

# EMPOWERING AUDIOVISUAL SERVICES FOR THE FUTURE

Verena Wiedemann

From the point of view of the European media, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (the Convention on Cultural Diversity) adopted by the UNESCO General Conference on October 20, 2005 can be considered as a great achievement.

To assess this Convention, one needs to step back in time just a few years and look at the situation faced then by scriptwriters, film directors, producers, musicians, public service broadcasters, and indeed the entire audiovisual sector in Europe and elsewhere.

The challenge was whether a choice needed to be made between two very different paradigms for the audiovisual sector in a globalised world. The Canadian sociologist Marshall McLuhan characterised this world as the “global village” some 40 years ago. And, in this global village, trade between countries has become ever more intensive and a positive trade balance is a key component of a country’s economic wealth. This explains the calls for free trade, for the abolition of all trade barriers that may impede the free flow of goods and services across borders. The demise of the Soviet Union has further strengthened the conviction that only liberal market economies with as little state intervention and protectionism as possible will maximise the wealth of nations.

## **Impact of free trade negotiations**

In order to understand what all of this has to do with filmmaking and broadcasting, one needs to look at the year 1994. In that year, the most potent global instrument was adopted by the greater part of the world community, an instrument designed to make liberal economics the binding priority of countries’ trade policies around the world. It was in April 1994 that the World Trade Organisation, the WTO, was born. It was a successor of the old international trading system GATT, but much more powerful and much more comprehensive. For the first time in history, a multilateral trade agreement did not only cover goods, but also services and intellectual property rights.

Services are covered in the WTO’s General Agreement on Trade in Services, or GATS. Under this agreement WTO members have committed to enter into consecutive trade rounds with the goal ultimately to abolish all restrictions on trade in services among them. The GATS covers all services sectors with no exceptions. In other words, filmmaking, music and broadcasting are covered by the agreement, because the making of a film, the creation of music or the production and transmission of broadcasting programmes are considered services for purposes of international trade law.

Not everybody in Europe agreed at the time that audiovisual services were the same and should be treated in exactly the same manner as financial services, postal services, maritime services or telecommunication services and should be covered by the GATS. It was the French government and a few isolated allies that claimed that audiovisual services should be left out of the trade agreement. They called for what came to be known as the “exception culturelle” or the cultural exception from the GATS. Their argument was that audiovisual services belong to the cultural sphere rather than the economic sphere and thus should not be subjected to the same rules as other, non-cultural, services. In fact, as they pointed out, the audiovisual media are one of the most powerful tools to express cultural identity and diversity. European countries have long recognised the particular role of the audiovisual

media for democratic decision making, for media pluralism and for cultural diversity. European audiovisual regulation reflects this special role. Firstly, the Community has limited competence in the realm of culture; most of the competence is left to Member States. Secondly, Article 151, paragraph 1 of the EC-Treaty recognises the importance of cultural diversity among and within Member States and requests the Community to help enhance and foster this diversity. It is based on this provision that the Community is providing funds to the European film industry under the MEDIA programme to help them produce films of European origin that represent and reflect the unique cultures and linguistic diversities across the EU. There is also the horizontal clause of Article 151, paragraph 4 of the EC-Treaty which requires the Community to take cultural aspects into account under other provisions of the Treaty.

But the calls for an “exception culturelle” were not taken on board by the rest of Europe and other WTO member states. For them, this call smacked of protectionism. EU member states also feared that this request could cost them too many concessions in other trade sectors where Europe clearly has an offensive trade agenda and wants other countries to make far reaching concessions. So in the end, audiovisual services were covered by the GATS, but Europe made no offers to the other WTO members to liberalise its markets in this sector. At the end of the Uruguay Round in December 1993, the Europeans had found something of a Solomonic solution: they had not too much alienated their other trading partners by calling for a cultural exception, but they had made no trade concessions in this sector either, so they were facing none of the possible consequences.

But it was clear back in 1993 that the deal the EU – and most other WTO members – had struck, namely not to liberalise audiovisual services, had only postponed the challenges of the question whether, in future, audiovisual services would be treated like other commodities for the purposes of international trade law. With each new trade round, the question of whether and to what extent to liberalise audiovisual services would be back again on the international agenda. Given that GATS members had already committed to increase substantially their level of liberalisation commitments in each trade round, it was safe to predict that the pressure would increase on Europe and other countries with interests in promoting their cultural industries, to commit to giving up such discriminatory cultural policies in favour of free trade principles.

Since the attempt to get an “exception culturelle” had failed, it was all the more important in the years following the conclusion of the Uruguay Round to raise global awareness of what would happen to the cultural role that audiovisual services play, if large scale liberalisation of these services under GATS would take place during the next trade round. Some international organisations, quite a number of governments, and a growing number of cultural activists and NGOs took part in what would prove one of the most successful campaigns for an international treaty which was aimed at finding an answer to these challenges.

