

**THE RELATIONSHIP BETWEEN THE UNESCO CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS AND OTHER INTERNATIONAL INSTRUMENTS:
THE EMERGENCE OF A NEW BALANCE IN THE INTERFACE BETWEEN COMMERCE AND CULTURE**

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Although Section V of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which addresses the Convention's relationship to other instruments,¹ only contains two articles (20 and 21), it is undeniably the section that sparked the most debate during negotiations. Its drafting was the source of lively discussions in the plenary conference and in the working group set up to reach a consensus on the relationships to be established between the Convention and other instruments.² It is no surprise, therefore, that the definitive wording for articles 20 and 21 was not adopted until the very end of the negotiations.³

Two visions divided the States. Seeing in the Preliminary Draft of the Convention a veiled attempt to remove culture from the World Trade Organization's (WTO) purview, certain countries voiced a desire to have it expressly stipulated in the future Convention that trade commitments would take precedence over the cultural commitments of the Parties in the Convention. However, for the vast majority of States, cultural goods and services could not be considered exclusively as merchandise or consumer goods because they convey identities, values, and meanings. In their eyes, culture must have a legitimate place next to the other concerns of the WTO. Reaching a consensus meant ensuring that the text of the official Convention clearly established the absence of any relation of subordination between itself and other international agreements. In other words, a new balance between commerce and culture had to be found.

These seemingly irreconcilable positions made for intensive legal wrangling. As we will see, the text that was finally adopted contains a certain amount of ambiguity, but faithfully reflects the desire shared by the vast majority of States to exclude any form of subordination between the Convention and the other treaties to which they are party without compromising other treaty commitments they have made.

In the following pages, we will first analyze the content of Article 20, entitled "Relationship to other treaties: mutual supportiveness, complementarity and non-subordination," to highlight its progressive character as an interpretative provision. Next, we will look at Article 21, entitled "International consultation and coordination," which supplements Article 20 by stipulating that the Parties must promote the Convention's objectives and principles in other international forums, and consult each other on the matter as needed. We will take a closer look at the role of the Intergovernmental Committee in this respect and examine the procedures and other mechanisms that could be implemented to meet these commitments.

1 ARTICLE 20: AN INTERPRETATIVE PROVISION

We shall start with a detailed analysis of the wording of Article 20 in order to understand its meaning and determine its role in the Convention's implementation. Next, we will take a look at the future of the article, whose meaning will be determined by State practices and the potential intervention of dispute settlement bodies called on to rule upon it.

¹ The Convention was adopted by the UNESCO General Conference on October 20, 2005. It entered into force on March 18, 2007 and had been ratified by 98 states as of June 25, 2008.

<http://www.unesco.org/culture/en/diversity/convention.com> (retrieved July 7, 2009).

² This is the case for the debates that arose during the examination of Articles 5, 6, and 8.

³ For more on this topic, see Ivan BERNIER, "La négociation de la convention de l'UNESCO sur la protection et la promotion de la diversité des expressions culturelles," *Canadian Yearbook of International Law* Vol.43, (2005): 3–43.

1.1 Article 20: A Breakdown

Article 20 of the Convention reads as follows:

1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,
 - (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and
 - (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.
2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

The article's actual meaning is not immediately clear. The first paragraph, which must be read carefully, seems to set forth elements required to interpret the second. This is confirmed by the history of the negotiations on Article 20. The initial text, the Preliminary Draft drawn up by independent experts, had two versions. The first, borrowing from the Rio Convention on Biological Diversity,⁴ stated that "the provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to the diversity of cultural expression or pose a serious threat to it."⁵ The other stated simply that "the Convention in no way modifies the rights and obligations of Contracting Parties to other existing international instruments." From the outset, a fairly clear division was apparent between the Parties who favored the first version, under which the Convention could, in certain circumstances, modify the rights and obligations arising from other international agreements, and those who preferred the second, which dismissed any possibility of this kind. To break the deadlock, a new approach was clearly necessary.

It wasn't until later in the negotiations that a proposition designed to rally the largest possible number of parties was presented. The text in question borrowed from the language of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity,⁶ whose basic approach with respect to relationships with other treaties was founded upon three propositions. These propositions are listed together in the preamble to the Protocol, where it is noted that "trade and environment agreements should be mutually supportive with a view to achieving sustainable development," that the Protocol "shall not be interpreted as implying a change in the rights and obligations of a party under any existing international agreements," and that "the above recital is not intended to subordinate this Protocol to any other international agreements." With the exception of paragraph (b) of Article 20.1, these are the key components of Article 20 of the Convention.

Interestingly, the Cartagena Protocol itself borrowed from the approach adopted by the negotiators of the 1998 Rotterdam Convention.⁷ Then came the 2001 International Treaty on

⁴ http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVE<http://www.cbd.int/convention/convention.shtml> (retrieved July 7, 2009).

⁵ See Article 19 of the Preliminary Draft of the Convention, version A, paragraph 2.

⁶ The Cartagena Protocol adopted in 2000 entered into force in 2003. <http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf> (retrieved July 7, 2009).

⁷ The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, negotiated under the auspices of the United Nations Environment Programme (UNEP) and the Food and Agriculture Organization of the United Nations. This convention was adopted in 1998 and entered into force in 2004. http://www.pic.int/home_fr.php?type=s&id=79 (retrieved July 7, 2009).

Phylogenetic Resources for Food and Agriculture,⁸ which used an identical solution to solve the issue of relationships with other international agreements. Article 20 of the Convention thus seems to fit into a relatively new trend in international governance that gives equal weight to non-trade and trade concerns with respect to international regulation.⁹ However, Article 20, paragraph 1 (b) of the Convention goes a step further by proposing a concrete means of enhancing complementarity in this matter. It states that “when interpreting and applying the other treaties to which they are parties or when entering into other international obligations,” Parties should take the Convention’s relevant provisions into account. To understand the result of the juxtaposition of the propositions in paragraphs 1 and 2 of Article 20, we will need to take a closer look at them both.

1.1.1 Article 20: Paragraph 1

In the first sentence of Article 20.1, a universally recognized principle of customary international law is set forth: good faith in the execution of international agreements. This principle is repeated in Article 26 of the Vienna Convention on the Law of Treaties, which states “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” In and of itself, the mention of this principle at the start of Article 20 adds nothing to the commitments of the Parties under the Convention. However, it does highlight the principle’s importance for understanding the content of Article 20. This is confirmed upon reading the second sentence, which begins with the word *Accordingly* and sets forth, in two clauses, the behavior expected of the Parties when relating the Convention to other international agreements. The second sentence clearly illustrates the scope of the principle stated in the first. However, before examining the behavior in question, we must first determine what meaning should be attributed to the words *without subordinating this Convention to any other treaty* that immediately precede clauses (a) and (b).

This part of the sentence clearly aims to qualify the scope of these clauses and paragraph 2 by stipulating that the proposed measures do not in any way subordinate the Convention to other treaties. But how should the words *subordinating to any other treaty* be interpreted? Article 30 of the Vienna Convention on the Law of Treaties, which describes the application of successive treaties on the same subject, gives us some insight into the subject. As stated in paragraph 2, “when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” An example of a clause of this type is provided in the North American Free Trade Agreement (NAFTA). It reads as follows:

In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

- a) The *Convention on International Trade in Endangered Species of Wild Flora and Fauna*, done at Washington, March 3, 1973, as amended June 22, 1979,
- b) The *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, and amended June 29, 1990,
- c) The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or
- d) the agreements set out in Annex 104.1,

⁸ This treaty, negotiated under the auspices of the Food and Agriculture Organization of the United Nations (FAO), was adopted in 2001 and entered into force in 2004. http://www.wipo.int/meetings/fr/doc_details.jsp?doc_id=1988 (retrieved July 7, 2009).

Both of these conventions raise the problem of the interface between trade and non-trade concerns. This issue was addressed by Jeffrey L. Dunoff in an excellent article entitled “The Death of the Trade Regime,” *European Journal of International Law* Vol. 10, no. 733 (1998).

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

For a treaty provision to be considered as a subordination clause, the desire to subordinate to other treaties must be readily apparent in the terminology used. Wording will indicate that the provision “is subject to,” “may not infringe upon,” or “may not be considered incompatible,” or that the other treaties “shall take precedence” or “prevail”. In contrast, a non-subordination clause implies that the preceding circumstances do not exist. In practice, however, the terms used are not always so clear. For example, how should we interpret the reservation entered by Mexico when ratifying the Convention on the Protection and Promotion of the Diversity of Cultural Expressions?

