

**DOCUMENT PREPARED BY THE EXPERTS OF THE<sup>1</sup>:**

**SPECIAL POLICY RESEARCH TEAM (SPRT) ON THE  
GOVERNANCE ISSUES OF AN  
INTERNATIONAL INSTRUMENT ON CULTURAL DIVERSITY (IICD)**

**OF THE INTERNATIONAL NETWORK ON CULTURAL POLICY (INCP)**

**“OPTIONS AND ISSUES FOR THE IMPLEMENTATION OF AN INSTRUMENT:  
DEPOSITARY, MECHANISM AND STRATEGY”**

A new International Instrument on Cultural Diversity must meet a clearly identified need, fill a legal void, pursue clear objectives and provide appropriate achievable solutions through the norms it sets.  
*(Lucerne Report, September 26, 2001)*

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<sup>1</sup> The Governance Study of the SPRT is being led by Switzerland and includes participants from Canada, Colombia, France and Sweden.

## TABLE OF CONTENT

1. Executive Summary.....	p. 3
2. Chapter 1: The WTO and an IICD.....	p. 8
3. Chapter 2: Evaluation of the Incorporation of the IICD within UNESCO...p.	15
4. Chapter 3: Implementation of an Independent IICD.....	p.18
5. Chapter 4: Comparison with Legal Instruments in Other Areas: Essential Features.....	p.23

## **EXECUTIVE SUMMARY**

### **Context**

The concept of “cultural diversity” has expanded with the advent of globalization, especially among governments interested in understanding the potential impacts of global economic integration, the development of new information technologies, migration patterns and the growth of ethnic or religious conflicts on the measures established and the development of their cultural policies.

“Cultural diversity” has accordingly become the topic of numerous discussions at various forums<sup>2</sup> and the INCP has contributed to the major movement that has defined the principles. It is no longer an abstract concept. This reflection has also allowed the INCP to more specifically identify the “new issues for cultural policies in a globalized economy” (Lucerne Report, p. 1), especially the need to strengthen the legitimate role, as well as the engagement and co-operation of governments to create and use tools in favour of the preservation and the promotion of cultural diversity.

### **Mandate**

At the fourth annual ministerial meeting of the INCP, held in Lucerne from September 24 to 26, 2001, the Ministers in attendance gave the Working Group on Cultural Diversity and Globalization (WG-CDG) a mandate to develop an international instrument on cultural diversity (IICD) within two years, and to submit a draft at their next meeting, to be held from October 14 to 16, 2002, in Cap. Regarding the fact that the draft of the instrument to be submitted to the Ministers have among other things to address the potential enforceability of the instrument<sup>3</sup>, Switzerland offered to head up a SPRT to “explore the issues of managing cultural diversity and where the instrument would be located” (Lucerne Report, p. 2).

### **Approach**

The INCP’s members expect that the instrument provides a range of norms and rules on whose governments could agree and use to meet their cultural objectives in the context of globalization. This intention implies to examine the institutional and legal measures (as the issues of the depositary, of dispute settlement

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<sup>2</sup> While some interest groups are apparently unwilling to give cultural diversity any particular weight or believe that their actions do not affect it (economic circles), others have identified the principles, objectives and issues that are set forth in declarations of intent (UNESCO, Francophonie, Council of Europe).

<sup>3</sup> Although there are currently a number of declarations of intent relating to cultural diversity, some accompanied by action plans, the INCP is convinced that these resources are insufficient, and its process differs in that it seeks to arrive at a text offering value added by designing an innovative and effective tool that will guarantee respect for the principles and measures it sets forth by including a prescriptive, legal and perhaps even enforceable element. This instrument must also support efforts within nations and protect national and international cultural interests alike, while also addressing social, human and economic issues. “Current international agreements on culture (...) are purely declaratory and cannot stand up to the international trade system and its conflict resolution mechanisms. The ability of countries and communities to make their own choices (...) is thereby reduced. Action is required to guarantee the fundamental right of cultural expression and to encourage diversity in cultural expression internationally.” (Lucerne Report, Appendix A, p. 1).

mechanism, ...) whose have to be set up within the instrument, first *per se*, then in a strategic perspective for the efficiency of the instrument.

### **Starting point**

The objective of the SPRT is to present the governance options for the IICD in the stage of its development within the INCP. The issue is to sort the pros and cons of the avenues estimated for the optimal and effective integration of the instrument without detracting from the cultural perspective that is to govern it.

Working from the question “What type of organization can assume responsibility for an IICD, using what type of mechanism”, the SPRT conducted four evaluation’s studies.<sup>4</sup>

The research choices were based on the WG-CDG’s draft text, which was prepared with a view to creating a legal instrument outside the WTO. If this decision should be argued, it also requires an evaluation of other international organizations that might accommodate the instrument and the revision of other possible structures that could support it, as the one of an autonomous instrument governed by its members. The preference may be influenced by the need for effective monitoring and dispute settlement mechanisms, the latter in particular must be carefully considered to ensure the force of an instrument developed solely with the cultural sector in mind. Hence the importance of the WG-CDG’s draft, which provides that any cultural conflict, involving at least one party to the IICD, must first be resolved by the recourse system included in the instrument. This limiting condition could serve either to confirm, complete or contradict a decision also made or made after the fact in the context of the WTO, but in any case to propose at least a resolution of a dispute from a purely cultural point of view.

### **Studies**

The SPRT’s research therefore pertained to issues relating to the IICD’s location and institutional, dispute settlement and monitoring mechanisms, and strategic implementation strategies. The results are presented in three documents that outline each of the options for integrating an IICD within the WTO, as part of UNESCO<sup>5</sup>, establishing it as an independent mechanism<sup>6</sup>, and a fourth study

<sup>4</sup> At its meeting in Oslo in November 2001, the WG-CDG suggested that the SPRT focus on the international governance of the instrument. The need for individual reflection by the interested parties on the options for the national integration of an IICD and the modes of domestic governance of an IICD was nevertheless stressed (see special contribution by Switzerland). The SPRT is comprised of experts from Canada, Columbia, France, Sweden and Switzerland, who met twice in Paris (April 2002) and London (July 2002). Finland (once), Greece (once), Norway (once) and South Africa (twice) also participate due to their presence at the sessions of the revision’s committee of the IICD held at the same time. The WG-CDG proceeded to an intermediate examination of the SPRT’s work at its meeting in Johannesburg in May 2002.

<sup>5</sup> It must be remembered here that this is complex network of organizations interested in cultural diversity, each of which seeks to defend its own interests. Nevertheless, with respect to the predefined framework and scope of the instrument being developed, UNESCO was the provisional and “natural” choice for evaluating the integration of an IICD into an international organization other than the WTO, given its clearly defined cultural mandate.

