A portrait of trade in cultural goods : in respect of the WTO and the UNESCO instruments in the contexts of hard-law and soft-law

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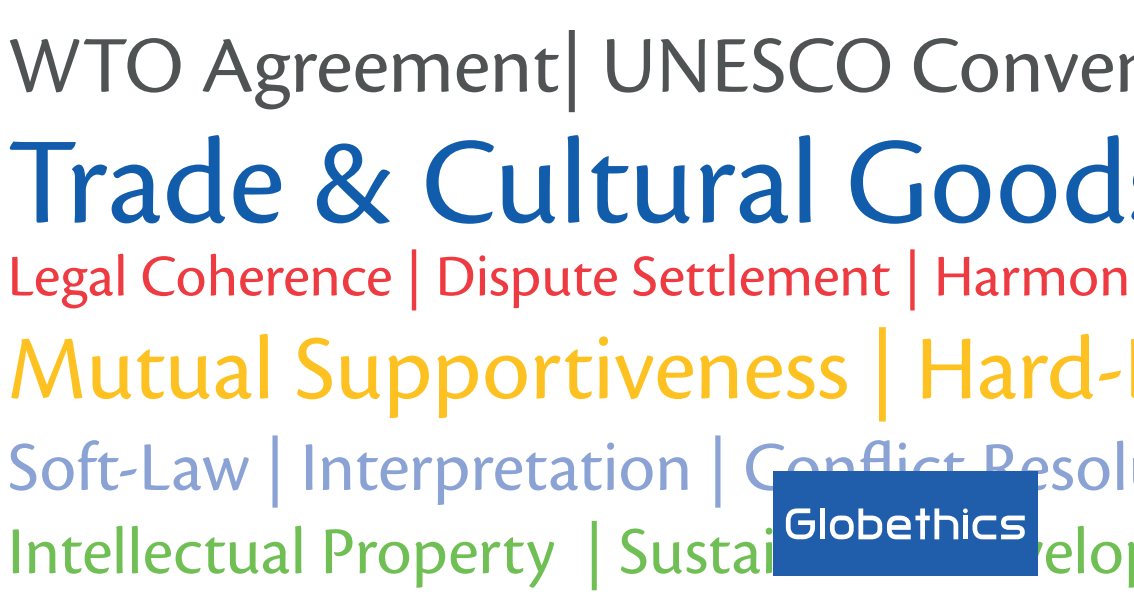
A Portrait of Trade in Cultural Goods

in Respect of the WTO and the UNESCO Instruments in the Contexts of Hard-Law and Soft-Law

Hassan Fartousi



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PREFACE

This book is a fascinating contribution to legal solutions in international trade of cultural goods, on three levels: the methodology, the values and the inter-institutional approach on UN level.

The WTO trade rules and the Unesco approach of protecting and trading cultural goods are to some extent in tension to each other. The book looks at the balance of freedom and fairness/justice (in trade), of harmonisation and diversification, of balancing unity (of global trade norms) and (cultural) diversity, of state sovereignty and international solidarity, of promoting non-discrimination and respecting the human right to diversity and dignity. The book weights the national treasures and international Common Goods, hard law and soft law. It is a Holistic approach searching for coherence and conflict resolution.

This study also contributes to institutional ethics through the setting, negotiation and dispute settlement mechanisms not only within, but between UN institutions. It refers to the SDG's as common frame within and across institutions and actors.

The author examines three approaches to settle conflicts between the WTO and the UNESCO rules: 1. to apply principles of interpretation, 2. to apply hard law, 3. to apply soft law by "mutual supportiveness". In hard law, the author examines three approaches (4.3): The amendment approach, the coordination approach and the construction approach. He concludes that only the coordination approach is feasible. In soft law, the author examines again three approaches (5.2): the interactive approach, the consultation approach and the guidance approach.

In the first decade of this century, I served for some years as President of the Subcommittee WTO of the Consultative Commission for

International Development of the Swiss Government. It was the time of tough debates between liberalisation of markets and protection of weaker economies in developing countries. I developed ethical criteria for the reconciliation of free and fair global trade in my book "Global Trade Ethics", German 2001, English 2002, French 2003, Chinese 2006. (Free download https://repository.globethics.net). Based on my experience and ethics background, I warmly welcome this very important, timely and innovative approach of Hassan Fartousi. It can also be a model for other inter-institutional conflicts in search of coherence and innovative conflict resolution.

In the current times of polarization, global multilateral solutions are more and more replaced by regional or bilateral approaches or just brutal power play. This study encourages to continue with global multilateral, regional or bilateral solutions by soft law in a holistic approach of mutual supportiveness and within the value system of the Sustainable Development Goals SDG. The book is an important contribution for feasible conflict resolutions.

I congratulate the author for the careful examination of options, the commitment to values of peace and the clarity of feasible solutions!