The United Mexican States wishes to enter the following reservation to the application and interpretation of Article 20 of the Convention:

- (a) This Convention shall be implemented in a manner that is in harmony and compatible with other international treaties, especially the Marrakesh Agreement Establishing the World Trade Organization and other international trade treaties.
- (b) With regard to paragraph 1, Mexico recognizes that this Convention is not subordinate to any other treaties and that other treaties shall not be subordinate to this Convention.
- (c) With regard to paragraph 1 (b), Mexico does not prejudice its position in future international treaty negotiations.¹⁰

Insofar as paragraph (b) describes the scope of paragraph (a), we would be inclined to think that the reservation gives the Convention and the other agreements equal weight. Another example of an ambiguous clause is Article 6 of the International Convention against Doping in Sport; 2005, entitled “*Relationship to other international instruments*”:

This Convention shall not alter the rights and obligations of States Parties which arise from other agreements previously concluded and consistent with the object and purpose of this Convention. This does not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.¹¹

At first glance, it would appear that the Convention against Doping in Sport takes precedence over other agreements.

Let us return to paragraph 1 (b), which asks Parties to foster mutual supportiveness between this Convention and the other treaties to which they are parties while implementing the Convention in good faith—but without going so far as to subordinate the Convention to the treaties in question. The choice of the verb *foster* to describe the level of commitment is not accidental. The use of a more restrictive verb such as *ensure* would have been difficult to reconcile with the obligation of not subjecting the Convention to other international treaties. As for the expression *mutual supportiveness*, we have already seen the same wording used in the Cartagena Protocol. The equivalent provision in the Rotterdam Convention states that “trade and environmental policies should be mutually supportive with a view to achieving sustainable development.” The same goes for the International Treaty on Plant Genetic Resources for Food and Agriculture, in which the Parties recognize that “this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to sustainable agriculture and food security.” However, whether concepts like *mutual supportiveness* or *complementarity* are used, these provisions make it fairly clear that the relationship between the Convention and other international

¹⁰ UNESCO, “Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005: Declarations and Reservations,” http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html (retrieved July 8, 2009).

¹¹ UNESCO, “International Convention against Doping in Sport, 2005,” http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html (retrieved July 9, 2009).

agreements is not a one-way street. Suggesting, as Michael Hahn does, that the Parties to the Convention should, in the event of a conflict between the Convention and other international agreements, convince the other parties to interpret and apply the former in a manner consistent with the aforementioned agreements without considering the possibility that supportiveness equally applies in the other direction as is suggested by Article 20.1 (b), reflects a biased position founded upon a reductive interpretation of Article 20.1 (a).¹²

With respect to clause (a), it is also worth noting that the notion of mutual supportiveness is no stranger to the debates that have taken place within the WTO on another topic related to trade and culture, that regarding the ties between the WTO and Multilateral Environmental Agreements (MEA). In a report dated June 28, 2004, the chair of the special session of the Trade and Environment Committee on the progress of negotiations on trade and the environment examined a specific aspect of the negotiation mandate assigned to the committee: reflecting on the "relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements."¹³ The report refers to two important documents received since the Ministerial Conference in Cancun, one on the principles of international governance (European Union), and the other on the negotiation and implementation of MEAs (United States). The first is of particular interest, as it suggests examining certain principles of international governance, such as:

(E)mphasizing the importance and necessity of MEAs; the need to design environmental policy within multilateral environmental fora; the need for close cooperation and increased information flow at the national level, and at the international level between various international bodies for the mutual supportiveness of trade and environmental policies; the fact that MEAs and the WTO were equal bodies of international law; and the need to not interpret WTO rules in "clinical isolation" from other bodies of international law.

This text contains the outline of what are now the main thrusts of Article 20 of the Convention. The second document, from the United States, addresses the coordination, transparency, and accountability required at the national level in terms of negotiating and implementing MEAs. It emphasizes the importance of national and international coordination between trade and environment experts, while also presenting a number of characteristics that are desirable in the planning and implementation of trade obligations that contribute to the effective application of MEAs. Although the approaches proposed in these documents are quite different, they both place a great deal of importance on coordination and the exchange of information, concerns that are also expressed in Article 21 of the Convention.

The second clause of Article 20.1 of the Convention completes the first by providing a tangible means of enhancing complementarity between the Convention and other international agreements. At first glance, the source of this provision is not clear, but if we consider the very active role that the European Union played in the drafting of Article 20, it is easy to make the connection between clause 2 and Article 151 of the Amsterdam Treaty Amending the Treaty on the European Union which, in its fourth paragraph, states: "the Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures."¹⁴

The second clause differs from the first in that it imposes upon the Parties a duty to take the relevant provisions of the Convention into account when interpreting and applying other treaties to which they are parties, or when signing other international agreements. According to H  l  ne Ruiz Fabri, the expression *take into account* may appear rather vague

¹² Michael HAHN, "A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law," *Journal of International Economic Law* Vol. 9 (2006): 515–541.

¹³ WORLD TRADE ORGANIZATION, TRADE AND ENVIRONMENT COMMITTEE, *Report by the Chairperson of the Special Session of the Committee on Trade and Environment to the Trade Negotiations Committee*, Document TN/TE 9, Geneva, June 28, 2004.

¹⁴ *Official Journal of the European Union*, Document C 340, November 10, 1997.

It is weaker than an obligation "to comply" but the use of this term would have produced a barely conceivable state of subordination to the Convention. It would have gone far beyond the usual formulas of international law and the ordinary rule of equality between conventions. Moreover, the "taking into account" formula should also, and again, be read in the light of non-subordination. This presupposes an effective "taking into account" within a context of conciliation.¹⁵

This obligation is not absolute, but the Parties must nonetheless take the relevant provisions of the Convention into account in the situations described. In this respect, the analysis by a WTO panel on the obligation imposed by Article 31.3 (c) of the Vienna Convention with respect to the European Communities – Measures Affecting the Approval and Marketing of Biotech Products case, is interesting:

It is important to note that Article 31(3)(c) mandates a treaty interpreter to take into account other rules of international law ("there shall be taken into account"); it does not merely give a treaty interpreter the option of doing so.¹⁶ It is true that the obligation is to "take account" of such rules, and thus no particular outcome is prescribed. However, Article 31(1) makes clear that a treaty is to be interpreted "in good faith". Thus, where consideration of all other interpretative elements set out in Article 31 results in more than one permissible interpretation, a treaty interpreter following the instructions of Article 31(3)(c) in good faith would in our view need to settle for that interpretation which is more in accord with other applicable rules of international law.¹⁷

The comments concerning the binding nature of the expression *take into account* certainly apply to the obligation to take into account set forth in Article 20.1 (b) of the Convention.

Advocate General Juliane Kokott made similar remarks in the Unión de Televisiones Comerciales Asociadas (UTECA) case heard by the European Court of Justice. After citing a number of provisions from the Convention on the Protection and Promotion of the Diversity of Cultural Expression, Ms. Kokott reiterated that "the Community and the Member States that are Contracting States to the UNESCO Convention have undertaken to take that convention into account when interpreting and applying other treaties, that is to say *inter alia* when interpreting and applying the EC Treaty."¹⁸ Although the Court of Justice didn't give the same weight to the Convention's provisions, it did refer to the Convention in the following statement:

Since language and culture are intrinsically linked, as pointed out by, *inter alia*, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the General Conference of UNESCO in Paris on 20 October 2005 and approved on behalf of the Community by Council Decision 2006/515/EC of 18 May 2006 (OJ 2006 L 201, p. 15), which states in paragraph 14 of its preamble that 'linguistic diversity is a fundamental element of cultural diversity', the view cannot be taken that the objective pursued by a Member State of defending and promoting one or several of its official languages must of necessity be accompanied by other cultural criteria in order for it to justify a restriction on one of the fundamental freedoms guaranteed by the Treaty.¹⁹

This first overture to considering the Convention in European Community case law suggests that the commitment undertaken by the parties in Article 20.1 (b) to the Convention is not without weight.²⁰

¹⁵ Hélène RUIZ FABRI, "Reflections on Possible Future Legal Implications of the Convention," in *UNESCO'S Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work*, ed. Nina OBULJEN and Joost SMIERS, *Culture Link Joint Publication*, no. 9., (Zagreb: Institute for International Relations, 2006), 84.