There were a number of main messages around which the debate took place:

- 1) Cultural goods and services are unlike any other commodities in that they play a unique role in their societies for cultural identity and diversity. The use of the term “cultural diversity” is significant in this debate, because it replaced the term “cultural exception.” While “cultural exception” was a defensive concept, accused of disguising protectionist and possibly even xenophobic policies, “cultural diversity” is a positive concept recognising the validity of not just one culture to the detriment of others, but a peaceful coexistence of cultures worldwide.

- 2) Globalisation is both an opportunity and a challenge for cultural diversity. The new information and communication technologies, and most notably the Internet, bring our societies ever more closely together. The global networks distribute information within seconds to the most remote corners of the world. This is good for freedom of information and for freedom of speech, and it can foster our mutual understanding of the rich diversity of our cultures. However, information is not neutral. When we communicate with each other, we express who we are and what we believe. As communication changes from being just local, regional or national to becoming global, cultural content, in other words the messages, also changes. For example, we may use a different language to make ourselves understood in the global environment, the images and stories we receive from abroad are new and different. This is fine as long as there is no dominant culture, as long as everybody who participates in this global exchange operates on equal terms. But it becomes problematic if there is a dominant culture which, because of the laws of economics, is helped much more than its rivals by economies of scale and scope in global markets. Such is the case with audiovisual productions from large countries like the United States.

Against this background it is felt that governments have a right and even an obligation to help preserve and foster cultural diversity in the audiovisual sector by appropriate means. Within the European Community, such measures consist, for example, in establishing and operating public service broadcasting with special obligations to offer diverse programmes with local, regional and national content of high quality. Europe also grants a whole range of subsidies to its film industries. Through its Television without Frontiers Directive, the European Community has established quotas in favour of European audiovisual works which television channels operating in Europe must respect.

However, in its negotiation guidelines on the audiovisual sector for the Doha Round, the United States argues that, since the Uruguay Round, the situation of the audiovisual media has changed totally due to the Internet which allows for audiovisual markets to turn global. Because of the new technologies, consumers have world-wide access to a multitude of information offers and thus there is no justification any more for state intervention, according to this argument.<sup>1</sup>

The European Community agrees that, since Uruguay, significant technological developments have taken place, but no structural changes of the sector have occurred. The Community is pointing to the high market share of U.S. audiovisual productions in Europe. In the cinema sector, this ranges from 65% to 85% according to the member state. In 2000, the overall market share of U.S. audiovisual programmes on European TV channels amounted to 69%.<sup>2</sup> In the same year, the EU trade deficit with the United States in the audiovisual sector amounted to U.S. \$8.2 billion.<sup>3</sup> The Community points to the high market share of U.S. audiovisual productions in Europe, where up to 60% of films shown in European movie theatres are of U.S. origin. This is ample evidence that the European markets are open and its policies in this sector are not protectionist. It also demonstrates that the lack of liberalisation commitments of the Community under GATS does not represent a market barrier for foreign audiovisual service suppliers in Europe. But while the Europeans do not fight the

---

<sup>1</sup> World Trade Organisation, Communication from the United States, Audiovisual and Related Services, WTO Document Nr. S/CSS/W/21.

<sup>2</sup> European Audiovisual Observatory, Press release of 9 April 2002.

<sup>3</sup> Ibid.

influx of foreign audiovisual works into their markets, they also want to preserve the right to foster and nurture their own audiovisual industries.<sup>4</sup>

- 3) The third main argument that has been advanced since the end of the Uruguay Round is that preserving cultural diversity is as important for humankind as biodiversity is for the world of plants and animals. This argument was inspired by the environmental movement and the concept of sustainable development. Until recently, it was recognised that sustainability of our planet, the goal to preserve our planet in a way to make it liveable also for future generations, had three dimensions: environmental, social and economic sustainability. Now the argument was made that sustainable development had a fourth dimension: cultural diversity, as a precious good of mankind.<sup>9</sup>

In order to understand the challenges that any liberalisation under the GATS regime poses to audiovisual services, it is necessary to look at the pertinent provisions of the instrument. Under the GATS Most Favoured Nation (MFN) clause, advantages granted to services suppliers in one country must be extended to all other WTO members. The EU member states and the Community itself have concluded special agreements for preferential treatment of cultural and audiovisual services with other countries, for example with the member countries of the Council of Europe. One of these agreements is the European Convention on Cinematographic Co-Production, another is the Eurimages Programme. If the exemption from the MFN clause that the Community negotiated during the Uruguay Round were to fall, the benefits that EU member states grant to film creators from member states of the Council of Europe under the Co-Production Agreement would have to be extended to all other WTO member countries. In other words, the Hollywood studios, for example, would enjoy the same benefits from this Agreement of the Council of Europe as the European film industry. This would render meaningless the whole purpose of this policy instrument, namely the promotion of European audiovisual content.<sup>10</sup>