<sup>6</sup> Formed in 1998 following the Summit in Stockholm on the initiative of the French and Canadian Ministers of Culture, the INCP is unique in that it is an informal organization that provides its 46 current member countries a flexible forum for direct discussion of cultural policies. Without a formal status or structure, the INCP would therefore not be in the position to provide future governance of the instrument it is currently developing, except if its members took the initiative to institutionalize it, which is not the preferred option at present.

providing an overview of instruments created in other sectors that could be helpful in establishing the method of governance for the IICD.

The experts focused their work on four concepts: “mandate/structure”, “representativeness”, “positioning”, “prescriptive power”. Their targeted analyses served to evaluate the pros and cons, noted or anticipated, relating to these criteria in each of the aforementioned options for the integration of an instrument. The content of the studies is summarise hereafter:

The orientations of two initial studies were determined by the scope to be given the instrument in preserving and promoting cultural diversity in the face of globalization and the need for recognition of the legitimacy of government cultural policies in the globalization process. One obvious conclusion was the advisability of assessing the integration of the instrument with UNESCO and the WTO, the two international policy bodies concerned.

One obvious conclusion was the suitability of assessing the integration of the instrument with UNESCO and the WTO, the two international policy bodies concerned.

#### The WTO and an IICD: considerations

Given that a new instrument on cultural diversity could touch on issues that affect the international trade in cultural goods and services, a study was undertaken to consider the possible relationship between an instrument and the WTO. The study first reviews the economic and commercial objectives of the multilateral trading system, the consensus-based decision-making process of WTO processes, and the enforceability of trade rules through its dispute settlement process. It then reviews how WTO trade rules can affect the non-trade objectives of WTO Members and how that interaction has been managed within the architecture of the rules themselves. The study looks in particular how WTO rules interact with cultural policy objectives of members, noting the absence of an overarching cultural exemption in the WTO.

The WTO study concludes by reviewing the considerations of the variety of possible relationships that an instrument on cultural diversity could have with the WTO. It reviews how the WTO system could in theory be the site of negotiations on cultural diversity issues that bear on international trade, but notes the difficulties in expecting timely progress as well as the impediments facing Culture Ministers in the INCP pursuing such work<sup>7</sup>. It then considers what relationship an instrument negotiated and housed outside the WTO framework might have to WTO rights and obligations. One approach would be for signatories to agree to new rights and

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<sup>7</sup> Note the membership of countries to regional agreements that restrains their ability to make individual commitments concerning multilateral commercial negotiations. For example, members of the SPRT, which are also members of the European Union, can not subscribe, in a international agreement, to individual commitments concerning multilateral commercial negotiations since this is a prerogative of the European Union. As a consequence, they do not support the option of the re-attachment of the IICD to the WTO.

obligations in the new instrument and use its mechanisms to resolve disputes rather than WTO procedures. A second approach would be to articulate an international framework of principles and obligations to promote and preserve cultural diversity that would be consistent with existing WTO disciplines. Signatories could then ensure that they retained the flexibility to carry out the objectives and obligations of the instrument in the context of the trend of trade liberalisation and of future WTO negotiations.

### Evaluation of the Incorporation of The IICD Within UNESCO

The UNESCO study delivers a summary report on the advantages and disadvantages of integrating a legal instrument within that organization. The mandate and positioning of UNESCO are eminently in favour of such a solution. The organization has been a dominant participant in defining the principles of cultural diversity, and work to preserve and promote them is definitely within its jurisdiction; by virtue of its representativeness, it can advance this task on a global scale, taking a normative approach. As regards the structures of the organization, however, the introduction and enforcement of an agreement would appear to be compromised:<sup>8</sup> not only is a decision on such an agreement blocked by the hopeful waiting for the return of the USA, but the scope of that agreement may well be diminished by the fact that a consensus on it has to be reached. The lack of a dispute settlement procedure at UNESCO also mitigates the force that the instrument seems to require.

The decision to explore an alternate solution in a third research project, creating a stand-alone instrument, and perhaps going so far as to create a new international organization, has been made with a view to the quick and effective integration of the instrument, on the assumption that the two above-mentioned potential hosts cannot accommodate it or are not adapted to accommodate it in the near future, as suggested by preliminary indicators which the respective studies would have to verify.

### Implementation of an Independent IICD

While it is clear about the problems that such an agreement will have in securing international recognition, the study underscores the inherent strength of this sort of instrument developed by partners who share common objectives, generating a consistency that should also be evident in the promotion of the instrument at the national policy level. The structure and mechanisms of the agreement have to guarantee its enforcement, on the one hand to defend and promote its “cultural” prerogatives, and on the other to promote externally and transversally the new law that it establishes—while ensuring that there remains some flexibility in relations between the signatory parties. In this way the instrument can progressively gain legal and political weight, so that a specific and concrete cultural law can be imposed. Ultimately, it is not out of the question that the international organizations

<sup>8</sup>. [French reads “comprises” (understood), not “compromises” (compromised) – TR.]

concerned may make approaches to the instrument without it being necessary to try and “sell” it to them.

Finally, to assess the possibilities of developing mechanisms for the instrument and for its modes of integration, particularly if it is designed in a non-institutional context, a fourth study has been undertaken to analyse results obtained in other sectors that take a similar approach.

### Comparison with legal instruments in other areas: essential features

This research shows the close connection that exists between the objectives of an instrument and its legal form, and finds that, while an agreement establishing a new law (as opposed to a declaratory instrument) has more favourable legal as well as political weight, it is nonetheless more difficult to formulate beforehand, and more cumbersome to govern afterward. However, these considerations are relative to the environment in which the instrument is developed: an agreement designed outside an institutional framework requires less time to create than one designed within a global forum, and represents a sizeable base of discussion for broad-scale negotiations; nonetheless, its recognition by an established international system is a significant advantage in ensuring and expanding its enforcement. Furthermore (certain examples having revealed their deficiencies in this regard), the monitoring of the instrument’s governance has to be given lengthy consideration, and the associated dispute settlement mechanism that binds the parties is deserving of close examination. The ties to be established with institutional partners as well as civil society, together with the structure and mechanisms of the agreement, are factors that have to be weighed attentively during the process of developing the instrument.