¹⁶ This perspective is confirmed by the International Law Commission which states the following in its comments on Article 27 of the draft Vienna Convention, whose wording is identical to Article 31: "these three elements are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them." *Yearbook of the International Law Commission* Vol. II (1966): 220, para. 9.

¹⁷ WTO, *WT/DS291-293*, para. 7.69.

¹⁸ ECJ, *Opinion of Advocate General Kokott*, Case C-222/07, 2008, para. 99.

¹⁹ ECJ, *Judgment of the Court*, Case C-222/07, 2009, para. 33.

²⁰ For a commentary in line with the ECJ's decision, see Anne Peigné, "La convention de l'UNESCO sur la diversité culturelle, un nouvel instrument pour déroger au principe communautaire de la libre circulation? Interactions entre le droit

The preceding remarks having mostly explored the binding nature of the wording *take into account* rather than its meaning, we must now consider its significance within the context of international law. Upon examination it becomes clear that this commonly used expression conveys the idea of a commitment of a procedural nature whose scope may vary significantly from one case to the next. A first example of its use, taken from WTO Law, appears in Article 3 of the Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994 (GATT):

In the determination of which Members have a principal supplying interest (whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII) or substantial interest, only trade in the affected product which has taken place on an MFN basis shall be taken into consideration. However, trade in the affected product which has taken place under noncontractual preferences shall also be taken into account if the trade in question has ceased to benefit from such preferential treatment, thus becoming MFN trade, at the time of the negotiation for the modification or withdrawal of the concession, or will do so by the conclusion of that negotiation.

Again within the framework of the WTO, the expression reappears a number of times within Article 5 of the Agreement on the Application of Sanitary and Phytosanitary Measures. For example, paragraph 5.3 states:

In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment, or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

Similarly, Article 5.3 of the Agreement on Trade-Related Investment Measures states:

On request, the Council for Trade in Goods may extend the transition period for the elimination of TRIMs notified under paragraph 1 for a developing country Member, including a least-developed country Member, which demonstrates particular difficulties in implementing the provisions of this Agreement. In considering such a request, the Council for Trade in Goods shall take into account the individual development, financial and trade needs of the Member in question.

A final example concerning the environment comes from Article 15.1 of the Cartagena Protocol: "risk assessments undertaken pursuant to this Protocol shall be carried out in a scientifically sound manner, in accordance with Annex III and taking into account recognized risk assessment techniques."

Having read these various examples of the expressions *take into account* and *take into consideration*, we realize that they are almost always followed by details on the subject to be accounted for or considered, and the context in which this should be done. The level of detail of the information provided helps define the scope of the Parties' commitment.

In the case of Article 20.1 (b) of the Convention, the pParties are asked to take into account the "relevant provisions" of the Convention. The subject of the commitment, however, is not very clear, leaving it open to different interpretations. In the Unión de Televisiónes Comerciales Asociadas (UTECA) case brought before the European Court of Justice, Advocate General Kokott cited paragraphs (9), (10), (11) and (12) of the preamble; clauses (a) and (h) of Article 1, Article 2.2, Article 5.1, Article 6.1; paragraphs (a) and (b) of Article 6.2; and Article 20 in its

entirety;²¹ while the Court limited itself to citing paragraph 14 of the preamble.²² On the other hand, the circumstances in which this taking into account comes into play are better defined in the Convention—the commitment provided for in Article 20.1 (b) applies when the Parties are “interpreting and applying the other treaties to which they are parties or when entering into other international obligations.” We will now take a brief look at these two situations.

The first situation deals with the implementation of existing agreements. In this case, the Parties are supposed to have interpreted their commitments and, as needed, defined the actions necessary to fulfill them. To determine whether the Convention’s provisions have been taken into account in the interpretation and application of other agreements, the Parties’ actions must be examined. The taking into account may be reflected in government declarations, laws and rules concerning the implementation of other agreements, or even in the text of these agreements. If the Convention’s provisions have effectively been taken into account the next step is to determine whether this has given way to actions compatible with the aforementioned agreements. In the event of a difference of opinion on this subject, it may be necessary to turn to the appropriate dispute settlement mechanisms to resolve the matter. Furthermore, if a uniform practice were to be widely adopted with respect to a given interpretation, the question might arise as to whether this qualifies as a subsequent practice in treaty application within the meaning of Article 31.3 (b) of the Vienna Convention on the Law of Treaties. We will take a closer look at these hypotheses later on.

The second situation deals with the taking into account of the Convention’s provisions when the Parties negotiate new international agreements. The taking into account then takes a more political character since the agreements are not yet concluded. It is up to each individual Party to convey its preoccupations concerning the taking into consideration of the Convention’s provisions, but, in order to influence the outcome of the negotiation, collective action may be needed. This last concern appears to have been important to the negotiators of the Convention, as they made it the subject of a separate article—21—which we will return to in the second part of this study. Finally, insofar as the taking into account occurs during the negotiation phase, the resulting outcome obviously cannot be portrayed as a modification to the agreement that is eventually concluded.²³

1.1.2 Article 20: Paragraph 2

Paragraph 2 of Article 20, which reads “nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties,” is a concrete application of the basic principle set forth in paragraph 1, namely that the parties must fulfill their commitments with respect to the Convention and other treaties to which they are parties in good faith. The effect of this paragraph is twofold: first, it rules out any interpretation that would present the Convention as an agreement intended to modify multilateral treaties between certain of the parties only, as per Article 41 of the Vienna Convention on the Law of Treaties, which envisages this eventuality. Second, it eliminates the possibility that the Convention, if it is subsequent to other treaties, prevails over them under the conditions set forth in paragraphs 3 and 4 of Article 30 of the Vienna Convention on the Law of Treaties. These provisions read as follows:

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

²¹ *Supra*, note 18, paragraphs 14–19.

²² *Supra*, note 19

²³ See H  l  ne RUIZ FABRI, *supra*, note 15, p. 85.

- a) as between States Parties to both treaties the same rule applies as in paragraph 3;
- b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

There remains the possibility, however, that paragraph 2 of Article 20 legally subjects the Convention to other treaties within the meaning of Article 30.2 of the Vienna Convention on the Law of Treaties. This provision, as we saw earlier, stipulates that “when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” Article 20.2 of the Convention does not, however, provide for this, as the terms *subject to* or *incompatible with* are not used to describe the relationship between the Convention and other treaties. Instead, it states that the Convention will not modify the rights and obligations of the parties with respect to the other treaties to which they are party. In other words, the Convention will not prevail over them. This does not mean that the Convention is subordinate to them, as some authors claim.²⁴ When we read paragraphs 1 and 2 of Article 20 together, it becomes perfectly clear that although the Convention does not prevail over other treaties, they do not prevail over it either. They are actually on equal footing. In fact, it is only when the Convention and the other treaties are so considered that the concept of mutual support set forth in paragraph 1 (a) of Article 20 can be fully understood.

Article 20, as written, is what could be described as a progressive provision, to borrow the term used by the International Court of Justice in its advisory opinion issued in the Namibia case (Legal Consequences), in that its “interpretation cannot remain unaffected by the subsequent development of law [...]”²⁵ Drawing on this decision by the International Court of Justice, the Appellate Body of the WTO also recognized, in the United States – Import Prohibition of Certain Shrimp and Shrimp Products case,²⁶ that the expression *natural resources* was essentially progressive. Therefore, it may be useful to take a closer look now at the factors likely to influence the evolution of this provision.

1.2 The Future of Article 20

The future of Article 20 is tied to how it is applied by the Parties and the way it is interpreted by dispute settlement bodies in eventual cases in the context of the Convention or in other contexts, such as within the WTO.

1.2.1 Applying Article 20

If a planned policy or cultural measure to protect and promote the diversity of cultural expression within a given territory seems likely to conflict with the undertakings made by the implementing Party under other treaties to which it is party, or with undertakings it plans to make as part of negotiations in progress, that Party must determine, according to its own interpretation of Article 20 of the Convention and other treaties to which it is party, how to behave in the circumstances. As long as the aforementioned policy or measure is not contested by the other Parties to the Convention or to the other agreements, the Party will be presumed to be in compliance with its commitments.