20 May 2023

Prof. Dr h.c. Christoph Stückelberger,
Professor of Ethics in Europe, Africa and Asia.
Founder and President of Globethics Foundation, Geneva,

FOREWORD

Culture and Trade have always been intertwined. This relationship has manifested throughout time as a desire to share culture, stories, and values, whether as an individual or as a group. Thus, apart from their market value, traded cultural goods are the material representation of the diffusion of people's histories. As a result of the principle of specialization of intergovernmental organizations, this interaction is not always well illustrated within the international normative order. Consequently, there is often a perception of fragmentation between trade matters falling under the jurisdiction of the World Trade Organization (WTO) (where discrimination and restrictions are generally prohibited) and cultural matters falling under the jurisdiction of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) which can be protected. Having said this, we should also recognize that the foundations of international economic law have undergone multidimensional changes. The line between subjects traditionally considered to be inside or outside the realm of international economic law has become blurred. The advent of a new flexible multilateralism, alternating between subgroups of like-minded States and large group discussions, facilitates negotiations of new rules. This allows international economic law to accommodate complex issues previously considered outside its scope. This context of reform creates an environment conducive to dialogue regarding a way to reconcile both trade's need for transparency, openness and stability and the need to protect the distinctiveness of cultural goods.

In the context of Hard-Law, the author carefully highlights the complexity of interpreting and enforcing jointly the rules of the WTO Agreement and Principles on the one hand and the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* on the other hand. This issue underscores the complexity of establishing a formal joint institution, for instance, a Coordination Bureau for Culture and Trade to address dispute settlement and prevent incoherence between each dispute resolution mechanisms. In the context of Soft-Law, the author's proposal to reconcile trade and culture through a close informal collaboration is likely to lead good outcomes. On the one hand, the WTO and UNESCO have a shared intention to promote the UN 2030 Agenda and its Sustainable

Development Goals. A cooperation between both institutions would therefore be in line with SDG17 to "Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development" and the WTO Members' efforts to strengthened collaboration and cooperation with other intergovernmental organizations.

Furthermore, during the COVID-19 pandemic, the WTO collaborated on a Task Force with the International Monetary Fund and the World Bank and on joint platform with the World Intellectual Property Organization and the World Health Organization. These collaborations have given outstanding results even though Public Health and Intellectual Property are not traditionally a part of the WTO's purview. Therefore, the author's proposal to create a "General Consultation Group" or a "Dispute Settlement Consultation Group" under the joint auspices of the WTO and UNESCO is very promising.

With this work, the author rightly demonstrates that the reconciliation of Trade and Culture should focus on both enhancing legal coherence and developing mutual supportiveness and mutual recognition. This innovative re-conceptualisation should be read by all experts in trade and in culture.

Professor Gabrielle Marceau, Faculty of Law UNIGE
Senior Counsellor, Research Division (ERSD), WTO Secretariat

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I would like to take this opportunity to give my thanks to many respected people who supported and helped me on my long path toward the finalization of my PhD thesis in the faculty of Law at University of Geneva in 2017 and of its presentation as this book today. Without them, the completion of this research would not be achievable.

First and most importantly, I would like to extend my utmost thanks to my supervisor, Professor Gabrielle Marceau for her constructive directions and critiques on my work, in addition to her constant motivation and support; I am sincerely grateful to her, forever. Likewise, I am very thankful to my thesis jury professors who read my thesis carefully and shared their valuable perspectives: Professor Laurence Boisson de Chazournes for her brilliant ideas and suggestions, Dr Lilian Richieri Hanania for her important critiques and extensive corrections on my work, and Professor Bénédict Foëx, Dean of the Faculty of Law in the University of Geneva, for his kind presence and appreciation. Without their valuable feedback and gentle encouragement, the publication of this book would not have been possible.

I also offer my gratitude to all the professors who partly read my work and commented on it, my colleagues who shared their academic opinions to enrich my research, and my friends who encouraged me to follow my work to the end, and the editors who helped me in different stages of my research to finalize my PhD and now, this book. My respect and gratitude to all of them.

I would like to thank my compassionate and supportive wife, Zahra, and my two darling daughters, Fatima and Aalaa, who are the greatest

sources of my happiness with their priceless love, continuous support, and patience throughout the years when balancing an academic career and family responsibilities were not easy for me. My heartfelt thanks to my dear father, who was the first lawyer I knew in my life, and no doubt the main influence that led to me pursuing my law studies at university and encouraging me to complete my PhD and successfully publish it as this book.

This book is in memory of my beloved Mom whose great gift to me was giving me the self-confidence and motivation to be successful that allowed me to carry her gracious thoughts with me at all times. May she rest in peace and be pleased with her son.

I would like to add how grateful I am to Globethics Publications for having kindly accepted to publish my book. I would also like to extend my heartful thanks to Prof. Dr. Christoph Stückelberger, Founder, and President of the global network on ethics "Globethics Foundation", and Dr. Ignace Haaz, the Programme Executive of Online Ethics Library and Publications Manager of Globethics, for their warm welcome to the idea of publishing this book with a deep belief in one of the missions of Globethics which is "safeguarding the interactions between the cultural values and the trade affects for the humanity".