Another example is the national treatment principle. It requires governments to treat foreign services suppliers no worse than domestic ones. If this principle were to apply to the audiovisual sector in Europe, the quota system in favour of audiovisual works of European origin in the Television without Frontiers Directive would need to fall, because quotas in favour of European works are directly opposed to any commitment to treat all audiovisual

---

<sup>4</sup> For a longer discussion of these arguments see *Verena Wiedemann*, Gesamtziel: Vielfalt – Audiovisuelle Medien in den GATS-Verhandlungen, epd medien No. 92, 23 November 2002.

<sup>9</sup> The link between cultural diversity and sustainable development was specifically recognised by the Council of Europe, Declaration on Cultural Diversity, December 2000, point 1.3; and UNESCO in its Universal Declaration on Cultural Diversity, November 2001, article 11, first sentence.

<sup>10</sup> See Council of Europe, Council for Cultural Co-operation, Culture Committee, A Strategy Document on cultural diversity and international trade agreements, Secretariat Memorandum prepared by Directorate General IV (Education, Culture, Youth and Sport, Environment) with contributions from *Verena Wiedemann* and *Jukka Liedes*, Strasbourg, 22 August 2000.

services from all WTO member states in the same way. Similarly, all the benefits of the media programme of the European Community would have to be extended to film producers, directors, scriptwriters, distributors, etc. from around the world. The very purpose of these instruments, namely to foster European content in order to strengthen European filmmaking, would be defeated.

A third example of the GATS mechanism is the subsidies clause. So far, the GATS does not contain a rule restricting subsidies that governments may grant to different services sectors. But this is about to change, because such a clause is presently being negotiated in Geneva. Depending on how the new rule is written, the funding for public service broadcasters might one day be considered by a GATS panel of trade experts, who decide about all trade conflicts, as distorting trade in services.

The potentially far-reaching impact of subsidies rules applied to the remit and financing of public service broadcasting is already being felt within the European Union. Under Community law, any state aid (subsidies) is prohibited, except if it can be justified, for example, if it serves to provide services of general interest, as is the case with public service broadcasting. This legal framework invites commercial media companies routinely to challenge the activities and the financing of public service broadcasters on the European level. Consequently, there is a growing case law on the decisions of the European Commission scrutinising the funding schemes of public service broadcasters in the Member States and, lately, a tendency by the Commission to limit the activities of public service broadcasters, in particular in the new on-demand media. The Commission's increasingly critical approach to public service broadcasting in the digital environment reflects its general emphasis on free markets in the information and communication sectors (ICT), an emphasis also evident in the decision taken by the European Commission presided by Barroso in late 2004 to deal with media policy issues in the context of the Community's ICT policies instead of, as had been the case in the past, in the context of the Community's cultural policies.

A final example of the impact of the GATS on audiovisual services is a trend of questioning transparency and proportionality of domestic regulations. If European regulation of the audiovisual media were to be subject to this proportionality test, all regulations, including measures safeguarding media pluralism, would in principle be subject to the scrutiny of a GATS dispute settlement body. Unlike in the EC Treaty, there is no horizontal "cultural clause" in the GATS which would require that trade experts who decide about any relevant WTO trade dispute need to take into account the special characteristics of cultural services.

For the purposes of the negotiations on the liberalisation of audiovisual services during the Doha Round, the United States has come up with a proposal for the present round of trade negotiations which it says strikes a balance between the interests of governments to maintain certain cultural policies and the interests of others to achieve a significant level of services liberalisation. It does not request that WTO members abolish their existing TV quotas or film funding schemes. But, under the so-called stand-still clause, they should commit to not adopting any new cultural measures of this or a similar kind, and in particular no measures which would lead to preferential treatment of audiovisual services transmitted digitally. While traditional forms of television and cinema services could be subject to some preferential treatment of local artists, film directors and the like, the U.S. intention in the present negotiations is to liberalise all new audiovisual services delivered on-demand, as well as all multimedia content delivered over the Internet.

As explained above, for the U.S. government the Internet is not a sphere where cultural concerns are valid. From their point of view the Internet is a market place and thus must not be burdened with any cultural policy considerations. It wants all services delivered via the Internet to be considered as e-commerce and argues that what is being transmitted is not really a service, but instead a "virtual good". The significance of this argument is that a "good" is covered by the WTO GATT agreement which is much more liberalised than trade in services and does not allow for the preservation of the same cultural policies as the GATS. Given that in just a few years time all audiovisual services will be produced digitally and delivered electronically on-demand, this approach would mean not just a stand-still for audiovisual policies, but in effect a quick abolition of all such measures, because the traditional regulatory frameworks, unless they are adapted to the new technologies, will *de facto* soon become irrelevant. The U.S. negotiating position for audiovisual services in essence implies that Europe and all other trading partners accept a paradigm shift for how they treat audiovisual services in the digital world. They are to be taken out of their cultural context and submitted to the prerogative of the laws of economics just like any other economic activity.