Should a significant number of parties adopt similar measures without provoking negative reactions from the other parties, they could potentially find themselves in a situation like the one outlined in Article 31.3 (b) of the Vienna Convention. This provision stipulates that, for the purposes of interpreting a treaty, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” must be taken into account

²⁴ Michael HAHN, *supra*, note 12, p. 546.

²⁵ *Yearbook of the I.L.C.*, 1971, p. 31.

²⁶ See *infra*, note 46.

simultaneously with the context. Of course, such an interpretation does not automatically arise from a common practice unless the practice is both convergent and clear with respect to its legal impact. In addition, it would only be applicable in principle to Article 20 of the Convention. However, insofar as the interpretation of Article 20 addresses the relationship between the Convention and other agreements, it opens the door to a reaction from the Parties to those other agreements. In this case, the notion of subsequent practice cannot sidestep this reaction.

In order to understand how the practice followed in the interpretation of the Convention can influence the interpretation of Article 20, let us consider two sample situations likely to result in the concrete application of the Article. In the first example, a Party to the Convention chooses to abstain from making international commitments that could hinder its ability to protect and promote its diversity of cultural expression. In the second, a Party concludes coproduction and codistribution agreements at the international level in order to create favorable conditions for promoting the diversity of cultural expression. A closer look at both of these cases will enable us to highlight the importance of practice in implementing Article 20 of the Convention.

The right of a party to the Convention to refrain from making international commitments likely to hinder its ability to protect and promote the diversity of cultural expression within its territory is a right inherent to its sovereignty. The Convention itself does not require that Parties refrain from making such commitments, even though this is implicitly suggested in Article 5, which reaffirms the sovereign right of parties to develop and implement cultural policies and adopt measures for protecting and promoting the diversity of cultural expression. Given the spirit of the Convention, it is difficult to understand why a party would want to voluntarily restrain its ability to protect and promote the diversity of cultural expression within its territory. Yet the WTO calls upon these same Parties to undertake the gradual elimination of existing restrictions on trade within all sectors, including culture. Article XIX of the General Agreement on Trade in Services (GATS) provides that successive trade negotiations will be held to progressively increase the liberalization of services, with no sector excluded out of hand from the negotiations.²⁷ However, the negotiation procedure used until now in the GATS negotiations does not require WTO members to make commitments in all sectors of activity, but rather allows them to choose the sectors in which they intend to do so. Although this seems to suggest that members possess all the latitude necessary to permanently refuse liberalization commitments in a specific sector such as that of culture, not everyone agrees.

Tania Voon expressed doubts on this matter in a 2006 article. She begins by affirming that a WTO member state that refuses to make any commitments concerning audiovisual services within the framework of GATS negotiations:

would be unlikely to violate any WTO obligations. The design of GATS is intentionally flexible, so that no WTO Member is legally bound under the WTO agreements to make commitments in any particular services sector, whether or not they have committed to do so or to refrain from doing so under another international instrument.²⁸

However, she then goes on to point out that the exercise of this right by a large number of Parties would go against the WTO's declared objective of progressively liberalizing trade in services—which suggests that this right is not absolute. Writing on the same topic in 2006, Michael Hahn pointed out that Article XIX of GATS:

requires the member's general commitment to progressive liberalization, but not an undertaking to liberalize each and every services sector in each and every future trade round. Any other interpretation would be un-reconcilable with the clearly expressed wish of the contracting parties to treat services as fundamentally different from goods and therefore not compatible with the Vienna Convention's mandate to read a provision in its context.²⁹

²⁷ GATS, Article XIX.1.

²⁸ Tania VOON, "UNESCO and the WTO: A Clash of Cultures?," *ICLQ*, no. 55 (2006): 643. See also from the same author, *Cultural Products and the World Trade Organization*. (Cambridge: Cambridge University Press, 2007), 151.

²⁹ Michael HAHN, *supra*, note 12, p. 542.

In such a context, the fact that the vast majority of WTO members refused to make such commitments in the audiovisual sector during the Uruguay Round negotiations without their actions being contested as running counter to the WTO's declared objective of progressively liberalizing trade in services appears to suggest that Hahn's opinion is correct. Parties to the Convention as a matter of fact may not only refrain from making commitments in the cultural sector, but may also consult with each other to defend this right during trade negotiations, as is suggested by Article 21 of the Convention. By doing so, the parties would simply be following up on their commitment under Article 20.1 (b) to take into account the provisions of the Convention when interpreting and applying the other treaties or making other international undertakings.

Where coproduction and codistribution agreements are concerned, the problem presents itself differently insofar as there is potential for conflict between Convention and WTO provisions. While Article 12 (e) of the Convention encourages such agreements, Article II of the General Agreement on Trade in Services prohibits the implementation of any measure incompatible with the treatment of the most favored nation—except if the measure appears in the Annex on Article II Exemptions and conforms to the conditions listed therein. Coproduction and codistribution agreements by nature are incompatible with this treatment, as only signatory States may benefit from the advantages that they procure—which explains why the majority of members that were party to such agreements when GATS came into force included them into the Annex of Article II. Countries that did not request such exemptions (particularly developing countries that were not parties to such agreements) are now prohibited in principle from making agreements of this type, even if they can contribute financially to the development of the country's film industry. In principle, countries that did exempt their coproduction and codistribution agreements in the Annex to Article II were supposed to eliminate them under Article 6 of Annex II after a 10-year period. However, there was no strict obligation to do so, even though certain authors stress again that this runs counter to the spirit of Article II of GATS and the Annex to Article II.³⁰ Over 13 years have passed since these reservations were entered, and the vast majority—if not all—are still in force. Furthermore, new coproduction agreements are regularly negotiated, some of which even involve members that did not enter reservations. Given these developments, it could be suggested that WTO member practices with respect to the coproduction and codistribution agreements reflect a rather broad interpretation of GATS Article II. It should also be noted that this interpretation seems to correspond to a major concern of the Parties involved, given the large number of bilateral coproduction agreements currently in effect³¹ and the many films coproduced worldwide each year. Coproduction is also encouraged through regional agreements such as the European Convention on Cinematographic Co-production³² and the MERCOSUR Protocol of Cultural Integration.³³

Even the film industry seems to have adapted quite readily to this development. By 1998, McFadyen, Hoskins and Finn were writing

In recent years, it has become increasingly difficult for national markets to support the cost of feature films and television drama production. Producers worldwide have increasingly turned to international co-productions (defined to include both official treaty co-productions and non-treaty co-ventures) in order to compete effectively.³⁴

In fact, all of this is happening as though the practice of states with respect to coproduction agreements, by drawing on a progressive rather than fixed interpretation of GATS Article II, simply fulfilled a concrete need. This hypothesis is perhaps not as unusual as it seems. In 1998,

³⁰ See Tania VOON, *Cultural Products and the World Trade Organization*, Op.cit., p. 116.

³¹ In Canada, for example, more than fifty agreements of this type are in effect. The list of agreements is available online at <http://www.telefilm.gc.ca/04/43.asp>. In fact, the majority of developed countries and a substantial number of developing countries—no less than 80 in total—are parties to coproduction agreements.

³² COUNCIL OF EUROPE, *Document STE/147*, 1992.

³³ MERCOSUR, Decision MERCOSUR/CMC/Dec., No 11/96, Protocol of Cultural Integration, Article IX.

³⁴ Stuart MCFADYEN, Colin HOSKINS, and Adam FINN, "The Effects of Cultural Differences on the International Co-production of Television Programs and Feature Films," *Canadian Journal of Communication*, Vol. 23, no. 4 (1998): 523.

in the United States – Import Prohibition of Certain Shrimp and Shrimp Products case, the WTO Appellate Body noted that it was necessary to interpret the expression *exhaustible natural resources*, which had appeared 50 years earlier, in a progressive fashion, and that it should be “read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”³⁵ It is also interesting to note that in its interpretive approach to that expression, this Body did not hesitate to borrow from non-WTO international agreements.