### Conclusion

Finally, without superseding the discussions and comments of the WG-CDG’s national experts or the INCP Ministers, who could still provide other responses or raise new questions, the conclusion to be drawn from this first series of research projects inevitably takes us beyond initial expectations. With regard to the concrete results of the SPRT’s studies, which are in line with the principles cited for the drafting of the instrument now in preparation, it is not just a matter of answering the question of where the initial integration of the agreement will take place, but also how it will take place, using what method for its development. This is the subject of the complementary document "Strategic options" [Nicolas Mathieu, Switzerland, integrating the comments of SRPT’s experts], which highlights the issue of the policy decisions associated with the instrument’s structure and mechanisms. The example proposed, a kind of "draft analysis", serves to create an awareness of the problem and to open the debate, as a basis for discussion.

## **CHAPTER 1: THE WTO AND AN IICD**

### **Introduction**

The World Trade Organization (WTO) was created in 1994 as a result of the Uruguay Round of multilateral trade negotiations. The successor to the General Agreement on Tariffs and Trade (GATT) of 1947, the Marrakesh Agreement Establishing the WTO (the “WTO Agreement”) is the fulcrum of the multilateral trading system. Since 1947, participating members of that system have, as stated in the preamble of GATT (1947), sought to negotiate mutually advantageous arrangements to reduce tariffs and other barriers to trade, with a view to achieving such economic goals as raising living standards, ensuring full employment, and expanding the production of and trade in goods and services. In the Uruguay Round, members built on the GATT 1947, by agreeing to a number of other agreements, the Multilateral Agreement on Trade in Goods (including GATT 1994), the General Agreement on Trade in Services (“GATS”), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), the Trade Policy Review Mechanism (“TPRM”). These agreements are known as the Multilateral Trade Agreements and, along with the WTO Agreement, comprise the rules-based multilateral trading system.

The WTO is a permanent organization with a formal structure and secretariat to administer the agreements. The WTO is a member-driven body that in practice is governed by consensus of all members, although there are some procedures where decisions can be taken based on prescribed majorities. In other words, the WTO only represents the consensus view of its members and does not have an autonomous voice as an international organization. It has a relatively small secretariat to support its work. Its structure includes a regular Ministerial Conference, and a number of Councils, Committees and other bodies, some permanent and some ad-hoc, that are forums for consultation and decision-making about existing agreements or further negotiations. The structure allows Members to agree to negotiate specific issues on an ad-hoc basis, or to conduct “rounds” of multilateral negotiations on a number of issues simultaneously, such as the Development Round, launched by the 2001 Ministerial Conference in Doha.

The Dispute Settlement Understanding (DSU) is perhaps the most distinctive component of WTO in relation to other international agreements. The settlement of disputes under the GATT (1947) operated on a consensus basis, meaning that parties to a dispute would not be bound by a decision because they retained the possibility of blocking a consensus. In developing the DSU, WTO Members agreed to submit themselves to procedures where the decisions of panels and the Appellate Body are effectively enforceable, without the need for consensus. If a panel or the Appellate Body finds that a measure taken by a Member contravenes a WTO obligation, and if the party does not implement the ruling, it can authorize the aggrieved party to withdraw a benefit that the contravening party would otherwise enjoy under the WTO. Members have thereby found a way to make the

rules of the international trading system effectively subject to a legal process of adjudication with a capacity to enforce its findings with economic sanctions.

The WTO Agreement is bound by the Vienna Convention on the Law of Treaties, as are all international agreements. WTO Members may come to agreements outside of the WTO that may alter their obligations among signatories to that agreement. However such an agreement would not be binding on non-signatories, and non-signatories would lose none of their rights under the WTO.

The WTO has a membership of 144 Members<sup>9</sup>, and has procedures for new members to accede. It is entirely a state to state organization, with no formal role for civil society representatives in the private sector or non-governmental organization in its decision-making or dispute settlement procedures. However, the WTO Agreement does include a provision allowing for the establishment of relations with other intergovernmental organizations that have responsibilities related to the WTO. The WTO may also make appropriate arrangements for consultation and co-operation with non-governmental organizations concerned with WTO-related matters. The WTO has periodically held symposia on a variety of issues to bring together trade experts with other policy communities or civil society representatives and the delegations of Members to Ministerial Conferences typically include members of civil society. Panels may also draw on information and expertise other than what is provided by Members.

### **Addressing Members' non-trade objectives in the WTO**

In considering the possible relationship between an instrument on cultural diversity and the WTO, it would be useful to be aware of how the WTO system addresses other non-trade objectives. The multilateral trading system has been used by Members to progressively reduce tariff and non-tariff barriers to international trade. The objective has been to realize primarily economic benefits of increased production and trade and full employment, as set out in the preamble of the WTO Agreement. Although it is not WTO's mandate to develop disciplines to advance non-trade objectives, the multilateral trading system has dealt with the interface of trade and non-trade matters in a variety of ways.

Throughout the evolution of the multilateral trading system, participating countries have found it necessary to address the reality of the overlap of government measures having trade and non-trade implications. From its beginning with the GATT (1947), the rules addressed not just border issues such as tariffs, but "behind the border" measures. For instance, Article III of GATT (1947) obliges members to provide "national treatment" to the goods of other members as regards such measures as "internal laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products" so that domestic products are not afforded protection. More recently, other WTO agreements have been negotiated, such as the Agreement on the

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<sup>9</sup>As of 1 January 2002.

Application of Sanitary and Phytosanitary Measures (SPS) and the GATS, that also comprise rules which can have a potential impact on measures undertaken by Members to achieve non-trade policy objectives domestically.

There are many ways Members have found to address the potential impact of trade obligations on their domestic non-trade policy objectives. For instance, Article XXI of the GATT provides a very wide exception from trade disciplines for the measures relating to national security. It is a self-defining exemption where Members themselves determine what they consider necessary to achieve the security objectives listed in the Article. This is a uniquely broad exemption in the WTO system, given the particular characteristics of national security policies.

In other cases, WTO agreements offer some exceptions for measures with a particular non-trade object and purpose which are circumscribed by defined tests. For example, Article XX of GATT provides, among others, exceptions for measures "necessary to protect human, animal, or plant life or health," and "measures relating to the conservation of exhaustible natural resources." The measures will be exempted from the agreement provided that the measures are not discriminatory between Members nor a disguised restriction on trade. The basic exemption of measures for human, animal or plant life or health and the basic tests defining the scope of that exemption was elaborated upon in the SPS Agreement, which asserted the "right" of Members to take measures to meet defined objectives provided they conformed to the disciplines of the agreement.

Members have also sought to address public health and environmental objectives in political statements by Ministers at the WTO. The preamble to the WTO Agreement added to the original objectives of the GATT (1947), among other themes, a recognition of the objective of sustainable development and the importance of protecting the environment. At the most recent WTO Ministerial Conference at Doha in November 2001, Ministers agreed to a political statement on the TRIPS agreement and public health.

