. Violating Freedom of Expression?

A more compelling argument made by the United States in its objection to the UNESCO convention, at first sight, is that it authorises states to restrict their citizens' access to information. Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression, and that this includes the right 'to seek, receive, and impart information and ideas through any media and regardless of frontiers'. This right is also enshrined in the International Covenant on Civil and Political Rights (Article 19), and all regional human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 10), and the Inter American Convention on Human Rights (Article 13).

However, there are restrictions on the right to freedom of expression. Both the European and Inter American Conventions allow limitations to be placed on this right, *inter alia*, for the protection of, or respect for, the rights or reputation of others. If used in good faith, the Convention on Cultural Diversity might be seen as an example of such a limitation. While this limitation was originally intended as a restriction on the freedom of expression in order to protect against incitement to hatred (and incitement to commit crimes against humanity and genocide), the UNESCO convention is an attempt to encourage states to engage in regulatory behaviour that would proactively support the survival and promulgation of cultural expressions. In practice, a state must provide a communications environment that allows its citizens an optimal choice when accessing or relating to cultural expressions.

Although the UNESCO convention allows states to take 'all appropriate measures' to do this (including, presumably, restricting access to information), the treaty articulates only positive measures, including the

provision of access to the means of production, dissemination and distribution of cultural activities, goods and services to domestic independent cultural industries, as well as measures aimed at providing public financial assistance. It establishes an International Fund for Cultural Diversity (Article 18), and it aims to promote measures aimed at encouraging non-profit organisations, as well as public and private institutions and artists to develop and promote the free exchange and circulation of ideas, cultural expressions and to stimulate both the creative and entrepreneurial spirit in their activities. In addition, the treaty expressly states that '[c]ultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. *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* (Article 2.1, emphasis added). In essence, the convention aims to encourage states parties to emulate the recent achievements of, for example, the Welsh and Irish parliaments in taking positive measures to protect their national languages from extinction without placing limitations on their citizens' rights to access any cultural expressions that they may wish to.

4. Conclusions

The objections of the United States to the Convention on Cultural Diversity do not stand up to close scrutiny. The treaty does not accord any rights to states that do not already exist under international trade law or international human rights law. While Europe's Television Without Frontiers Directive has received legitimate criticism, it does not contravene any existing international law, and the European Commission is currently drafting new legislation on audiovisual content to replace it. Although Iran (which is currently undergoing accession negotiations with the WTO), banned all foreign films in the week following the adoption of the UNESCO convention (in an unrelated event), mature democracies do not generally violate international treaties in the manner that the US fears. However, the position of the United States on the convention is understandable; as a country with a powerful audiovisual sector, it is in a strong position to compete in, and benefit from, a multilateral trading system that is liberalised and deregulated. The objections of the US to the Convention on Cultural Diversity should be understood as primarily political, and not legal, objections. Successive US governments since the early 1980s have been reluctant to make compromises in international agreements, and the UNESCO convention is the latest in a long list of widely-ratified treaties that have seen strong US objec-

tions. Amongst others, it has not ratified the Rome Statute of the International Criminal Court, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women, the Kyoto Protocol, or the International Convention on the Rights of the Child.

A more valid criticism of the convention may be that it does not go far enough to promote and protect cultural expressions. For the wealthier northern states, the treaty is primarily about the audiovisual services sector and (questionably), about freedom of expression, but it has much greater implications for the majority of the world's people. Countries like Cameroon and Nigeria, with more than 200 distinct cultural groups each and still struggling with the legacies of colonialism, face continuing political and social instability in the absence of positive action towards minority cultural expression, in its creative, economic, and political forms. While states are accorded rights under the UNESCO treaty, they assume no obligations on ratification. Indeed, such an overwhelming adoption of an international treaty is usually an indication that few obligations exist. The Convention on Cultural Diversity should have been the first major international minority rights treaty. With the exception of the International Labour Organisation's Convention 169 on Indigenous and Tribal Peoples, minorities and indigenous peoples are still waiting for their first effective international treaty. While the UNESCO convention does not warrant the fears of the US, it also does not alter existing rights or obligations of states, and unfortunately, does little to advance the rights of minorities. For all its controversy, the Convention on Cultural Diversity, without an adequate enforcement or dispute resolution mechanism, may ultimately prove to be UNESCO's paper tiger.

Alan Brouder (B.A. M.A. LL.M. MSc.) is Senior Research Fellow at the Transnational Economic Law Research Centre, Martin-Luther- University Halle-Wittenberg, Germany.