All in all, there is reason to believe that turning to Article 20 of the Convention to guide parties’ actions with respect to coproduction agreements would tend to support an interpretation and application of GATS Article II similar to the practices employed to date by WTO members. In other words, by acting in this way, the Parties would place themselves in a position of mutual support rather than conflict with the WTO, as stipulated in Article 20.1 of the Convention. Furthermore, it is safe to assume that they would defend an identical position within the framework of future WTO negotiations. It is worth remembering in this regard that the primary justification given for most of the Article II exemptions requested during the GATS negotiations on coproduction agreements was the need to protect national and regional identities.³⁶

1.2.2 Article 20 As Interpreted by a Dispute Settlement Mechanism

It is only natural to think that the functioning of Article 20 would be tested first and foremost within the framework of the dispute settlement mechanism created by the Convention. After all, under Article 25, the mechanism can be set in motion by the plaintiff alone unless the defending Party declared upon ratification of the Convention that it did not recognize the conciliation procedure provided for. Since only three of the 99 states that have ratified the Convention so far accompanied their ratification with such a declaration,³⁷ the potential for invoking the Article 25 mechanism is very real in cases of conflict concerning the interpretation or application of Article 20 of the Convention. However, when a Party to the Convention considers that a dispute with another party to the Convention concerns the violation of obligations or the annulment or reduction of advantages resulting from WTO agreements, there is nothing preventing it, by virtue of both the Convention and the WTO Understanding on Rules and Procedures Governing the Settlement of Dispute, from appealing to the WTO mechanism. This means that depending on the nature of the dispute between the Parties and the legal arguments set forth, either or both of the dispute settlement procedures could be employed.

1.2.2.1 Article 20 Interpreted Within the Framework of the Convention

Given that the dispute settlement mechanism provided for by the Convention is based on conciliation,³⁸ it is important to begin by thoroughly understanding its characteristics and what distinguishes it from the WTO arbitration mechanism. Conciliation is defined as “an intervention in the settlement of an international dispute by a body with no political authority of its own that is endowed with the trust of the Parties to a dispute and tasked with examining all aspects of the dispute and proposing a non-binding solution.”³⁹ Given its mandate, this body must first elucidate the facts of the case. In its examination of the arguments of the parties, it can take into account not only the rules of law applicable to the present case, but also all of the non-legal elements of the dispute. Its recommendations can be founded fully or in part in the law. Since the solution

³⁵ WTO *DS58/AB/R*, p. 51, para. 129.

³⁶ See, on this subject, Ivan BERNIER, “Trade and Culture,” in *The World Trade Organization. Legal, Economic and Political Analysis*, ed. Patrick F. J. MACRORY, Arthur E. APPLETON, and Michael G. PLUMMER (New York/Heidelberg: Springer, 2008), 768, note 100.

³⁷ Chili, Mexico, and Vietnam.

³⁸ Article 25.1 provides, first and foremost, that parties seek a solution to their dispute through negotiation. If no agreement is reached, they may also, through a shared agreement, have recourse to the good offices of a third party or request third-party mediation (Article 25.2). Article 25 is clarified in the Annex to the Convention regarding the procedure for conciliation.

³⁹ Gérard CORNU, *Vocabulaire juridique* (Paris: Presses universitaires de France, 1992), 173 (translation).

recommended by the body is non-binding, the Parties are naturally free to reject it.⁴⁰ Arbitration, on the other hand, is characterized by the fact that it always results in a ruling. This ruling is generally handed down on the basis of law, although the arbitrator may also decide cases *ex aequo et bono* if given the power to do so by the Parties. Also, because it is binding,⁴¹ the adjudication must be implemented in good faith by the Parties.

Recourse to conciliation for settling disputes within the framework of the Convention is appealing because it makes it possible to account for legal, political, and economic as well as social and cultural considerations, and results in a solution oriented toward the future. Indeed, the goal is to bring the Parties together rather than to declare a victor. For example, in the border dispute between Belize and Guatemala, the conciliation commission was able to go beyond the immediate conflict to arrive at solutions based on respect and collaboration, such as the implementation of a tripartite regional fisheries management commission, the creation of a multiple-use ecological park, and the establishment of a development trust fund.⁴² Application of the Article 25 conciliation procedure to disputes that raise concrete questions over the relationship between the Convention and other international instruments opens the door to solutions that are more likely to take the dispute's cultural dimensions into account. Some might argue that the further the proposed solution is from a strictly legal interpretation of the parties' rights and obligations, the less likely it is to be adopted. However, this remains to be proven. In the 1997 magazine dispute between the United States and Canada at the WTO, the organization's ruling—although entirely favorable to the United States—was the subject of lengthy negotiations between the parties with respect to its implementation. The negotiations led to an arrangement that, to a certain extent, took into account Canada's cultural concerns. Would this three-year dispute have been better settled through conciliation? It is hard to say, as not only would the United States have had to sign and ratify the Convention, but also agree to be subject to Article 25. Nonetheless, there is reason to believe that the agreement reached by the Parties would not have been beyond the scope of a conciliation commission such as the one provided for by the Convention. In fact, were a similar conflict to arise today between two parties to the Convention, conciliation proceedings would in all likelihood make it possible to reach an equivalent compromise, more quickly and at a lower cost.

1.2.2.2 Article 20 Interpreted Within the Framework of the WTO

The Dispute Settlement Body of the WTO is primarily called upon to rule on the interpretation and application of WTO-related agreements,⁴³ so it seems unlikely that it would refer to Article 20 of the Convention to settle a case brought before it. To this effect, it is worth recalling the following comment by the Special Group in the Canada – Certain Measures Concerning Periodicals case:

Before concluding, in order to avoid any misunderstandings as to the scope and implications of the findings above, we would like to stress that the ability of any Member to take measures to protect its cultural identity was not at issue in the present case. The only task entrusted to this Panel was to examine whether the treatment accorded to imported periodicals under specific measures identified in the complainant's claim is compatible with the rules of GATT 1994.⁴⁴

However, the possibility of a reference to Article 20 cannot be ruled out inasmuch as the Dispute Settlement Body has recognized that non-WTO legal instruments could, in some cases, play a role in the interpretation of the organization's agreements. The scope of this overture must yet be defined, as it is far from clear. For the moment, the least we can say is that the Dispute Settlement Body's jurisprudence on the subject lacks consistency.

⁴⁰ Jean-Pierre COT, *La conciliation internationale* (Paris: Éditions A. Pedone, 1968), 8–9.

⁴¹ Gérard CORNU, *Op. cit.*, note 31, p. 173.

⁴² ORGANIZATION OF AMERICAN STATES, GENERAL SECRETARIAT, *2002 Annual Report*, Conflict Prevention, Doc.cap02a-3, p. 28.

⁴³ WTO, *Dispute Settlement Understanding*, articles 1 and 11.

⁴⁴ WTO, *WT/DS31/R March 14, 1997*, para. 5.45.

It was in 1996—in the United States – Standards for Reformulated and Conventional Gasoline case to be precise—that the Appellate Body of the WTO first opened the door to borrowing from non-WTO rules of law⁴⁵ for interpreting its own agreements. To justify this borrowing, it affirmed that the “General Agreement is not to be read in clinical isolation from public international law.” Two years later, in the United States – Import Prohibition of Certain Shrimp and Shrimp Products case,⁴⁶ it appreciably enlarged the possibility of borrowing from international public law by drawing on conventions other than the Vienna Convention on the Law of Treaties—at least one of which had not been ratified by all of the parties to the dispute—to interpret the expression *natural resources*.⁴⁷ In 2001, still in relation to the same case, the question arose again when Malaysia appealed under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Dispute to contest the implementation by the United States of the of the Appellate Body’s decision. The Special Group stated that:

Finally, we note that the Appellate Body, like the Original Panel, referred to a number of international agreements, many of which have been ratified or otherwise accepted by the parties to this dispute. Article 31.3(c) of the Vienna Convention provides that, in interpreting a treaty, there shall be taken into account, together with the context, “any relevant rule of international law applicable to the relations between the parties”. We note that, with the exception of the Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS), Malaysia and the United States have accepted or are committed to comply with all of the international instruments referred to by the Appellate Body in paragraph 168 of its Report.⁴⁸

In 2006, however, the Special Group called upon to examine the dispute between the United States, Canada, Argentina, and the European Communities in the European Communities – Measures Affecting the Approval and Marketing of Biotech Products case⁴⁹ issued an opinion on borrowing from public international law that significantly narrowed the opening made in the Shrimp case. Drawing from Article 31.3 (c) of the Vienna Convention, which stipulates that “any relevant rules of international law applicable in the relations between the parties” must be taken into account simultaneously with the context, the Special Group stated:

The European Communities appears to suggest that we must interpret the WTO agreements at issue in this dispute in the light of other rules of international law even if these rules are not binding on all Parties to this dispute. In addressing this argument, we first recall our view that Article 31(3)(c) should be interpreted to mandate consideration of rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted. The parties to a dispute over compliance with a particular treaty are, of course, parties to that treaty. In relation to the present dispute it can thus be said that if a rule of international law is not applicable to one of the four WTO Members which are parties to the present dispute, the rule is not applicable in the relations between all WTO Members.⁵⁰

As the Special Group’s report was not appealed, the parties now face two seemingly contradictory points of view and a divided school of thought on the matter.⁵¹

⁴⁵ WTO, *WT/DS2/AB/R April 29, 1996*, para. 17.