Members have also found a means of dealing with the interface of trade and environmental objectives by the establishment of the Committee on Trade and the Environment (CTE). The CTE is part of the formal structure of the WTO supported by the Secretariat. It has served as a forum for Members to consider issues related to trade and the environment has held public symposia on the subject of trade and the environment.

Despite the recognition of the interface of trade rules and the objectives of protecting the environment, it is important to note that there is still no agreement among WTO Members on the legal relationship between multilateral environmental agreements (MEAs) and the Multilateral Trade Agreements of the WTO. There was little consideration of the interrelationship of MEA and WTO obligations as those agreements were negotiated in different fora. Only after the MEAs were negotiated, and as a result of the Doha Ministerial, did WTO Members agree to hold negotiations in this area.

Members have also agreed to work programs to address the relationship of trade rules and other economic policies. A noteworthy case here is the agreement at Doha to establish a working group to consider the relationship of trade, the debt of developing countries, and the international financial system. One of the stated goals is to strengthen the "coherence" of international trade and finance policies.

The GATS is a comprehensive agreement that covers international trade in all services and has the potential to reach quite deeply behind the border in a wide array of domestic policy areas. It deals with domestic non-trade and trade objectives in a number of ways. For example, it establishes a "right" to regulate and accommodates domestic policy objectives. The agreement does not apply to services "offered in the exercise of government authority," so that public services offered on a non-commercial basis and not in competition with other service suppliers are not subject to the agreement.

Most importantly, the GATS is structured to give Members some flexibility to liberalize trade only in those services where they wish to make commitments. Obligations such as transparency and the Most-Favoured-Nation treatment (MFN), apply to all services on a horizontal basis, although Members did have the one time opportunity to inscribe an exception to the MFN obligation in their schedule of commitments. Members choose the services sectors where they will undertake to offer market access or provide national treatment. This structure accommodates diverse domestic policy objectives of Members and has allowed them to agree to progressive liberalization in services trade. Progressive liberalization means that Members have the opportunity in current and future multilateral negotiations to seek further market access and national treatment openings in all service sectors covered by the GATS.

Members have also found ways to address particular non-trade economic objectives, where policies may be required that are non-conforming to a trade agreement. For instance, the Agreement on Subsidies and Countervailing Measures (SCM) provided in Article 8 exemptions for subsidies for R&D, regional development, or meeting new environmental standards, provided these measures meet certain tests set out in the Article. The Article was equipped with a sunset clause and lapsed in 1999, and its reinstatement will be subject to negotiations between Members. Another example is found in the Financial Services Annex to the GATS. Article 2 of the Annex provides an exemption for measures taken for "prudential reasons," that is, measures taken to ensure the integrity and stability of the financial system. Once again, that exemption is defined in scope by a proviso that such measures may not be used as a means of avoiding obligations under the agreement.

### **Cultural policy measures and the WTO system**

There is no formal mandate to deal with cultural measures in the WTO, nor is there a formal cultural exemption on par with the exceptions the GATT provides in Article

XXI for national security and in Article XX for human, animal and plant health and life. The WTO system does, however, contain some specific and general provisions for specific cultural policy measures. For instance, Article IV of the GATT specifically permits members to have in place quotas to assure domestic films a particular share of screen time in cinemas. Furthermore, Article XX of GATT provides an exception for measures to protect "public morals" and measures for the "protection of national treasures of artistic, historic or archaeological value." These are the only culturally specific exemptions in the WTO system. Towards the end of the Uruguay Round, there was discussion of some kind of provision for cultural policy measures within the WTO, but Members could not arrive at a consensus at that time. Trade in those goods and services that fall within the ambit of cultural policy objectives are therefore bound by WTO disciplines. Many WTO Members have taken advantage of the flexibility of the GATS, described above, and have not made market access and national treatment commitments in culturally related services sectors, such as audiovisual production and distribution services, sound recording, publishing, etc. Many also scheduled exemptions from their general MFN obligations to accommodate such measures as international co-production agreements that are widely used in domestic cultural policies. As long as Members have not scheduled commitments for these services sectors, their cultural policy tools will not be subject to GATS market access or national treatment disciplines. In the context of progressive liberalization, however, WTO Members have agreed to multilateral services negotiations where requests may be made to make commitments in cultural service sectors.

The flexibility of the GATS is important, in contrast to the comprehensive obligations of the GATT which do apply to trade in cultural goods, because domestic policies supporting domestic cultural content typically affect trade in services. However, recent developments have highlighted some questions about the relative scope of application of GATT and GATS rights and obligations. For instance, in a case where the United States challenged some of Canada's policies in relation to trade in magazines and advertising services, the Appellate Body ruled that even though a measure may be directed at services, it could still affect trade in goods and therefore be bound by the GATT. That is, the same measure can be subject to both GATT and GATS obligations at the same time and the determination of a GATT or GATS violation should be done on a case-by-case basis. The Appellate Body upheld this position in subsequent decisions. In another example, the revolution in new information and communications technologies has meant there are now products delivered digitally which have a physical equivalent as a good. This has given rise to new questions about the classification of such "e-deliverables" as goods or services.

### **The WTO and an IICD: considerations**

Some issues that belong to the cultural diversity agenda, and which may be included in the principles and objectives of a new instrument, have no interface with international trade agreements. For these issues, the relationship of an instrument to WTO obligations is clearly a moot point.

However, some elements of a new instrument may touch on matters that are already part of international trade rules in relation to trade in cultural goods and services. For example, an instrument may deal with measures relating to financial support for cultural industries, yet there are existing WTO rules governing subsidies for cultural goods and negotiations may lead to new rules for subsidies for services. An instrument may also deal with measures regarding domestic content requirements, which could overlap with GATS market access and national treatment commitments, depending on a Member's schedule of GATS commitments. For those provisions for which there is such an overlap, there would need to be an assessment of the current or potential future impact of the WTO system on the ability of signatories to realise those objectives. How to best handle the relationship of the WTO system and the instrument itself will need to be addressed at some point by the signatories of the instrument.

Given the architecture of the WTO system and basic principles of international law governing the legal relationship between different international agreements, there are technically a number of approaches to dealing with the interface between WTO rights and obligations and those aspect of a new international instrument on cultural diversity that touched on international trade.

One approach would be to work towards some form of an agreement within the WTO system. A variety of possible mechanisms within the WTO system are technically possible. It might be determined that while no substantial new agreement is required within the WTO to achieve the shared cultural diversity objectives, the relative scope of certain WTO agreements may need clarification. Such an assessment could arise from a lack of clarity of the meaning of particular provisions as regards the specific characteristics of cultural industries, or from a view that the jurisprudence arising out of DSU decisions was not reflecting the intentions of WTO members. Article IX of the Agreement Establishing the WTO allows the Ministerial Conference or the General Council to adopt interpretations of WTO agreements.