Finally, I am immensely thankful to all the people who helped me during the lengthy duration of the writing process; it is impossible for me to name each one of you respectively in such a short acknowledgement but nevertheless, I would like to express my wholehearted appreciation to you forever. I am grateful to Mrs. Siobhan Ackroyd who edited this work efficiently. In the end, I should add that I accepta responsibility for the outcome and any mistakes that remain.

This research focused on the interactions between the provisions, institutions and practices of the WTO Agreement and UNESCO CDCE on trade in cultural goods. It examines potential conflicts between the two

agreements including incoherence between their dispute resolution mechanisms. It proposes three routes to enhance legal coherence between the rules of the WTO Agreement and the UNESCO CDCE: improved interpretation, harmonisation through hard law, and mutual supportiveness through soft law.

This work has found and illustrated several feasible solutions, with various levels of utility and practicability, for the problem of fragmentation between the WTO's rules for the international trading regime, and specific UNESCO rules that States have adopted to enhance cultural diversity.

The book concludes that mutual supportiveness through soft law is the best route for stability and legitimacy of the international legal order and to enhance coherence between the WTO Agreement and the UNESCO CDCE.

Dr Hassan Fartousi,
Research Fellow, World Trade Institute (WTI), University of Bern,
Geneva, 30 January 2023

CHAPTER 1

STATEMENT OF THE PROBLEM, METHODOLOGY AND OUTCOMES

1.1 Statement of the Problem: Fragmentation of International Law Governing Trade in Cultural Goods

Traded cultural goods have a dual nature that poses a challenge to the international legal order. First, they are traded goods with market value: Trade is a communication of cultures and values.[1] Second, they are meaningful symbols: laden with cultural, social, and political importance to people groups and the States that represent them. The 'trade' and 'cultural' facets of traded cultural goods fall individually under the jurisdiction of a unique legal regime, administered by a different international body. While trade falls under the jurisdiction of the World Trade Organization (WTO), cultural diversity exists within the purview of the United Nations Educational, Scientific, and Cultural Organization (UNESCO).

This work explores the interplay between the WTO and UNESCO jurisdictions, with respect to the measures States adopt to protect the traded cultural goods.

The following clarifies the limited scope of this research:

1. As far as the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is concerned, it

1 Jack Ma, <https://www.brainyquote.com/quotes/jack_ma_801801>, Accessed 16 December 2022.

is noteworthy that the Convention was negotiated taking into account the WTO rules, in order to strike a balance between cultural diversity protection and international trade. It is a new Convention adopted in 2005 and came in to force in 2007 for the States that became Parties and thus is younger than the other relevant UNESCO Conventions. So, the 2005 UNESCO Convention and its relationship with the established rules of international trade is examined.

2. The investment-related aspects of cultural goods will not be discussed and therefore, the Agreement on Trade-Related Investment Measures is excluded from the scope of this research.
3. As the work discusses the trade regime of cultural goods and not services, it does not examine the *General Agreement on Trade in Services* (GATS), except when the GATS provisions might serve as a model for similar considerations in the proposals of this work, like the positive list approach of the GATS.
4. As the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) is concerned with protecting and promoting cultural goods by several measures, one of which could be subsidies, this work will look at restrictions in the WTO *Agreement on Subsidies and Countervailing Measures* (SCM Agreement). In discussing the price of cultural goods, the study touches upon provisions of the *Anti-Dumping Agreement*.

In addition to the above remarks, the potential normative inconsistencies between the WTO Agreement and the UNESCO CDCE, and resulting probable institutional incompatibilities between the WTO and UNESCO, contribute to the 'fragmentation' of international law applicable to trade in cultural goods. Chapter 2 defines the term 'fragmentation'.

1.1.1 Potential Conflict Between the WTO Agreement and the UNESCO CDCE

The WTO Agreement prescribes non-discrimination (see also Chapter 2) between goods and does not provide for cultural exceptions to this principle. Thus, cultural goods must compete with generic commercial goods because they can be considered under WTO rules. By contrast, the UNESCO CDCE explicitly proposes 'protection' of cultural goods, including through processes such as national subsidies, which *prima facie* appear to conflict with the WTO's non-discrimination principle. This is a situation of legal fragmentation: a term described in further detail below, which constitutes this work's central preoccupation.

Provisions of the WTO Treaty (a constellation of agreements herein described collectively as the 'WTO Agreement', considered legally to be a 'Single Undertaking') draw on the 70-year history of the postwar economic order. In many ways, the WTO Agreement (and its predecessor the GATT 1947) is responsible for the advent of 'globalisation' (a concept explored below), giving rise to the clash between the trade interests of broadly commercial goods on one hand, and cultural nature of the goods on the other.