Looking at the Internet, the European Community defends the concept that all products delivered electronically should be classified as services. The Community insists on the principle of technological neutrality on which the GATS is based. This means that the technology used to transmit an audiovisual programme does not make any difference with respect to the content and the rules governing this content. In other words, whether a film is shown in the cinema or broadcast on television or transmitted online via the Internet to a multitude of users does not change the character of the service as an audiovisual production which carries cultural significance. This view is also supported by the WTO Council for Trade in Services in Geneva.<sup>11</sup> The approach for the WTO negotiations is essential, if countries want to keep their regulatory options open in the digital information society.

Against this background, Member States of the European Union have given a qualified negotiating mandate for the audiovisual sector to the European Commission which negotiates in Geneva on their behalf. This mandate reads:

"During the forthcoming WTO negotiations the Union will ensure, as in the Uruguay Round, that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audio-visual policies for the purpose of preserving their cultural diversity."<sup>12</sup>

The mandate is understood to mean that the European Community will make no liberalisation commitments on audiovisual services in the present round just as they did not enter into any commitments during the Uruguay Round. The Commission has recently confirmed this view explicitly in a public statement.<sup>13</sup>

Given that much is at stake during the Doha Round for the future of audiovisual services, there are some key questions. How long can the European Community and other countries that share their views withstand the neo-liberal pressures by the United States and other trading partners with offensive interests in this sector? How long can they successfully refuse to liberalise audiovisual services? What if more and more WTO members from around the

---

<sup>11</sup> World Trade Organisation, Council for Trade in Services, Progress Report to the General Council Relating to the Work Programme on Electronic Commerce, 19 July 1999.

<sup>12</sup>

<sup>13</sup> European Commission, Press Release of 20 October 2005, MEMO/05/387.

world would make far-reaching commitments in this sector? Such a development would increasingly isolate the Community in WTO and would make it ever more difficult to maintain this position in future.

### **UNESCO and negotiations on the Convention**

This is where the UNESCO Convention on the protection and promotion of the diversity of cultural expressions enters. The idea was to establish the principle that cultural goods and services are unlike all other goods and services and deserve to be treated differently, as a legally-binding principle on the global level. In other sectors relevant for sustainable development, international instruments have been in place for years, starting with the multilateral trade regime under the auspices of WTO for economic development, continuing with an international agreement on social issues setting up the International Labour Organisation (ILO), and concluding with numerous international treaties on the protection of the environment, like the Convention on Biodiversity and the Kyoto Protocol. But there was no equivalent in the cultural domain.

As the history of the debate over the past ten year evidences, however, the time was ripe for such a Convention on cultural diversity (although nobody knew that in the early years,, and even the closest observers remained sceptical until the end). Still, it is most extraordinary that such a novel and comprehensive binding international treaty could be drafted and passed by the UNESCO General Conference in just two years, the time it took from the mandate the General Conference gave the Director General in 2003 to prepare a text and the final adoption of the Convention. What lead the way were a number of earlier milestones: the 1995 Report of the World Commission on Culture and Development entitled *Our Creative Diversity*, also known by the name of its chairman, the Pérez de Cuéllar Report; the Intergovernmental Conference on Cultural Policies for Development 1998 in Stockholm; the creation of the International Network for Cultural Policies (INCP) in 1998, an informal network of cultural ministers under the leadership of Canada's then culture minister Sheila Copps; the Declaration on Cultural Diversity of the Council of Europe in December 2000; and finally UNESCO's Universal Declaration on Cultural Diversity in November 2001.

However, all these initiatives by international organisations and cultural ministries were political in nature and in no way legally binding. It was long doubted that anything more would be possible than a few well-meaning policy declarations and resolutions. But alongside the discussions among cultural ministers a popular movement formed. A growing number of cultural activists from around the world actively accompanied and heavily influenced the entire political process and called for a binding international instrument for the protection and promotion of cultural diversity. They also formed their own organisations to support this cause, such as national coalitions for cultural diversity and the International Network for Cultural Diversity (INCD).

For a while it looked like UNESCO was not going to do more than to pass the declaration on cultural diversity of 2001, because the idea of an international treaty that would address the challenges that globalisation and trade policies pose to cultural diversity appeared too controversial for this UN body to pursue. After all, countries like the United States and Japan warned early on that it did not fall within the competence of UNESCO to deal with matters outside cultural policies. They charged that what was being discussed in this context were trade policy matters which on the international level are the competence of WTO. In essence, of course, the dispute was not a procedural one so much as it was about the notion that any such international cultural initiative, and particularly one spearheaded by UNESCO, could undermine the economic paradigm for cultural and audiovisual services set up in the WTO.