The assessment of the cultural diversity-trade interface could also lead those working towards a new instrument to the conclusion that an agreement was required within the WTO to positively lay out how WTO agreements would relate to measures taken to meet cultural policy objectives. This approach would offer the advantages of having cultural policies with trade implications benefit from the rules-based WTO system.

In considering an approach involving work within the WTO, however, it will be recalled that it would require building a consensus among WTO Members first to put the cultural diversity – trade interface on the official negotiating agenda of the WTO and then to reach an agreement. The lack of an international instrument setting out a framework of principles and obligations regarding cultural diversity could add to the challenges of reaching such a consensus in the WTO. Negotiations of a cultural diversity instrument within the WTO might put the cultural

negotiations into the midst of wide-ranging trade negotiations, where a consensus would be required on a variety of trade issues before agreement could be reached on any one issue, including provisions for cultural diversity. This would mean submitting the development of a cultural instrument to the trade-offs that are characteristic of trade negotiations. Indeed, WTO Members failed to reach such a consensus on culture and trade during the Uruguay Round. Another consideration for INCP members is that given the European Commission's (EC) competencies in international trade, the EU Member States who belong to the INCP would not be directly involved in negotiations that took place at the WTO.

Given these considerations, the Working Group on Cultural Diversity and Globalization has concentrated its efforts on considering an instrument developed outside of the WTO. Such an approach could in theory have two kinds of relationship with the WTO. In one, signatories could agree upon new rights and obligations for trade in cultural goods and services that, in their acceptance of the need to preserve and promote cultural diversity, would be distinct from their WTO obligations. Signatories could agree to make use of the dispute settlement mechanisms of the cultural diversity instrument rather than WTO procedures for those measures that fall within the scope of the instrument. However, as noted in the Introduction above, only signatories to such an instrument would be bound by it, and non-signatories would retain their rights under WTO agreements. Moreover, this approach would require signatories to forego rights and obligations among themselves that they have already negotiated at the WTO.

A second approach for an instrument developed outside of the WTO would be to have the agreement articulate an internationally agreed upon set of objectives and principles regarding cultural diversity, bind members to carry out particular obligations in support of cultural diversity, and establish a framework of cultural policy measures available to signatories to realise their shared objectives. This framework could be consistent with existing WTO rules, but could affect the future development of WTO rules as they affected measures in support of cultural diversity. Signatories of such an instrument would conduct their WTO negotiations mindful of the principles, objectives and obligations of the instrument on cultural diversity and so would seek to retain the flexibility to carry out those obligations under new WTO rules. Indeed, the instrument could provide a forum for consultation on the culture - trade interface that could assist signatories in future WTO negotiations. The relationship between the WTO dispute settlement procedure and the mechanisms of an instrument outside the WTO would under this model have no overlap and would not be in conflict.

Whatever approach is taken, either inside or outside of the WTO, there may be a desire for greater consultation between WTO Members and on-going monitoring of the issues. In that case, the proponents may wish to seek a consensus to create a working group or committee, akin for instance to the Committee on Trade and the Environment, to undertake such work. If WTO Members formed a consensus, this Committee could in theory perform a number of functions. It could, for instance, establish working relations with other inter-governmental organizations, such as

UNESCO or the secretariat of a new instrument. Under the same rules, and with a consensus, it could also engage in consultations with non-governmental organizations.

## **CHAPTER 2: EVALUATION OF THE INCORPORATION OF THE IICD WITHIN UNESCO**

The Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO) was adopted by the London Conference in November 1945 and became effective when 20 States ratified it on November 4, 1946.

### **Mandate**

*[The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations...]. The Organization has [...a view to preserving the integrity and fruitful diversity of the cultures and educational systems of the Member States]*  
(constitutional instrument, article 1)

### **Pro:**

- UNESCO is the **only** UN agency with a cultural mandate.

### **Representation**

UNESCO, the United Nations Educational, Scientific and Cultural Organization, currently has 188 members from the five continents.

### **Pros:**

- It is an IGO (international governmental organization),
- The number of members: broad representation from around the world ensures that its principles are widely publicized.

### **Cons:**

- The US is no longer a member,
- UNESCO does not want to take action that would jeopardize the return of the United States,
- The large number of members means that, in order to win support from the greatest number of States, compromises must be made, which can result in vague and consensual terminology in declarations and resolutions.

## Position

Since the Intergovernmental Conference on Cultural Policies for Development, held in Stockholm in 1998, UNESCO has continued to affirm the importance of national policies supporting cultural industries.

The free circulation of cultural goods and services *[should not be subject solely to the rules of the international marketplace]* (30<sup>th</sup> General Conference of UNESCO - 1999).

The first round table of culture ministers on the theme of “Cultural Diversity in a globalized world” (November 2, 1999) enabled the ministers to reaffirm their commitment to *[defending and promoting cultural diversity ... they (the ministers) recognize the right of States and governments to establish freely their cultural policies at the national and international level.]* (UNESCO 30C/inf.39).

The Experts Committee on the Strengthening of UNESCO’s Role in Promoting Cultural Diversity in the Context of Globalization (September 21-22, 2000) recognized *[the importance of UNESCO’s work in this area which falls clearly within its mandate...]* and invites its Director-General *[...to envisage the preparation of a Declaration that will recognize the legitimate right of States to support and create a favourable environment for the creation and expression of diverse forms of national culture, through the implementation of cultural policies which they judge to be appropriate, both with regard to cultural production and circulation.]* (UNESCO CLT/CIC/BCI/DC.DOC 8E).

The preliminary elements of a declaration on cultural diversity were submitted for review to the culture ministers at the second round table, which was held in Paris in December 2000 on the theme of “Cultural Diversity: Challenges of the Marketplace”. The ministers set forth the first elements of a draft declaration on cultural diversity.