Contrary to the WTO Agreement, which does not regulate trade in any specific manner, but prohibits discrimination generally, the UNESCO CDCE (as this work will document in detail) does regulate cultural goods with a view to protecting culture. In many senses, the UNESCO CDCE is an attempt to curtail the reach of globalisation. According to some authors the CDCE was drafted with the explicit intention of shielding some products from the GATT's non-discrimination principle.

Boisson de Chazournes maintains:

> "The Convention [i.e. the UNESCO CDC] lays down the principle of the sovereign right of States to 'formulate and implement their cultural policies and to adopt measures to protect and pro-

> mote the diversity of cultural expressions and to strengthen international cooperation […][2] This sovereign right offers State Parties the possibility of restricting international trade of cultural goods…. Consequently, a problem of coherence or even coexistence could arise between the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* and the WTO agreements, in particular the 1994 *General Agreement on Tariffs and Trade* (GATT)…."[3]

Voon also perceives the potential for conflict between the UNESCO CDCE and the WTO: "the first aims to promote regulatory cultural measures, and the second to prevent them where they would impede trade".[4] She outlines "key WTO rules that affect culture and so create a potential clash with the *Convention on the Diversity of Cultural Expressions*" (in particular, the non-discrimination principle).[5] Voon furthermore argues "that uncertainty on the side of the WTO regarding the interpretation of its provisions hampers an extensive implementation of the *Convention on the Diversity of Cultural Expressions*", since "no clear guideline determines whether a given good…that might be traded subject to WTO rules is 'cultural' or not".[6]

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[2] Ellipsis in original.

[3] Laurence Boisson de Chazournes 'Monitoring, Supervision and Coordination of the Standard-setting Instruments of UNESCO' in Abdulqawi Yusuf (ed) *Standard-setting in UNESCO Volume I: Normative Action in Education, Science and Culture: Essays in commemoration of the sixtieth anniversary of UNESCO* (UNESCO/Nijhoff 2007) 70.

4 Tania Voon 'Substantive WTO law and the Convention on the Diversity of Cultural Expressions' in Toshiyuki Kono and Steven Van Uytsel (eds), The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law (Intersentia 2012) (273-290) 274.

[5] ibid 273.

[6] ibid 276.

The CDCE provisions have not attempted to clarify the definition of cultural goods, consequently, what Voon argues is reasonable. However, one can understand the UNESCO CDCE's propositions for the protection of cultural expression, *inter alia* by taking into account the UNESCO definitions in other instruments. For example, UNESCO provides guidelines that help on how to classify goods as 'cultural', in its *Framework for Cultural Statistics*, as this work will later show. Such observations provide one of the clearest rationales for working to increase coherence between the two treaties.

1.1.2 Scope of the Present Work

The UNESCO CDCE covers all 'cultural expressions', a term encompassing -according to its Article 4(4)- three categories for cultural expressions: cultural goods, cultural services, and cultural activities, which the Preamble notes 'have both an economic and a cultural nature'.

The categories of 'cultural activities' and 'cultural services' do not come within the scope of this work. 'Cultural activities' is a rather indeterminate category, and few instruments beyond the CDCE appear to deal with this notion or its relationship to trade. (One notable exception is General Comment 21 to Article 15(1)(a) of the UN *International Covenant on Economic, Social, and Cultural Rights*, which Chapters 3 and 5 both mention regarding its reference to cultural goods, but which also addresses 'cultural activities'.) In particular, no WTO covered agreement seems to address 'activities' as an economic category. Therefore, this category will not be discussed in this work. Also, 'cultural services' which are governed by the GATS,[7] lie outside

[7] The GATS 'positive list' mechanism allows WTO Member States to inscribe a given service on a list of protected cultural services that will not be liberalised under the 'specific obligations' of 'Market Access' (GATS Article XVI) and 'National Treatment' (GATS Article XVII). The Market Access principle essentially allows States to limit the ability of foreign service providers to enter a

the scope of this study because its focus is on traded cultural goods and not services.

This work proposes a specific regime for the traded cultural goods that would exclude them from the regular free trade commitments of the WTO in order to protect the cultural aspects of traded cultural goods. Such protection could be achieved for trade in cultural services, based on the existing GATS market access principle, but this will not be discussed in this book.

Additionally, the literature review shows that there is almost no research done exclusively on trade of cultural goods; most research focuses on trade in cultural services. The study of both trade in cultural goods and services would be too broad for this study.

However, chapter 4 will examine cultural services and GATS mechanisms solely as a model for the propose a new agreement on cultural goods.

Consequently, among the three categories of 'cultural expressions' (cultural goods, cultural services, and cultural activities) that the UNESCO CDCE mentions, cultural goods will be the main focus. The scope of this book is restricted to 'traded cultural goods' because, while the CDCE exists to protect their cultural aspects, and while the WTO Agreement regulates their trade aspects, it is necessary to ensure a coherence between the two. The same is not true for the other two categories.