Sheila Copps, the Canadian culture minister who launched the informal network of culture ministers of the INCP, contemplated initiating the drafting of a new international legally binding instrument on cultural diversity outside of UNESCO, should that organisation fail to bring a treaty on its way. But, when the question of a convention was formally put before the General Conference in 2003, the negotiating mandate was given by consensus.<sup>14</sup> The same year, the United States, which had left UNESCO years earlier because of disagreements over its policies, rejoined the Organisation as a member. And it was well understood that the United States, which vehemently opposed the project, would do its utmost to stop it or at least to water down its content so much that the convention could never hurt its trade interests in this sector. Indeed, the United States did just that, it tried to torpedo the negotiating process every step of the way and it did that with all instruments it had available, including complaining to the WTO that UNESCO was interfering with its competence in trade policy.<sup>15</sup>

But how successful was the United States with these efforts? Well, 148 UNESCO members voted in favour of the Convention. There were only two votes against it in the General Conference on 20 October 2005, the United States and Israel, while four governments abstained, Australia, Honduras, Liberia and Nicaragua.

In the words of the European Commission, the Convention on Cultural Diversity “is the first of its kind in international relations, as it enshrines a consensus that the international community has never before reached on a variety of guiding principles and concepts relating to cultural diversity .... [It] forms the basis of a new pillar of world governance in cultural matters.”<sup>16</sup>

The Convention is based on certain key principles, namely:

- 1) That cultural diversity is an essential component of sustainable development.
- 2) In order to ensure the right of individuals to disseminate their ideas and cultural creations, it is legitimate for countries to adopt policy measures that protect and promote the diversity of cultural expressions within their territories.
- 3) The signatory countries acknowledge that they have a positive duty to protect and promote cultural diversity within their borders which means not only to take measures in favour of their own citizens, but also to create the framework for a lively exchange of cultural expressions across their borders and to be open to cultural goods and services from abroad.
- 4) Given that the pressures on cultural diversity stem very much from international developments and in particular from technological developments and globalisation, it is essential for governments to cooperate internationally in order to foster cultural diversity.
- 5) Since the cultures under most pressure are those of developing countries and countries in transition, it is essential for the world community to cooperate in this field in the spirit of international solidarity and to help these countries in building their own cultural industries.

---

<sup>14</sup> UNESCO General Conference, 33<sup>rd</sup> session, Paris 2005, Preliminary report by the Director-General setting out the situation to be regulated and the possible scope of the regulating action proposed, accompanied by the preliminary draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, p. 1.

<sup>15</sup> Government of Quebec, Culture et Communication, Publications/Studies 2005/06/28-29, Trade Treaties and Cultural Diversity, foreword to *Ivan Bernier*, Simposio international, Santiago, Chili, 28-29 June 2005, accessible under <http://www.mcc.gouv.qc.ca/international/diversite-culturelle/eng/publications-studies/> (date: 20 November 2005); *Sabine von Scharlemmer*, Kunst und Freihandel. Der UNESCO-Streit um kulturelle Vielfalt, Blätter für deutsche und internationale Politik, 5/2005, p. 619-626, 624-625.

<sup>16</sup> European Commission, Press Release of 20 October 2005, MEMO/05/387.

- 6) The Convention must be able to adapt to developments in this field through mechanisms set up under the Convention and rules to settle disagreements among its signatories.<sup>17</sup>

## Audiovisual

The title of the Convention is significant, because it describes the scope of the agreement as covering “cultural expressions”. This scope refers to creations of the mind: it is thus obvious even from the title that the audiovisual sector is covered, because cinematographic films, music and broadcast programmes are considered cultural expressions.

Nonetheless, representatives of the audiovisual sector who attended the negotiations at UNESCO and submitted comments and suggestions to the negotiators felt that it was important to leave no doubt that the Convention covered not only traditional forms of cultural expressions, like painting, theatre, literature or music, but also the media, and that the specific policies enhancing and promoting the diversity of audiovisual services were as legitimate as any other cultural policies aimed at cultural diversity. These requests were taken on board, and the Convention now contains a number of explicit references to the media.