⁴⁶ WTO, *WT/DS58/AB/R October 12, 1998*.

⁴⁷ *Idem*, para. 130.

⁴⁸ WTO, *WT/DS58/RW June 15, 2001*, para. 5.58.

⁴⁹ WTO, *WT/DS291-293/R*, para. 7.61–7.75.

⁵⁰ *Idem*, para. 7.71.

⁵¹ See, for example, Gabrielle, MARCEAU, “Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and other Treaties,” *Journal of World Trade*, No. 35 (2001): 1081; Joost PAUWELYN, “The UNESCO Convention on Cultural Diversity, and the WTO: Diversity in International Law-Making?,” *Insights* (2005); Michael HAHN, *supra*, note 12, p. 547; C.B. GRABER, “The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO,” *Journal of International Economic Law*, No. 9 (2006): 553; Alex KHACHATURIAN, “The New Cultural Diversity Convention and its Implication on the International Trade Regime: A Critical Comparative Analysis,” *Texas International Law Journal*, No. 46 (2006):191 and 201–204.

The chances of seeing the Dispute Settlement Body of the WTO issue an opinion on Article 20 of the Convention thus seem fairly slim for the time being. Yet, it came close to doing so in the recent China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products case.⁵² Indeed, in its oral presentation at the first substantive meeting of the Panel on the subject, the United States, which was responding to an argument put forth by China to the effect that the Convention on the Protection and Promotion of the Diversity of Cultural Expressions and Other International Instruments justifies the use of special protective rules for cultural goods that are counter to the rules of the WTO, made the following point:

China fails to note 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.”⁵³

Referring back to the WTO text, it followed up with a second argument:

In any event, nothing in the text of the WTO provides for an exception from WTO disciplines in terms of “cultural goods”, and China’s Accession protocol likewise contains no such exception. China’s reference to the work of UNESCO is thus unavailing, even without considering the fact that the United States and a number of WTO Members are not parties to the UNESCO Convention.⁵⁴

The issue did not come up again in the subsequent exchanges between the Parties and no reference to it appears in the findings of the Panel of the Panel, However. China, in its attempt to justify some of the measures at issue under paragraph (a) of Article XX of the GATT (measures necessary for the protection of public morality), did succeed in linking the UNESCO Declaration on Cultural Diversity to that provision Its argument was as follows:

China considers that reading materials and finished audiovisual products are so-called “cultural goods”, i.e., goods with cultural content. China submits that they are products of a unique kind with a potentially serious negative impact on public morals. China explains that, as vectors of identity, values and meaning, cultural goods play an essential role in the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviours. China notes in this respect the UNESCO *Universal Declaration on Cultural Diversity*, which China says was adopted by all UNESCO Members, including the United States. In its Article 8, the *Declaration* states that cultural goods are “vectors of identity, values and meaning” and that they “must not be treated as mere commodities or consumer goods”. In China’s view, it is clear, therefore that, depending on their content, cultural goods can have a major impact on public morals⁵⁵.

It is interesting to point out here that Article 8 of the UNESCO Declaration on Cultural Diversity quoted by China is reproduced integrally in the Preamble of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and cited again in Article 1 (g) as one of the goals of the Convention. The argument was received in the following terms by the Panel:

⁵² China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products ,WTO, *Case DS363/R*, 2009.

⁵³ *Ibid.*, p. 33, para. 4.207. See also OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (USTR), “China – United States, Oral Statement of the United States of America at the First Substantive Meeting of the Panel,” July 22, 2008, para. 25. <http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/china-%E2%80%94-measures-affe> (retrieved July 10, 2009).

⁵⁴ *Ibid.*, para. 26.

⁵⁵ *Supra*, note 52, paragraph 7.751 of the Report

We note China's reference to the UNESCO *Declaration on Cultural Diversity*. We observe in this respect that China has not invoked the *Declaration* as a defence to its breaches of trading rights commitments under the Accession Protocol. Rather, China has referred to the *Declaration* as support for the general proposition that the importation of products of the type at issue in this case could, depending on their content, have a negative impact on public morals in China. We have no difficulty accepting this general proposition, but note, as indicated, that we need to focus more specifically on the types of content that is actually prohibited under China's relevant measures⁵⁶.

In the light of these remarks, one might think that an argument using the Convention to interpret Article XX (a) of the GATT would have been received by the Panel if the United States had been party to the Convention. But would it have been received if some other members of the WTO were not parties to the Convention? Had an argument based on Article 20 of the Convention been submitted to it in those conditions, the Panel could have simply pointed out that not all WTO members were parties to the Convention and refused to take it into consideration, as was decided in the 2006 European Communities – Measures Affecting the Approval and Marketing of Biotech Products case. But it could have just as readily adopted a broader approach based on the conclusions of the Appellate Body in the United States – Import Prohibition of Certain Shrimp and Shrimp Products case and examined the scope of Article 20 of the Convention in the case at issue.

2 ARTICLE 21: AN OPERATIONAL PROVISION

When Parties to the Convention are subject to international agreements that interfere with the Convention or are negotiating new agreements likely to affect it, they can always attempt to promote its objectives and principles within these forums. Article 21, which recognizes this possibility, asks them as a matter of fact to act in this manner. The Parties can do so either on an individual basis without consulting each other or, where circumstances allow, as a group after consulting amongst themselves, as suggested in the second sentence of Article 21. We will now examine these two possibilities.

2.1 Parties' Individual Commitment within the Framework of Their Diplomatic Practices

The commitment in question is one of means: it commands Parties to “promote the objectives and principles of this Convention in other international forums,” but allows them to choose their own means of doing so. It is interesting to note that the original version of this article, Article 13 of the Preliminary Draft, stipulated that the Parties would undertake, *as appropriate*, to promote the principles and objectives of the Convention. The fact that the words *as appropriate* were removed from the final version clearly shows that this is not an optional commitment. In fact, this commitment, which is one of good faith, could go so far as to prohibit the Parties from defending, in other international forums, positions contrary to the objectives and principles of the Convention and likely to compromise their commitment to its terms.

The expression *international forums* used in Article 21 can be interpreted in a number of ways, as is evident upon the examination of other international instruments that refer to it. In the Canada – Colombia Free Trade Agreement signed on November 21, 2008,⁵⁷ Article 504.2, which enumerates the various functions assigned to the Committee on Sanitary and Phytosanitary Measures created by the agreement, lists the following forums in clause (g):

⁵⁶ Ibidem, note 538 of the Report

⁵⁷ <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/andean-andin/can-colombia-colombie.aspx?lang=fra> (retrieved July 9, 2009).

the promotion of bilateral consultations on sanitary and phytosanitary issues under discussion in multilateral and international forums such as the WTO SPS Committee, the Committees of the Codex Alimentarius Commission, the IPPC, the OIE, and other international and regional forums on food safety, human, animal, and plant health.