The **UNESCO Universal Declaration on Cultural Diversity**, adopted on November 20, 2001 by acclamation, affirms that *[...the specificity of cultural goods and services which, as vectors of identity, value and meaning, must not be treated as mere commodities or consumer goods]* (article 8). Article 1 of the action plan accompanying the Declaration states that Member States are committed to *[...deepening the international debate on questions relating to cultural diversity, particularly in respect of its links with development and its impact on policy-making, at both the national and international level; taking forward notably consideration of the opportunity of an international legal instrument on cultural diversity].*

## Pros:

- UNESCO’s recognized ability to promote cultural diversity,
- UNESCO’s ability to consider the difficulty less developed countries have developing the cultural industries necessary to express their creativity,

- The issue of cultural diversity is not strictly limited to conflicts of interest among large countries that are traditional producers of cultural property: *[UNESCO must give top priority to the defence and protection of cultural diversity and the re-establishment of balanced intercultural exchanges in light of existing inequalities; it must also play an active role in ensuring that the globalization of products and messages improves relations among different peoples.]*

([http://www.unesco.org/culture/industries/trade/html\\_eng/question25.shtml](http://www.unesco.org/culture/industries/trade/html_eng/question25.shtml))

### **Prescriptive Powers**

UNESCO has the authority to set standards (constitutional instrument, article 4). When a general conference decides to adopt an international convention, a majority of two thirds of Member states, which are voting members in attendance, is required.

In the cultural sector, UNESCO has the following prescriptive instruments:

- Florence Agreement (1950) and its Nairobi Protocol (1976), a legal instrument on the importation of educational, scientific or cultural objects that fosters the free circulation of books and other goods, particularly cultural property. Even though this agreement and its protocol clearly champion the liberalization of markets for cultural goods, both the Agreement and its Protocol contain safeguards allowing countries to avoid importing cultural goods that may prejudice the development of national cultural products (see the reserve clause made by the United States at its adhesion to the Agreement – published as an appendix to the Protocol).  
([http://www.unesco.org/cultures/industries/trade/html\\_eng/question19.shtml](http://www.unesco.org/cultures/industries/trade/html_eng/question19.shtml))
- The Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted at the Hague in 1954,
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970),
- Convention for the Protection of the World Cultural and Natural Heritage (1972).

### **Pros:**

- UNESCO's ability to issue a international prescriptive instrument,
- Please note: although the US is not a member of UNESCO, it may be party to the Organization's international prescriptive instruments (e.g. Convention on the illicit traffic of cultural property, Convention for the Protection of the World Cultural and Natural Heritage).

### **Cons:**

- A 2/3 majority is required for ratification;
- Lack of dispute settlement procedure.

## **CHAPTER 3: IMPLEMENTATION OF AN INDEPENDENT IICD**

### **The idea of an independent instrument**

Why consider an independent instrument on cultural diversity? Quite simply because a number of people have doubts about this instrument being part of the WTO or UNESCO and because the creation of such an instrument does not necessarily require a new international organization.

The instrument is intended to recognize the importance of the cultural policies that these states and governments adopt to support culture for the people they represent, policies that thereby help preserve and foster cultural diversity in the world. It is readily understandable that some people may be doubtful that an organization whose very purpose is the liberalization of trade, such as the WTO, would be able to develop or accommodate the instrument. Others maintain that the WTO is not especially known for its expertise or sensitivity to cultural issues. While it may be generally agreed that in order for the instrument to be effective, it must have an effect on the WTO, on its internal law, few people could see the WTO promoting an instrument which, in several respects, might contravene the basic principles the WTO defends.

UNESCO, on the other hand, would be the natural place for the instrument in view of its cultural purpose. Yet its size and highly institutionalized nature might make it too slow and therefore ineffective in the short term to establish the instrument that is desired in the short term. That does not however preclude the possibility that an independent instrument supported by an initially limited but growing number of countries might eventually be part of UNESCO. Since it is acceptable for a trade organization such as the WTO to develop trade instruments that may have an impact on culture, it would accordingly be difficult to object to a cultural instrument that has an impact on trade.

Thus the impossibility of developing or establishing an instrument in the short to medium term as part of an existing international organization is the basis for suggesting an independent instrument. This idea does not however preclude the possibility that the instrument could in the longer term become part of an existing international organization, which would be responsible for its management. We must therefore consider the idea of an independent instrument as an option that leaves various possibilities open and raises various strategic issues. We will now examine only the main questions about such an independent instrument.

### **What are the minimum conditions for the implementation of an international instrument on cultural diversity?**

#### *Internationally*

If created outside of the WTO and UNESCO, the independent instrument would not benefit from the association with those organizations to raise its visibility, nor their

large membership. It would therefore be up to the signatories of the independent instrument to promote it internationally. In that sense, the future of an independent instrument would be closely linked with the original number of member states and governments (which we could call the critical mass of supporters of the instrument) and with their desire to “sell “ it internationally in all the appropriate forums (it would therefore be desirable for the very principles of the instrument to reflect the duty of signatories to promote and defend its principles at every possible opportunity). The instrument should not come into effect until it has a sufficient number of supporting states and governments (twenty, thirty or the number that the initial signatories deem sufficient). A solid core of four or five member states or governments should agree to play a leading role in promoting the independent instrument and attracting new members. In this sense, an effort should be made to ensure that the initial signatories are as representative as possible, both geographically and economically.

The institution of the instrument is of course not the ultimate purpose. That would merely be the first step since the strongest supporters would have been involved from the outset, and those who are less convinced would have to be coaxed to support it. But the instrument would gain in recognition and legitimacy internationally as more and more new states and governments become members.

While it might be more challenging to promote an independent instrument than it would be if the instrument already had the support of a recognized international organization, an independent instrument that is the product of cooperation among stakeholders who share the same underlying concerns would be more clear and focussed than one subject to broad negotiation among states and governments that do not all share the same interest in the cause being defended. An instrument requiring the support 150 countries might take much longer to develop and might, as a result of negotiation that is too broad and consensual, be too watered down and weak.

### *Nationally*

The signatories to the instrument should at a minimum be able to include in their own constitutional framework, or at least in their cultural policies, references to the principles and commitments of the international instrument and to the importance of cultural diversity. Such references would enhance the credibility of the instrument itself and the signatories’ commitment to it. They would also stress the importance of culture in general and of cultural diversity in particular as regards other aspects of social life, such as social unity, development, identity, etc.

### **How can the effectiveness of an independent instrument be ensured?**

The answer to this question depends in part on the possibility of establishing a mechanism to monitor the application of the instrument and of including a dispute settlement mechanism.

Although there are a number of possibilities in this regard, one option would be to create a kind of secretariat responsible for monitoring the implementation of the instrument. This secretariat could for instance give advice about the instrument, ensure cooperation among signatories on all matters relating to the instrument or monitor developments likely to have an impact on the principles the instrument promotes or defends. This monitoring role could be especially important during multilateral or regional trade negotiations, to advise members about potential threats to the preservation of state and government prerogatives to support culture through the various legitimate measures of the instrument. It could also hold occasional meetings among signatories to the instrument on relevant topics and thereby no doubt foster coordination among members for the preparation of their positions on trade negotiations when cultural issues are involved. Even with a modest budget, this secretariat could represent the instrument, making it not only a legal entity but also a political one.