The preamble and article 2.7 of the Convention acknowledge that cultural diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures. This “principle of equitable access” ensures that cultural diversity is not misunderstood as an excuse to erect barriers for free cultural exchange. Instead of barring entry of cultural goods and services from other countries, the idea is to be open to cultural exchanges but to also create space for indigenous cultural products. An example of such a balanced policy would be that the European Community does not ban U.S. films from being distributed in Europe. Instead, it uses subsidy schemes for European productions and a quota system imposing, “where practicable”, a majority of European works (51 percent) on certain programming genres of European television channels, and thereby ensures that its citizens have a choice whether they want to watch audiovisual content of non-European origin or works with European topics, actors, and narratives. The Chinese policy of imposing on Chinese television channels a 90 percent quota in favour of Chinese productions, however, appears questionable under this principle of balance, because it seems to pursue the aim of blocking out foreign audiovisual programmes, curtailing freedom of information and nearly banning access to cultural creations from abroad.

In other words, the concept of balance implies cultural policies which embrace curiosity and openness for foreign cultural expressions, but not at the expense of one’s own cultural creations. As the Convention mentions in article 1(c), the aim is to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace. This *balance* in the international cultural exchanges makes the difference from a world trade system based solely on free trade principles. The trade regime is indifferent to the actual outcome of free trade: it does not object to the laws of economics working in favour of a dominant culture crowding out the cultural creations of another people.

The preamble and article 2 of the Convention also reaffirm that freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies. This principle clarifies that human rights relating to cultural

---

<sup>17</sup> *Ivan Bernier*, *Traité de Commerce et Diversité Culturelle*, speech given at the Simposio internacional Diversidad Cultural : el valor de la diferencia, Santiago, Chili, 28-29 June 2005, accessible at <http://www.mcc.gouv.qc.ca/international/diversite-culturelle/eng/publications-studies/> (date : 20 November 2005).

expressions, such as freedom of expression and of information, are paramount and may not be compromised under the guise of policies that claim to promote cultural diversity. Thus, the practice of North Korea to block any access to the Internet for its citizens could not be justified under the Convention.

Article 6(h) of the Convention, as well as the preamble, contain specific references to media pluralism as a prerequisite for cultural diversity. Media representatives felt that this reference to the legitimacy of policies strengthening and preserving media pluralism was of particular importance given that media diversity is one of the keys for an environment in which cultural diversity can flourish and given that policies aimed at safeguarding and fostering media pluralism can sometimes be regarded as discriminating against foreign media service providers. An example of such policies in EU member states are the must-carry rules for cable television operators which allow governments to ensure that certain local, or national, or minority language TV channels which are of particular relevance to local audiences are carried on cable networks. From the point of view of the GATS, such policies could raise questions, for example, under the market access principle, and could therefore be subject to requests for liberalisation. These rules could also be vulnerable under the proportionality test which is foreseen to apply to domestic regulation.

Article 2.2 of the Convention lies at the heart of the Convention because it expressly recognises the sovereign right of states to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory, subject only to the Charter of the United Nations and the principles of international law. Article 4 of the Convention defines the term “cultural diversity” as “the manifold ways in which the cultures of groups and societies find expression.” As a result, and in line with UNESCO’s 2001 Universal Declaration on Cultural Diversity, cultural diversity is defined in the broadest of terms. This is followed by a description of the various modes through which cultural expressions find their purpose, such as artistic creation, production, dissemination, distribution and enjoyment. Again, the list of activities mentioned is not a finite one and leaves ample room for countries to adapt their audiovisual and other cultural policies as circumstances change.

In this context, it is also highly relevant for audiovisual policies that article 4.1 of the Convention acknowledges that all these modes of artistic creation, production, dissemination and distribution are covered “whatever the means and technologies used.” In other words, the principle of technological neutrality so vehemently defended by the European Community in the GATS negotiations and of such significance for audiovisual policies in the age of the Internet, has been recognised explicitly in the Convention. It will be interesting to study how this principle enshrined in the UNESCO Convention may ultimately impact even on internal Community law. Once the Convention has come into effect and the European Union itself (and not just its Member States) has become a party to it, the legitimacy of cultural policies extending to the Internet, including the offers of public service broadcasters, will be recognised as a legally-binding principle and not just a simple policy option.

From the standpoint of the audiovisual sector, and in particular its artistic creators, the reference in the preamble to the importance of intellectual property rights in sustaining those involved in cultural creativity, is also helpful. While rightly refraining from covering copyright, the UNESCO Convention establishes the link to international treaties on intellectual property rights, especially those of the World Intellectual Property Rights Organisation (WIPO) and reminds signatory countries of the importance of such policies for individual cultural creations as well as for the sector as a whole. Similarly, the Convention comes out strongly in favour of policies promoting the interests of artists, others involved in

the creative process, cultural communities and organisations that support their work, proclaiming that “parties shall endeavour to recognise the important contribution” they make “and their central role in nurturing the diversity of cultural expressions” (article 7.2).