There is an even more explicit provision on the subject in a decision rendered by the International Tropical Timber Organization (ITTO) to establish a group of experts tasked with drafting recommendations on the role of the ITTO within international organizations and forums:⁵⁸

In its work, the Expert Panel will take into account Members' views and on-going developments within relevant international and regional organizations and forums, including inter alia:

- United Nations Forum on Forests (UNFF)
- Collaborative Partnership on Forests (CPF)
- African Timber Organization (ATO)
- United Nations Food and Agriculture Organization (FAO)
- World Bank
- Center for International Forestry Research (CIFOR)
- International Union for Forestry Research Organizations (IUFRO)
- United Nations Environment Programme (UNEP)
- International Union for the Conservation of Nature (IUCN)
- United Nations Framework Convention on Climate Change (UNFCCC)
- Convention on Biological Diversity (CBD)
- Convention to Combat Desertification (CCD)
- Convention on International Trade in Endangered Species (CITES)
- Global Environment Facility (GEF)
- World Trade Organization (WTO)
- ASEAN Foundation
- Asia Pacific Economic Cooperation (APEC)
- Tarapoto Process

The striking thing about these two examples including the expression *international forums* is the use of an illustrative list of related forums to facilitate the implementation of the commitments made. This technique could certainly be employed to good end to clarify the scope of Article 21 of the Convention. However, the language used in these examples raises some questions concerning the scope to be given to the expression *international forums* with respect to the Convention. For example, should the distinction between the organizations and international forums in the decision by the International Tropical Timber Organization lead us to believe that there is an obvious difference between them, or are they just two synonymous terms that express the same reality? Article 21, as we know, does not explicitly refer to international organizations. The same question may be raised with respect to the distinction made between international, multilateral, and regional forums in both texts. Because Article 21 of the Convention speaks exclusively of "international forums," should multilateral and regional forums be considered to be excluded? Finally, should it be considered that the expression *international forums* applies equally to international governmental and non-governmental organizations, as suggested by the mention of an international non-governmental organization like the International Union for the Conservation of Nature in the list of international and regional organizations and forums annexed to the decision of the International Tropical Timber Association? In the case of Article 21 of the Convention, this poses the problem of identifying which types of interventions could be carried out by the Parties within these non-governmental organizations.

⁵⁸ ITTO, International Tropical Timber Organization, *Decision 13(XXIX), Document ITTC(XXIX)/29*, November 4, 2000.

At the risk of attributing it a content largely devoid of meaning, it seems obvious that the expression *international forums* should be interpreted relatively broadly in the context of the Convention, i.e., as encompassing both international governmental organizations (including the commissions and special committees under them) and international non-governmental organizations, be they multilateral, regional, or bilateral. The choice of the English words *international forums* is also noteworthy, because it refers first and foremost to public spaces for discussion. International documents that use the expression make reference to international organizations of all types, but also to international conferences and meetings where states discuss matters of common concern. The use of the term *forums* in the English text of the Convention supports a broad interpretation of *enceintes*, the term used in the French version. The only limitation applicable in this regard concerns the relevance of the forums in question with respect to the objectives and field of application of the Convention, and the possibility offered to states interested in participating in them.

Does Article 21 require operational guidelines? It was not among the articles identified by the Conference of the Parties in 2007 for priority treatment in establishing such guidelines. However, judging from the guidelines already adopted for Articles 7, 11, 13, 14, and 15, for example,⁵⁹ it is difficult to see why Article 21 should not have its own guidelines, as it could benefit from further clarification. As we saw earlier, drawing up an illustrative list of relevant forums where Parties could promote the Convention's objectives and principles would certainly facilitate its implementation. In the cultural sphere, forums such as UNESCO, the International Forum on Cultural Policy (IFCP), the Organization of American States (OAS), the UN, the Council of Europe, Convenio Andrés Bello, and Organisation intergouvernementale de la Francophonie could be mentioned. Outside of the cultural sphere, forums such as the WTO, UNCTAD, MERCOSUR, ASEAN, OECD, WIPO, etc. could also be included. Because it is essentially the duty of the Parties to promote the objectives and principles of the Convention in other international forums, the operational guidelines could also encourage them to draw up their own list according to their own international commitments. To compose this list, inspiration could be drawn from (and necessary adjustments made to) the following policy statement issued by the government of Finland with respect to cultural cooperation under the auspices of international organizations:

A key aspiration in international cultural policy, emerging as a result of growing globalisation, is to safeguard cultural diversity and to promote sustainable development in culture. This global issue is discussed within the EU, the Council of Europe, the World Trade Organisation and the UN organisation. The UNESCO Convention on the protection and promotion of the diversity of cultural expressions provides a basis for cultural cooperation in which the guiding principle is to recognise the value of cultural products and services both as cultural intermediaries and as commodities in international trade.

Important vehicles for the Ministry of Education in cultural cooperation are UNESCO, the Council of Europe, the Nordic Council of Ministers and the Nordic Cultural Fund, the Council of Baltic Sea States, the Barents Euro-Arctic Council and their cultural organs. Another important form of international interaction is cooperation with regions adjacent to Finland.⁶⁰

Concrete ways of promoting the objectives and principles of the Convention could also be suggested to the Parties in future guidelines on Article 21. Various avenues are open to the Parties on this issue. They could begin by making statements to this effect at conferences and international meetings on relevant themes or even during bilateral or multilateral meetings between heads of state.⁶¹ When speaking on culture within the framework of existing

⁵⁹ For the text of these provisions, see UNESCO, *Diversity of Cultural Expressions*, Conference of the Parties, 2nd regular session, Paris, June 15–16, 2009, Document CE/09/2.CP/Res., Resolution 2.CP7, Annex.

⁶⁰ See Government of Finland, "Ministry of Education, Cultural Policy, International Cultural Cooperation," <http://www.minedu.fi/OPM/Kulttuuri/kulttuuripolitiikka/?lang=en> (retrieved July 9, 2009).

⁶¹ On the bilateral level, see "Déclaration conjointe de M. Jacques CHIRAC, président de la République, et de M. Nambaryn ENKHBAYAR, président de la Mongolie," 2008. <http://www.ambassademongolie.fr/Article/65-declaration-conjointe.html> (retrieved July 9, 2009). On the multilateral level, see ORGANISATION INTERNATIONALE DE LA

international agreements, Parties could stress the importance of taking these objectives and principles into account or even ask, when negotiating new international agreements, that provisions to this effect be added. This practice seems to be catching on, but it is too early to tell what will come of it. Some recent developments are however worth noting: barely a month after adopting the Convention in 2005, Brazil drew explicitly from Article 21 while negotiating a new WIPO treaty on the protection of broadcasting organizations to request the insertion of an article related to the protection and promotion of cultural diversity. Peru followed in its footsteps just a few months later.⁶² In December 2007, the European Union, party to the Convention, signed an economic partnership agreement with Cariforum in which it invoked the UNESCO Convention to include a protocol for cultural cooperation as an appendix. As other agreements of a similar nature are currently in the process of negotiation, we can expect the number of agreements that make reference to the Convention to rise.

Despite these developments—or perhaps because of them in cases where they are seen as indicators that the Parties do not necessarily need guidelines to take action in accordance with Article 21—the Conference of the Parties, at its second ordinary session in June 2009, neglected to include Article 21 among those for which guidelines were to be established by the Intergovernmental Committee by 2011. However, this choice in no way modifies the task mandated to the Committee to establish procedures and other mechanisms of consultation in order to promote the objectives and principles of the Convention.

2.2 Consultation: The Parties' Collective Commitment

Under Article 21, not only do the Parties undertake to individually promote the objectives and principles of the Convention in other international forums, but to “consult each other, as appropriate, bearing in mind these objectives and principles.” The original version of this article in the Preliminary Draft of the Convention stated that “States Parties shall consult each other within UNESCO in order to develop common approaches.”⁶³ During the negotiations, the reference to UNESCO was deleted, providing the Parties with more leeway to organize the consultation themselves, but without leaving them entirely to their own devices. In the current text of the Convention, Article 21 is supplemented by Article 23.6 (e), in which the Intergovernmental Committee is tasked with the concrete mandate “to establish procedures and other mechanisms for consultation aimed at promoting the objectives and principles of this Convention in other international forums.” Contrary to the operational guidelines prepared at the behest of the Conference of the Parties and submitted for its approval, this mandate is provided for in the Convention and its execution is left to the discretion of the Intergovernmental Committee, which is responsible for determining the appropriate time and manner for fulfilling it.

Although the title of Article 21 refers to international consultation and coordination, the term coordination does not appear in the related text or in the text of Article 23.6 (a). In fact, only consultation is mentioned. Since the purpose is no longer to “develop common approaches,” as stipulated in Article 13 of the Preliminary Draft of the Convention, it appears that Article 21, despite its title, and Article 23.6 (e) now deal solely with consultation. In practice however, nothing prevents consultation from leading to some form of international consultation and coordination.

The mandate entrusted to the Intergovernmental Committee under Article 23.6 (e) to establish “procedures and other mechanisms for consultation” leaves the Committee a great deal of latitude in choosing which of these it prefers. This flexibility can range from a simple invitation to the Parties to express themselves freely on a given subject—be it orally, at a meeting organized

FRANCOPHONIE “Déclaration de Bucarest,” September 29, 2006, para. 47. <http://www.tfq.ulaval.ca/axl/francophonie/Bucarest-decl2006.htm> (retrieved July 9, 2009).