Such a secretariat would have to have the financial support of all signatories to the instrument, of course in keeping with their ability to provide such support.

The instrument should also have its own dispute settlement mechanism. It should be flexible enough to allow states to resolve their differences, if possible through conciliation (which would also facilitate the signing of the instrument). But there must also be some way of ensuring that the signatories recognize the precedence of this mechanism over competing mechanisms in addressing matters covered by the instrument.

Moreover, at the local level, each minister of culture or minister responsible for culture should be responsible for ensuring the application of and compliance with the instrument. They would also be responsible for making their colleagues aware of its principles and of actions that might infringe upon it.

Similarly, it is noteworthy that the desired instrument does not oppose the current globalization trend, but instead seeks to address some of its problems. The instrument must also be sold to civil society, and it might be helpful for the instrument to include some provisions recognizing the importance of civil society in maintaining and promoting cultural diversity. There could even be activities related to the instrument, probably associated with a future secretariat that would afford civil society a prominent role.

### **What influence would an independent instrument have on the WTO?**

The independent instrument could generate a new international law and create a new binding relationship with regard to potentially conflicting regulations that other organizations such as the WTO might issue. The influence of the instrument on the WTO could be both legal and political.

*Legal influence:*

- Once introduced, the instrument would establish a new law for its signatories that would govern their dealings with each other on matters addressed by the instrument. Although different from WTO law and addressing topics that apparently overlap, this law would compete with WTO law. The instrument's law would have no direct influence on WTO law, but the inverse is also true.
- The instrument could have an indirect influence on current internal WTO law, in particular as a result of interpretations made on cultural disputes. Special groups and the WTO appeal body might invoke the instrument's law to settle disputes that cannot be resolved by WTO internal rules alone.
- With respect to the WTO, signatories to the instrument could endeavour to include references in the instrument to WTO agreements. For example, these states could set forth commitments within the limitations established by the instrument, or indicate an absence of commitments on the basis of the principles set forth by the instrument. In either case, references to the instrument in WTO texts would sooner or later require interpretation in keeping with the said instrument.

*Political influence:*

- The instrument would rally states and governments around a shared vision, states that in the past had to resist individually to pressures for the liberalization of their cultural sector in the context of multilateral WTO trade negotiations.
- The instrument could play a significant role in fostering the coordination of respect for cultural diversity and the principles it defends, especially if it provides that its signatories must work together and seek to develop common positions in all international forums, including trade negotiations such as those conducted by WTO.
- The political weight of the instrument would of course increase as the number of signatories increases. Its influence would be even greater since some of its principles will also reflect the importance of openness to foreign cultures and the importance of transparent cultural policies, since these principles are consistent with some WTO objectives.

The independent instrument is clearly both a legal and political instrument and will have a growing influence on the WTO.

**How would this instrument be linked to the INCP and to UNESCO?**

Since it was the first forum that stressed the need for an independent instrument on cultural diversity, one might expect several members of the INCP to be the first signatories to the instrument. We cannot expect all INCP members to be

signatories to the instrument when it is implemented. The instrument could evolve from the special work of the INCP, but it could initially be implemented by a few countries that are members of the INCP and others that are not members but are interested in it.

For its part, UNESCO can clearly not remain indifferent to the instrument. If the instrument is well focussed, if it addresses a specific issue not addressed by UNESCO and if it is written in clearly “cultural” language, UNESCO will have to take a position on it. In addition, the recent UNESCO universal declaration on cultural diversity is no stranger to the debates on the instrument conducted in other forums over the last three years. The same is true for the reference to the appropriateness of an international legal framework in the Action Plan accompanying the declaration.

### **Examples of an independent instrument**

An interesting example in this regard that is not entirely foreign to our purpose is GATT. Before the WTO was created, GATT was no more and no less than an independent instrument with its own dispute settlement mechanism and a small secretariat in Geneva. GATT was a success and gained visibility not because of a recognized organization that supported or accommodated it, nor due to the adherence of a large majority of states and governments to its principles and rules when it was established in 1947; rather, it was a success because of its members’ will to apply and improve it over the years, and the growing adherence of other states to its rules until this day.

### **Conclusion**

The independent instrument on cultural diversity must allow a new law to emerge and be recognized on the international scene. To achieve this, the instrument must be specific enough in its objectives and application to ensure that it is understood that the law it establishes and supports gives concrete form to the concepts and principles set forth in usual cultural declarations. This new law must also be as concrete and effective as trade law. And this cultural law must serve to counterbalance trade law.

The ministers of culture or responsible for culture of the various contracting countries will have to provide for monitoring and compliance with the instrument and work with groups and representatives of civil society interested in related issues. These ministers will also have to refine, complete, develop or review the instrument over the years, as required by constantly evolving culture.

## **CHAPTER 4: COMPARISON WITH LEGAL INSTRUMENTS IN OTHER AREAS: ESSENTIAL FEATURES**

When considering a new international instrument on cultural diversity, the development of international law in other policy areas can serve as a guideline.

The *legal form* of an international instrument on cultural diversity will depend on *inter alia* the *results* that one wishes to achieve with the instrument. A *convention, treaty* or a similar instrument, is *legally binding* for the contracting states and is as such the ultimate legal form for formalised obligations between states. It is also the most appropriate form to address related administrative issues such as financing and organisational structures for the monitoring of the agreement. However, a convention need to be negotiated and accepted in accordance with the constitutional orders of the contracting states, which is a more time-consuming process than that for a legally non-binding instrument (resolution, declaration, recommendation etc.).

If a convention is desired, the negotiations will have to follow certain procedures and they need to be initiated at a certain time. As a proposal, a Conference (on the Convention on Cultural Diversity) with a mandate to negotiate the instrument could be set up by the INCP parties.

### **Intra-institutional or independent negotiations**

- The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, also known as the **Aarhus Convention**, was adopted in 1998. The Convention, an environmental rights convention, was drafted within the framework of the United Nations Economic Commission for Europe (UN-ECE), and it was adopted in 1998 within a pan-european organisation, Environment for Europe, signed by 39 European Countries and the European Commission. However, all other members of the UN or regional commissions are invited to accede the Convention. United Nations Secretary-General, Kofi Annan, has referred to the Aarhus Convention as "a remarkable step forward in the development of international law", and called on the international community to strengthen the commitment to environmental rights - not only in Europe but throughout the world.
- By taking advantage of the system of an international organisation, e.g. *UN*, it is possible to *highlight a possible global significance of an instrument developed in an extra-institutional context, and promote its global application*. Developing such an international instrument in an extra-institutional context could probably be *less time consuming* compared to negotiations in a global forum. Furthermore, the mere existence of an instrument constitutes a strong basis for further negotiations on a global level.
- It seem reasonable that the *INCP, in co-operation with appropriate bodies and organisations, could initiate such negotiations and develop the instrument, and*

invite other parties to accede the instrument as well. The organisational issues, notably the function of a secretariat needs to be thoroughly discussed.