In addition to what was mentioned above, trade in cultural goods seems to be the Convention-protected category that has been most af-

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domestic market. National Treatment (which is discussed afterwards) requires states to provide equal treatment to national and foreign industries once this access has been granted. Importantly, however, GATS does not permit States to protect services from the Most Favoured Nation principle (is also discussed afterwards), which requires that every Member State should grant all WTO Members the same treatment it offers any Member, but there are exemptions to these general obligations.

fected by fragmentation between regimes of trade and culture. Research restricted to trade in cultural goods allows us not only to ensure the institutional aspects of coherence but leads us also to recognise it as the category most amenable to developing strategies for coherence.

To elaborate, the GATT 1994 regulates trade in goods, and contains categories of protected exceptions in Article XX, but it does not recognise 'culture' as a protected category. Except for the reference to the right of WTO Members to protect national treasures of artistic, historic or archaeological value (mentioned in GATT Article XX(f)), the WTO Agreement does not contain any general exceptions for cultural affairs or any specific exception for cultural goods, despite the aforementioned 'dual nature' of traded cultural goods. Therefore, considerations of the cultural aspects of these goods within the global trading system merit further investigation.

The traded cultural good is thus the basis for the analysis within this work delimiting its scope and providing its impetus. This study shows that the overlapping scopes of the WTO Agreement and the UNESCO CDCE, which promotes differing objectives regarding these goods, gives rise to a situation of legal 'fragmentation'.

In the context of ensuring the defragmentation, looking for paths to increase the coherence between trade and culture (WTO rules and CDCE articles) is fundamental. To examine in detail and through a systematic perspective, the work needs to clarify how different interpretative approaches may contribute to greater coherence and consistency among norms, as well as the diverse possibilities for amendment; in other words, the formal and informal tools -through hard and soft law-, are the two approaches developed in this book.

1.2 Methodology and Design

1.2.1 Primary Research Hypothesis and Methodology

This work's primary hypothesis is that *coherence between the UNESCO CDCE and the WTO Agreement is possible*. In its development of this claim, the study investigates three routes to enhance coherence between legal instruments. These routes are:

1) Interpretation (which forms the basis of Chapter 3);
2) Harmonisation through hard law (forming the basis of Chapter 4); and
3) Mutual supportiveness through soft law (which forms the foundation of Chapter 5).

Dahrendorf lists three possible sources of rules for conflict resolution between the two instruments: first, the UNESCO CDCE; second, the *Marrakesh Agreement Establishing the World Trade Organization*[8] including its Annexes; and third, conflict rules of customary international law[9] as laid down in the *Vienna Convention on the Law of Treaties* (VCLT).[10]

However, in *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (a book that Francesco Bandarin, UNESCO's Assistant Director-General for Culture, hails as a 'landmark work') Stoll reports that coordination

[8] While Dahrendorf calls this document the 'WTO agreement', this study refers to it as the 'Marrakesh Agreement', to avoid confusion with the 'WTO agreement' in the broad sense of the WTO's single undertaking.

[9] For the purpose of this work, a principle of customary international law is a non-written general principle of International Law.

[10] Dahrendrof, Anke 'Trade Meets Culture: The Legal Relationship between WTO Rules and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions'in Schneider and van den Bossche (eds)*Protection of Cultural Diversity from a European and International Perspective* (Intersentia2008) 50.

between the dispute settlement mechanisms of this instrument and of the WTO is virtually non-existent.[11] Such a lack of coordination poses a clear problem. This study addresses that challenge, by suggesting methods to enhance coherence between provisions of the WTO Agreement and the UNESCO CDCE and dispute settlement between both agreements.

1.2.2 Routes to Enhance Coherence

How to reduce fragmentation (or, 'enhance coherence') between regimes governing trade in cultural goods, is the aim of the present work. Coherence is essential for the stability and integrity of the international legal system: leaving fragmentation unaddressed may lead to violations of the *pacta sunt servanda* principle, through selective enforcement of one treaty or another. Coherence thus forms a foundational principle around which the international legal system must be organised.

This study proposes three routes to enhance coherence: (1) interpretation through analogical reasoning, and with the assessment of the possibility of normative and institutional coherence, (2) the feasibility of harmonisation through hard law, and (3) mutual supportiveness through soft law.

In this thesis, all three routes are found to be useful in reducing fragmentation. It is necessary to mention here that harmonisation and mutual supportiveness are discussed both as general principles of inter-

[11] Peter-Tobias Stoll, 'Article 20: Relationship to Other Treaties: Mutual Supportiveness, Complementarity and Non-Subordination' in Sabine von Schorlemer and Peter-Tobias Stoll (eds) *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (Springer 2012) 538.

pretation in chapter 3[12] and as two separate routes in the context of hard and soft law in chapters 4 and 5 respectively.

This thesis, in chapters 3, 4 and 5, proceeds by testing an overarching statement using a treaty-based positivist analysis approach, which affirms the 'feasibility' of each chapter's subject, by verifying the particular corollary hypotheses that can be derived from it. The term 'feasibility' stands on two scales: utility and practicability. 'Utility' describes the ability of the approach to genuinely reduce legal fragmentation between the WTO Agreement and UNESCO CDCE. 'Practicability' describes the likelihood that States and the two organisations would be willing to implement such approaches.