⁶² For Brazil, see ITTO, *Document SCCR/13/3Corr*, November 21, 2005. http://www.wipo.int/meetings/fr/doc_details.jsp?doc_id=53241 (retrieved July 9, 2009). For Peru, see ITTO, *Document SCCR/14/6*, April 28, 2006. www.wipo.ch/edocs/mdocs/copyright/fr/sccr_14/sccr_14_6.doc (retrieved July 9, 2009).

⁶³ For Article 13 of the Preliminary Draft of the Convention, see UNESCO, *Document CLT/CPD/2004/CONF.607/6*, December 2004.

for this purpose, or in writing by a set deadline—to sending out a relatively detailed questionnaire. The procedure to follow will be determined on the basis of each request for consultation.

Given the Parties' well-known reticence toward initiatives with the potential to complicate the functioning of the Convention, it seems obvious that a simple, gradual, and pragmatic approach should be developed to implement such a mechanism. This approach could be similar to the one adopted by the Intergovernmental Committee and the Secretariat for drawing up operational guidelines for the sectors of intervention covered by the Convention. The approach in question generally comprises a first phase involving preparation of an issue paper, a second phase where the Parties' views are explored through consultation, and a third phase to seek a consensual approach. Of particular interest in this respect was the approach used to draft operational guidelines for Article 16 of the Convention, as the issue at hand—the granting of preferential treatment for developing countries—was clearly likely to have repercussions in other international forums, particularly the WTO. During the first ordinary session of the Intergovernmental Committee, it was initially decided to task a group of six qualified experts with preparing fact-finding documents on the issue of preferential treatment addressed in Article 16. During its second ordinary session in December 2008, the Intergovernmental Committee, after discussing the experts' report, asked the Secretariat to prepare and submit a questionnaire on the drafting of operational guidelines for Article 16 to the Parties to the Convention and to civil society organizations. At the same time, it asked the Secretariat to prepare preliminary draft guidelines for the next session of the Intergovernmental Committee, based on the responses received. Lastly, in March 2005, during the second special session of the Intergovernmental Committee and following an in-depth discussion of the proposed amendments presented by the Committee members, a preliminary draft of operational guidelines for Article 16 was adopted. As we can see, consultation played a key role in this process.

The implementation of measures and other consultative mechanisms envisaged in Article 23.6 (e) will first require that the issue be included on the agenda of the Intergovernmental Committee. To this end, Rule 8 of the Rules of Procedure of the Intergovernmental Committee provides a list of items that can be added to its agenda:

- 8.1 The provisional agenda of the sessions of the Committee shall be prepared by UNESCO Secretariat (Article 24.2 of the Convention).
- 8.2 The provisional agenda of an ordinary session of the Committee may include:
 - (a) Any question required by the Convention or the present Rules;
 - (b) Any question referred by the Conference of Parties to the Convention;
 - (c) Any question the inclusion of which has been decided by the Committee at a previous session;
 - (d) Any question proposed by Members of the Committee;
 - (e) Any question proposed by Parties to the Convention which are not Members of the Committee;
 - (f) Any question proposed by the Director-General.
- 8.3 The provisional agenda of an extraordinary session shall include only those questions for the consideration of which the session has been convened.

In light of Rule 8.2 (a) of the Rules of Procedure, it seems reasonable to argue that Article 23.6 (e) of the Convention is a point that must be added to the Intergovernmental Committee agenda, even though the procedure for doing so is unclear. As it is difficult to imagine the Secretariat taking it upon itself to do so, we presume that the final decision lies in the hands of the Committee, which could be asked to act by its members or Parties to the Convention that are not committee members. Once a decision has been made to go forward, procedures and other

consultative mechanisms will need to be developed in order to promote the objectives and principles of the Convention in other international forums.⁶⁴

These procedures and other mechanisms will have to address a certain number of concrete challenges. The first concerns the procedure for setting the consultative process in motion. To begin, it must be assumed that nothing prevents two or more Parties from consulting each other informally on their approaches to promoting the objectives and principles of the Convention. In fact, this approach should be promoted, and the Parties involved encouraged to inform the Intergovernmental Committee of their initiatives. However, Article 23.6 (e) goes further by stipulating that the Intergovernmental Committee establish a formal procedure for the launching of a consultation. The process will normally be set in motion at the request of a member of the Intergovernmental Committee or any Party to the Convention, the decision itself to proceed with a consultation being adopted by a simple majority of Committee members. Another important matter that must be addressed is the subject of the consultation. It must be sufficiently precise for the consultation to be productive and must provide, moreover, some indication as to its potential use given that Article 23.6 (e) aims to promote the objectives and principles of the Convention in other international forums. A third issue concerns the scope of the consultation. Article 21, which underlies Article 23.6 (e), seems to suggest that it can only involve the Parties to the Convention, thus excluding non-party states, international organizations, and civil society. A final—but not insignificant—issue consists of determining who will take responsibility for running the consultation and compiling the results. The most convenient solution would be to assign this task to the UNESCO Secretariat, but, as we have seen, it was explicitly excluded during the negotiations surrounding Article 21. However, given that the principle motive for eliminating the reference to the UNESCO Secretariat was apparently to not exclude the possibility of consultations outside the UNESCO framework, involving the Secretariat does not seem out of the question. Another possibility could be to turn to an independent organization—as long as the necessary resources are available.

As can be seen, the establishment of an effective consultative process for the promotion of the objectives and principles of the Convention in other international forums will require some serious effort by the Parties. Once in place, however, this work tool will undoubtedly be of great use. Over time, it could even prove to be a determining factor in the success of the Convention.

CONCLUSION

Given the grouping together of Articles 20 and 21 in Section V of the Convention, they must be seen as interrelated and complementary. Their placement is no coincidence, as they were clearly separate in the Preliminary Draft of the Convention.⁶⁵ Although they are complementary, the articles pursue very different objectives. Article 20, as we have seen, is an interpretative provision that aims to clarify the link between the Convention and other international agreements. Article 21, on the other hand, is an operational provision that aims to encourage and support the taking into account of the objectives and principles of the Convention in other international forums.

The idea of the link between the Convention and other international agreements promoted by Article 20 borrows substantially from three multilateral environmental conventions adopted between 1998 and 2001. These conventions state very clearly that, while they do not in any way modify the rights and obligations of the Parties in accordance with other international agreements, they are also not subordinate to them. Repeated in Article 20 of the Convention, this assertion simply reaffirms a basic tenet of international law on the relationships between treaties—that is, that they must be executed in good faith and that, unless there are special provisions establishing a relationship of superiority or inferiority between the treaties, they hold the same legal status. Despite this, the statement is nonetheless important as it refutes a fairly common belief on the

⁶⁴ The Committee could also decide that it is not yet time to go forward with Article 23.6 (e). However, if the Committee were to be consistently averse to implementation after repeated requests to include the issue on the agenda, and without any party objecting, the question could be asked as to whether this constituted an implicit amendment to the Convention.

⁶⁵ Article 20 replaces the old Article 19, and Article 21, the old Article 13.

international scene that commercial treaties automatically prevail over other treaties. However, Article 20 of the Convention does not only reaffirm the principle of equal status—it also provides positive manners of dealing with the relationship between the Convention and other international agreements by requiring the Parties to encourage mutual support and take relevant provisions into account when interpreting and applying other agreements or acceding to other international commitments. In this sense, Article 20 can be considered as a progressive provision, the true significance of which will be revealed through the practice of the Parties.

Article 21 supplements Article 20 by stipulating that Parties must promote the objectives and principles of the Convention in other international forums. Although the article is entitled “International Consultation and Coordination,” it is apparent both in its history and content that it leaves parties individually responsible for its implementation, and only goes so far as to suggest that they consult each other as required (it contains no reference to coordination). Should we be disappointed that the Conference of the Parties in 2009 did not believe it necessary for the time being to include Article 21 among the provisions for which operational guidelines should be established? This would have doubtlessly helped clarify its meaning and provided the Parties with useful strategies for its implementation. However, we must assume the Conference of the Parties had good reasons for acting as it did. Furthermore, nothing prohibits the Conference from reconsidering its decision at a later date, particularly given that unlike with Article 12, it has not determined that operational guidelines will not be necessary for Article 21. It is also worth bearing in mind that under Article 23.6 (e), the Intergovernmental Committee must create procedures and other consultative mechanisms to promote the objectives and principles of the Convention.