- If an instrument on cultural diversity should be regarded as a global human rights instrument, the UN would probably claim jurisdiction over the subject matter, and the agreement must be subjected to the General Assembly. The role of UNESCO, discussed in chapter 2 must naturally be considered in such cases.

### **The role of the civil society and NGOs**

- The **Convention on the Rights of the Child** is a global UN Convention, in the area of human rights, adopted by the UN General Assembly, with an individualistic approach and establishes the rights to which every child is entitled. It relies upon the guiding principles of non-discrimination, best interest of the child, survival and development, and participation. National authorities, as e.g. the system with ombudsman for children, lawyers and NGOs have promoted the application of the Convention by invoking its articles before national courts, thereby obliging the State to fulfil its obligations, and by raising awareness of the Convention to the general public. *These organisations, often bound together in global networks, should be seen a constructive partner when considering the development and content of an instrument on diversity.*

### **The Convention on Biological Diversity – a role model**

- The negotiations on the **Convention on Biological Diversity** (CBD) were initiated in February 1990, and it was adopted in May 1992. It is a global Convention (with 183 parties in March 2002), famous for its holistic approach, comprising a wide range of actions and sectors, in contrast to previous sector-specific conventions in the environmental area. The CBD was developed within the framework of UN, by the United Nations Environment Program (UNEP). *The notion of diversity used in the context of the CBD could very well be applicable to the cultural area.*
- Signed in 1992 at the UN Earth Summit, the Convention on Biological Diversity is highly representative of UN conventions. *A large number of contracting States ensures political visibility for an international convention.*
- Even though many obligations of the Convention on Biological Diversity are specific to the environment sector, the structure and aims of the instrument are interesting, and some of the subject matter to be regulated, and desired policy effects are comparable to the cultural area. The CBD aims at regulating a cross-border problem, of a global character with common standards at international level and obligations to take action at a national level. *An instrument on cultural diversity could rely upon a similar philosophy.*

- It could be argued that the mechanisms of a free market are not capable of fulfilling the aim of a maintained diversity. Trends seem to point to a more harmonised demand for cultural “products”, and important signs of diversity, as e.g. languages, are being threatened and eventually erased. The situation is comparable in the environmental area. This assumption, that market forces alone cannot guarantee diversity to a necessary degree, *constitute an argument in favour of provisions on state intervention* in a future IICD.
- Some of the obligations of the CBD could well be considered for appropriate for an instrument in the cultural area, such as *co-operation with other Parties*, development of *national strategies, plans and programmes*, identification and monitoring of important factors of diversity, detailed description of different measures to preserve diversity, incentive measures, research measures and raising awareness.
- Governments must prepare national reports on policies implemented to achieve the objectives of the Convention. The contracting States may receive assistance from the Convention Secretariat to draft these reports, which are then released. *This provision may also be used for an instrument on cultural diversity since it offers transparency.*
- A special feature of the CBD is that it leaves the contracting states a certain degree of discretion when fulfilling its obligations, as it remits to each state to decide upon the appropriate normative solution. This feature has been called “balancing norms” or “escape clauses”, and is expressed in the convention by the fact that some obligations must be complied with only “as possible and appropriate”, or other provisions are formulated as obligations “to endeavour”. Such a mechanism allows the states to balance environmental protection against other factors when implementing the convention. Although this may give rise to some implementation difficulties, *such a mechanism may have to be equally considered for an instrument on cultural diversity.*
- The Convention on Biological Diversity provides for special treatment of LDCs. Developed countries that are signatories to the Convention agree to provide financial resources to LDC members. To meet their obligations under the Convention, LDCs receive technical and financial assistance from the other members. LDCs may therefore submit funding applications for projects that fall under the jurisdiction of the Convention. The projects selected are funded by the UNEP, the United Nations development program and the World Bank. *These provisions are in addition to the WTO’s special and differential treatment of LDCs. This mechanism introduces flexibility and takes into account the different positions of its members. An instrument on cultural diversity could also provide for the special treatment of LDC members.*
- An instrument on cultural diversity must also define its position in relation to other international organizations. Article 22 of the Convention on Biological Diversity is important in this respect. This article states that the provisions of the Convention shall not affect the rights and obligations of any Party under any

existing international agreement, “except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity.”

*Accordingly, in the event of a conflict between the obligations under a pre-existing treaty and the objectives of preserving biological diversity, the provisions of the Convention take precedence. The practical application of this provision is unclear, however, particularly in view of WTO regulations.*

- *The Convention on Biological Diversity includes provisions to work with other international environmental organizations through forums and partnerships. A convention on cultural diversity could therefore also include provisions to work with cultural organizations in order to develop synergy with them.*
- There have been difficulties as for the implementation of the CBD. There have been calls for an establishment of a separate body to deal with the implementation of the Convention, but no consensus has been reached. According to legal scholars, the main obstacles to implementing the Convention has been *inter alia* the nature of activity to be regulated, with many different actors responsible for activities covered by the Convention, the framework character of the Convention, lack of administrative capacity, political and socio-cultural factors and insufficient representation of international organisations. Similar difficulties may well arise for an instrument of cultural diversity, and *the question of implementation will have to be carefully examined.*
- Finally, the Convention on Biological Diversity provides for the establishment of the following dispute settlement mechanism:
  1. The Parties shall make every effort to settle their differences, first through negotiation, then through mediation,
  2. If these attempts are not successful, a mediation board shall be created (the decision handed down must be examined in “good faith” by the Parties),
  3. The Parties may at any time notify the depositary of the Convention (the UN) in writing of their agreement in advance, in case of a dispute regarding the implementation of the convention,
    - To submit the dispute to the International Court of Justice, or
    - To resort to arbitration (the arbitration award is binding and without appeal)

This procedure is flexible and provides for a gradation of dispute settlement mechanisms, from the most economical and shortest mechanism to the longest and most binding mechanism. The imposition of a binding decision is voluntary and is not a general commitment that the Parties must make in order to accede to the Convention.

***The implementation of a dispute settlement mechanism for decisions imposed on the Parties is a political decision. The binding nature of the decisions may give the instrument greater credibility but it requires that the States agree in advance to implement the decisions. The question of dispute settlement mechanisms should therefore be carefully examined.***