1.2.2.1 Route I: Enhancing Coherence via Interpretation through Analogical Reasoning

Chapter 3 illustrates how interpretation could enhance coherence between the WTO Agreement and UNESCO CDCE. Rather than developing a formal hypothesis to test, it investigates how interpretation has aided past efforts to improve coherence between treaties. By analogy it then reasons that enhance interpretation may enhance coherence between the WTO Agreement and UNESCO CDCE, offering examples of how this approach could find such an application with the aid of different principles, e.g. the harmonisation and mutual supportiveness are selected and discussed.

One of the most important contributions of this work is demonstrating how two interpretations of the notion of 'conflict' between norms give rise to two divergent methods of resolving fragmentation. Donders proposes the possibility of 'narrow' and 'broad' interpretation of conflict between the WTO rules and the UNESCO CDCE provisions of cultural

[12] Like harmonization, mutual supportiveness is general principle of international law (an assertion that Boisson de Chazournes and Mbengue have also made), and thus must also be considered as one of the 'rules governing the relations between the Parties' according to VCLT Article 31(3)(c).

rights under the UNESCO CDCE.[13] Her insight forms part of the analytical structure of Chapter 3 on interpretation, and this work applies the narrow interpretation of conflict to the relationship between WTO Agreement and UNESCO CDCE. Chapter 3's development of Donders' insight forms the logical structure underlying the material of Chapters 3, 4, and 5.

Broad interpretations of certain GATT Article XX general exception provisions may be used to cover the protection of cultural goods. Chapter 3 submits that examples could include national treasures and public morals. Chapter 3 furthermore notes that both the WTO Agreement and the UNESCO CDCE allow States to protect different policies and goals.

Narrow interpretations of 'likeness' allow non-discrimination provisions to protect cultural goods in certain circumstances, since culture refines the concept of 'likeness'. For example, Van den Bossche notes that

> "while not all WTO Members will agree, it can be argued that cultural goods and services using the national language(s) are not 'like' cultural goods and services using another language (e.g. English) and that therefore the non-discrimination obligations do not apply between these goods or services."[14]

However, broad interpretations may not be sufficient and resolving conflict between UNESCO CDCE and the WTO for trade in cultural goods may require amendment, implying the route of harmonisation.

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[13] Yvonne Donders 'Cultural Rights and the Convention on the Diversity of Cultural Expressions: Included or Ignored?' in Toshiyuki Kono and Steven Van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Intersentia 2012) 165-182 (167-168).

[14] Peter Van den Bossche *Free Trade and Culture: A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures* (Boekman 2007)136.

This forms the foundation of Chapter 4, which proposes and tests harmonisation as a strategy to enhance coherence.

1.2.2.2 Route II and Corollary Approaches: Enhancing Coherence via Harmonisation through Hard Law

This book will show that harmonisation is a separate approach in international law to reduce incoherencies between the WTO and UNESCO CDCE with respect to trade in cultural goods.

The UN International Law Commission (ILC) has also concluded that harmonisation *must* be considered as one of the "rules governing the relations between the Parties" according to VCLT Article 31(3)(c). Harmonization, this work will show, has an intrinsic relationship with hard law.

Chapter 4 therefore examines the following overarching statement:

"Harmonization by way of hard law is a feasible route to reduce fragmentation and enhance coherence regarding trade in cultural goods between the WTO and UNESCO legal regimes." It proceeds by testing three corollary hypotheses drawn from the three possible combinations of normative and institutional solutions to fragmentation:

Hypothesis 1 (the 'Amendment Approach'): It is feasible to harmonize the WTO and UNESCO legal regimes regarding trade in cultural goods, through *normative coherence*. This employs the solely normative approach.

Hypothesis 2 (the 'Coordination Approach'): It is feasible to harmonize the WTO and UNESCO legal regimes regarding trade in cultural goods, through *institutional coordination* to bring the evolving practices of both organisations closer to one another. This employs a combination of normative and institutional approaches.

Hypothesis 3 (the 'Construction Approach'): It is feasible to harmonize the WTO and UNESCO legal regimes regarding trade in cultural goods, by *constructing an external dispute settlement mechanism* be-

tween the two organisations which brings the two regimes closer to one another. This employs the solely institutional approach.

1.2.2.3 Route III and Corollary Approaches: Enhancing Coherence via Mutual Supportiveness through Soft Law

Mutual supportiveness is considered merely a general principle of customary international law. It would nonetheless offer a viable means of enhancing coherence between the WTO Agreement and the UNESCO CDCE that States could use effectively.

Mutual supportiveness, as this work will show, has an intrinsic relationship with soft law. Mutual supportiveness fills the gaps left by interpretation and harmonization; just as soft law fills the gaps left by hard law.