The term “others involved in the creative process” applies to cultural industries, namely industries producing and distributing cultural goods and services. Cultural industries are explicitly mentioned in article 4.5 of the Convention. Thus, cultural policies relating to broadcasters, film producers, publishing houses for the printed press, for books or music are deemed legitimate. It is unusual for a UNESCO cultural instrument to include *industries* in its scope. This recognises, however, that the global exchange of cultural goods and services cannot be successful by focussing solely on artists and other individual creators, but requires facilitators as well. It is also indicative of the fact that UNESCO members understand that cultural exchange can be “big business” and can contribute significantly to a country’s GDP, as is already the case, for example, with the U.S. film industry. This is particularly true given the relevance of cultural goods and services for knowledge-based societies. Against this background, article 4.4 of the Convention completes this approach by stating that cultural activities, goods and services, are covered by the Convention “irrespective of the commercial value they may have.” In other words, there are no two classes of audiovisual productions under the Convention, for example, art films on the one hand which may benefit from subsidies, and blockbuster movies that may not. The Convention acknowledges that both types of production are cultural expressions and can thus legitimately be promoted by relevant audiovisual policies. Another way of looking at this text is to understand that UNESCO negotiators acted with a keen sense of business as well as out of a genuine concern for cultural diversity.

Article 14 of the Convention, which obliges parties to endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, contains the ultimate recognition of how much the Convention is rooted in the notion of the important economic implications of successful cultural policies. The clause talks about the importance for signatory countries to help parties from developing countries to strengthen their cultural industries through “facilitating wider access to the global market and international distribution networks for their cultural activities, goods and services”; “enabling the emergence of viable local and regional markets”; and “encouraging appropriate collaboration between developed and developing countries in the areas, *inter alia*, of music and film.”

The recognition of the important role of cultural industries for development policies is in line with work in other international fora, and in particular the work done in the United Nations Conference on Trade and Development (UNCTAD). In recent years, UNCTAD has placed considerable emphasis on helping developing countries understand the economic potential of cultural industries. The UN organisation has begun actively to support these countries in setting up, developing and growing cultural industries of their own with meaningful export potential.<sup>18</sup>

The European Commission clearly sympathises with the aim to provide for special assistance for developing countries to develop their own cultural sectors into cultural industries with export potential. On the day of the adoption of the Convention by the UNESCO General

---

<sup>18</sup> UNCTAD : Eleventh session, São Paulo, 13–18 June 2004: High-Level Panel on Creative Industries and Development, available under: [http://www.unctad.org/en/docs/tdximisc1\\_en.pdf](http://www.unctad.org/en/docs/tdximisc1_en.pdf) (date: November 28, 2005)

Conference, the Commission pointed out that article 151 of the EC Treaty already obliges the Community to promote cultural diversity not just internally, but also in its foreign policy.<sup>19</sup> The Commission then recalled its existing “ambitious” development policies for certain regions, namely the countries of Africa, the Caribbean and the Pacific (ACP), as well as towards the Mediterranean countries and all its neighbouring countries, which already comprise “clear cultural components”. Against this background, the Commission cites the Convention and pledges to support developing countries to build their own sustainable local cultural industries and to help them find export markets for their cultural productions.

Another relevant provision in the context of international cooperation and audiovisual policies is article 12(e) of the Convention. It encourages signatory parties to conclude co-production and co-distribution agreements. This clause covers multilateral agreements like the Convention on Cinematographic Co-Production or the Eurimages Programme concluded by the Council of Europe, as well as bilateral agreements of this or a similar kind.

Apart from individual artists and cultural industries, the Convention also recognises the role of public institutions and organisations for cultural diversity. Article 6.2, which contains a non-exhaustive list of measures which member states may employ at the national level to safeguard and promote cultural diversity, makes an explicit reference to “measures aimed at establishing and supporting public institutions, as appropriate”. More specifically, the same paragraph also recognises the legitimacy of measures “aimed at enhancing diversity of the media including through public service broadcasting”. Given that public service broadcasting in Europe and elsewhere has come increasingly under attack from commercial media operators claiming that public service broadcasters distort competition and are no longer needed in a global communications environment,<sup>20</sup> the legal principle contained in the Convention that public service broadcasting may contribute to cultural diversity and media pluralism may be regarded as something of a global equivalent to the 1997 Amsterdam Protocol on Public Service Broadcasting adopted by European member states as part of the EC Treaty.

Article 6 of the Convention also mentions other legitimate policy measures with particular relevance to the audiovisual sector:

- Measures to provide the availability for domestic cultural goods and services within the national territory and relating to their creation, production, dissemination, and distribution, including measures in support of languages. This clause would support, for example, quota systems applying to domestic television channels in favour of domestic content.
- Measures aimed at providing domestic independent cultural industries, and activities in the informal sector, effective access to the means of production, dissemination and distribution of cultural goods and services. The notion of *effective access* is a particularly novel and potentially controversial one. It appears to apply to measures relating, for example, to access of cultural content to the means of distribution, such as communications networks, electronic programming guides, and other gateway

---

<sup>19</sup> European Commission, Press Release of 20 October 2005, MEMO/05/387.

<sup>20</sup> See for more details, Verena Wiedemann, “Emerging Case Law of the European Commission on State Aid and Public Service Broadcasting: Will Public Service Activities be Permitted on the Internet?” European State Aid Law Quarterly, available under [http://www.ebu.ch/CMSimages/en/online\\_47\\_e\\_verana\\_bis\\_tcm6-18562.pdf](http://www.ebu.ch/CMSimages/en/online_47_e_verana_bis_tcm6-18562.pdf) (date: 28 November 2005)

technologies.

- Measures providing public financial assistance. This clause covers all film funds, and other public financing aimed at the production, promotion, and distribution of audiovisual content, including TV and multimedia productions, music, and public service broadcasting.

While the Convention addresses a wide range of traditional as well as novel cultural policies that signatories may direct at cultural expressions, the question remains about its significance with respect to the WTO. Does the Convention supersede and replace commitments signatories made under the WTO in the audiovisual sector? Does it provide protection against possible trade disputes in WTO?

The Convention does not exclude audiovisual and other cultural services from the scope of WTO agreements and, for reasons of international law, it could not have achieved such a goal. This is because the UNESCO Convention on Cultural Diversity is a cultural treaty and not a trade agreement, and also because not all the parties to the WTO are likely to become signatories to the UNESCO Convention. This principle of international law has been expressed in article 20.2 of the Convention. However, article 20.1 explicitly states that this instrument is not subordinated to any other treaty. The Convention thus has the same legal standing as any other international agreement, including those administered by the WTO. It does not conflict with it, but complements other international obligations. In particular, it calls on the signatories to foster mutual supportiveness between the Convention and other treaties to which they are parties, and 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 the Convention.

A key obligation in this context is article 21 of the Convention according to which signatory parties have agreed to promote the objectives and principles of the Convention in other international fora and to consult each other, as appropriate, bearing in mind these principles and objectives. Together with the commitment in article 19 according to which parties will exchange information and share experiences concerning best practices for the protection and promotion of cultural diversity, the Convention in effect provides for a mechanism for signatories to consult with each other and to support each other in WTO negotiations, when it comes to calls to liberalise audiovisual and other cultural services. As a consequence, the Convention and the mechanisms set up under it, should have an impact on the way its signatory parties act in new bilateral, plurilateral and multilateral trade rounds and how they respond to requests to liberalise their audiovisual services.

The main effect of the Convention for the purposes of the WTO is thus not legal but political. It creates a common reference point for all signatory countries that want to protect and promote their cultural industries. Common approaches on how best to achieve this goal can be discussed and worked out in the Intergovernmental Committee to be set up under article 23 of the Convention. Also, recommendations concerning best practices for cultural policies would make these policies less subject to criticism, because they would be more predictable and no longer dismissed with the accusation of protectionism. With these arguments and procedural structures working in their favour, it should be much easier, even for weaker countries, in future trade negotiations, to defend their cultural policies against requests to liberalise these sectors. Cultural ministries of signatory parties should find a friendly forum where they can consult with experts and with each other about future challenges, such as the significance of policies relating to the digital, on-demand environment of the Internet, and

about how to ensure that trade obligations do not prevent them from keeping the necessary regulatory flexibility to protect and promote their cultural industries adequately in a fast changing environment.

It should be mentioned, however, that there has been criticism of the Convention, not just by the United States, but also, for example, by cultural activists. They rightly point out that the WTO mechanism is at least *de facto* much more powerful than the UNESCO Convention, because only the trade agreements have binding enforcement mechanisms backed by sanctions. It is also true that the Convention does not help countries such as New Zealand, which has undertaken wide-ranging liberalisation commitments in broadcasting services under GATS and later regretted its decision terribly. And it is equally true that the dispute settlement mechanism foreseen in the Convention does not help in cases of disputes over audiovisual policy measures where the complainant country has not signed the Convention and will be certain to bring the dispute before a WTO trade panel.<sup>21</sup>

However, the implications of this Convention are nonetheless enormous and they were well worth the effort. For the first time in history the world community has recognised the legitimacy of cultural and audiovisual policies by an overwhelming majority of votes of UNESCO members in a legally binding treaty. These countries supported the text despite the political pressures of the United States, and they have done it with full knowledge of the challenges to cultural diversity from new technologies and WTO trade liberalisation. The Convention documents the express will of governments around the world to protect and promote cultural diversity actively and to resist the calls for economic policies to reign supreme. The world community has come a long way in only a few years.

---

<sup>21</sup> *Jane Kelsey*, Speech at the 4th Meeting of Cultural Professional Organisations, Madrid, 9-11 May 2005 (unpublished manuscript).