Chapter 5, therefore, investigates the following overarching statement:

"Mutual supportiveness by way of soft law is a feasible route to reduce fragmentation and enhance coherence regarding trade in cultural goods between the WTO and UNESCO legal regimes." It proceeds by testing three corollary hypotheses, each again drawn from the three possible combinations of normative and institutional approaches to reduce fragmentation.

Hypothesis 1 (the Interaction Approach): It is feasible to encourage mutual supportiveness between the WTO and UNESCO legal regimes regarding trade in cultural goods, through a mutually supportive interaction.

Hypothesis 2 (the Guidance Approach): It is feasible to establish mutual supportiveness between the WTO and UNESCO legal regimes regarding trade in cultural goods, through providing *flexible guidance to States*. This approach is strictly institutional in nature.

Hypothesis 3 (the Consultation Approach): It is feasible to establish mutual supportiveness between the WTO and UNESCO legal regimes regarding trade in cultural goods, through *establishing an expert*

consultation group between the secretariats of the WTO and UNESCO. Such a consultation group may offer non-obligatory consultative proposals to the relevant dispute settlement mechanism. This approach combines normative and institutional features.

1.3 Overview of What Each Chapter Wants to Demonstrate

Chapter 2 will elucidate the problem, methodology, and terminology that this introduction presents, integrating a review of the literature that has previously addressed the subject. It presents the instruments that the work examines, and the essential concepts required to understand the background and significance of the book.

Chapter 3 will find that interpretation is relatively simple to apply in enhancing coherence between the WTO Agreement and UNESCO CDCE regarding cultural goods. Interpretation remains the most accessible option because it does not require charting any new territory. The concepts of harmonization and mutual supportiveness are used in this chapter as the general principles of interpretation. Applying theses principles to the problem of fragmentation between WTO and UNESCO regimes is both useful and practicable. Interpretation is thus a feasible method of enhancing coherence.

Chapter 4 demonstrates that harmonization through hard law, using amendments and the creation of hard-law instruments, has very high utility in bringing the WTO Agreement and UNESCO CDCE into coherence. It posits a natural relationship between the 'hard' techniques that harmonization uses and instruments of hard law. However, it notes that the practicability of this technique is low. The high threshold of State approval and the lengthy process of approvals and ratifications required under amendment procedures, makes it an avenue that is unlikely to lend itself to effective international cooperation. Nonetheless, Chapter 4 is not a completely fruitless investigation: it makes concrete

proposals for provisions that should be harmonized, and for bodies to produce instruments of hard law, if States should prove willing to use this method.

Chapter 5 establishes that mutual supportiveness through soft law has both high utility and high practicability for bringing the WTO Agreement and UNESCO CDCE into coherence. It posits a natural correspondence between the mutual supportiveness approach and the instruments and bodies associated with soft law. Soft law can often achieve the same results as hard law, without requiring the necessary threshold of State agreement and the cumbersome amendment procedure entailed under WTO and UNESCO law. These latter considerations make States more amenable to using, and more likely to comply with, soft law instruments since these instruments favour flexible methods that account for particular circumstances.

Thus, this work analyses the potential for three main routes - interpretation, harmonization, and mutual supportiveness- to reduce fragmentation between the WTO Agreement and the UNESCO CDCE. It does so, in part, by positing an intrinsic relationship between harmonization and hard law on the one hand, and mutual supportiveness and soft law on the other. In the contexts of harmonization by way of hard law, and mutual supportiveness by way of soft law, the present work analyses each approach through normative, institutional, and combined normative and institutional frameworks. It then concludes by assessing the utility and practicability of each strategy to enhance coherence in matters regarding trade in cultural goods.

1.4 Original Contributions

As Chapters 1 and 2 make clear, previous literature has rarely focused on trade in cultural goods. Moreover, such literature as exists has limited itself to suggesting the need for enhancing coherence between

the WTO Agreement and UNESCO CDCE without any specific proposal and mechanism to realise such coherence.

Chapter 2's contribution builds on the existing literature's aforementioned understanding that the concept of 'fragmentation' encompasses normative and institutional dimensions. It proposes three routes to coherence. The first one relies "only on normative type changes; the second one, only on institutional actions; and the third one, refers to a combination of normative and institutional dimensions to develop practical approaches". This synthesis then shapes the logical structures of the subsequent chapters.

Chapter 3 contributes the original understanding that "particular types of interpretation regarding 'conflict' between treaties implicitly prescribe the route that should be taken towards enhancing coherence." The chapter goes further than simply proposing techniques to avoid conflict. It poses, and proposes answers to, certain questions that are fundamental to the discipline of international law, and trade in cultural goods in particular.

Considering the inadequacy of the good faith efforts in averting a potential conflict between two treaties, the procedures and practical approaches that States and international organisations should adopt, will be discussed in this Chapter.

A 'broad' notion of conflict (an interpretation that States cannot fulfil the provisions under two treaties simultaneously) implies the principle of harmonization. By contrast, a 'narrow' conception of conflict (an interpretation which views rights under one treaty as refining the provisions of another treaty based on shared goals and principles) implies the principle of mutual supportiveness.

This chapter's primary value lies in its proposal of two principles to enhance coherence that goes beyond the VCLT. The general principles of international law govern State behaviour under Article 38(1)(c) of the *Statute of the International Court of Justice* (ICJ Statute) and VCLT

Article 31(3)(c). Harmonization constitutes a general principle of international law, and the ILC has recognised its status as such -it can be used in the interpretation of potential conflicts between the provisions of the WTO and UNESCO CDCE. This chapter proposes using the work of Boisson de Chazournes and Mbengue, which suggests that mutual supportiveness is also a general principle of international law, with equal status to that of harmonization.

Chapter 4 proposes the new understanding that "the route of harmonization flourishes best when employed on the foundation of hard law." Harmonization has a natural relationship with instruments and amendments that fall into the category of 'hard law'. Chapter 4 also proposes three practical approaches to reduce fragmentation, based on each of Chapter 2's three perspectives on fragmentation: the 'Amendment Approach' (a solely normative approach), the 'Construction Approach' (a solely institutional approach), and the 'Coordination Approach' (an approach combining normative and institutional dimensions).

Chapter 5 contributes the new understanding that "the route of mutual supportiveness lends itself well to the use of instruments that fall into the category of 'soft law'." Boisson de Chazournes and Mbengue make a brief reference to this relationship in their discussion of mutual supportiveness in the UNESCO CDCE.[15]In this work, this approach is developed more broadly to apply to the relationship between the UNESCO CDCE and WTO Agreement.

Like Chapter 4, Chapter 5 proposes three practical approaches to reduce fragmentation, based on each perspective on fragmentation. Changes to norms will yield to what is called in this work the 'Interaction Approach'; the institutional changes will yield what is called in this

[15] Laurence Boisson de Chazournes and Makane Moïse Mbengue 'A propos du principe du soutien mutuel : les relations entre le protocole de Cartagena et les accords de l'OMC' (2007) 4 *Revue générale de droit international public* 829-862.

study the 'Guidance Approach'; and the combination of normative and institutional changes will deliver the 'Consultation Approach'.

Finally, this work contributes an understanding that whereas hard law (and thus the route of harmonization) entails the risk of unforeseen conflict, the use of soft law forestalls conflict and enhances coherence because of its non-binding nature.

This study provides an understanding that mutual supportiveness through soft law is both more practicable from the perspective of State implementation, and more useful from the perspective of genuinely reducing fragmentation, than is harmonization by way of hard law.

Each one of this work's original contributions plays an essential role to the overall structure of the work; no one element can be subtracted or isolated without disrupting the logic of the whole. Every element that this work introduces contributes to a larger picture that is greater than the sum of its parts. Taken together, the case study of reducing fragmentation between the WTO Agreement and the UNESCO CDCE may illuminate principles and suggestions for practical application that could prove useful in efforts to enhance coherence between other apparently conflicting instruments.

CHAPTER 2

BASIC CONCEPTS AND BACKGROUND

2.1 The Multilateral Trading System as a Guarantee of Peace in the Postwar International Legal Order

The *General Agreement on Tariffs and Trade* (GATT) was an important part of the postwar order. Even before the World Trade Organization's (WTO's) creation, GATT principles paved the way for the trend of globalisation. A number of international institutions established under the Bretton Woods Agreement, in the wake of World War II, played an important role in promoting a global free market. Some of the main organisations or agreements created in this period were the World Bank, the International Monetary Fund (IMF), and GATT.

After the ending of the Second World War, and wishing to avoid a repetition of the global depression of the 1930s, several States became Parties to the GATT. Holmes explains:

> "For many economists, the political nightmare of the 1930s was caused by a retreat into protectionism. This worsened the depression through falling trade, leading to massive unemployment and, ultimately, the rise of fascist aggression. Links between the economics and the ensuing conflicts of the time have been made by economists and historians…. The old adage 'if goods don't cross

> frontiers, soldiers will' became a driving force in the creation of the GATT."[16]

Part of the impetus behind the GATT's existence, then, was to reduce the likelihood of war for control of international markets that grew out of State protectionism of domestic industry. Eventually, the GATT and other trade-related treaties developed to the extent that administrative systematization of these treaties seemed desirable. The result was the WTO Agreement, with its 'single undertaking' of normative instruments and the creation of the Word Trade Organization as a new international organization.

Both the WTO, and its predecessor in the GATT, thus seek to prohibit State protectionism in the trade of goods. The two primary mechanisms for this purpose were the Most-Favoured-Nation principle (MFN) and the National Treatment principle (NT), which may together be summed up as a principle of 'non-discrimination'. The present chapter will explain this notion in greater detail.

The non-discrimination principle set the rules establishing the economic foundation for the present trend of globalisation. Each party to the GATT exchanged its exclusive sovereign right to regulate trade relations in its sole national interest for access to a multilateral trading system that mitigated the need to resort to armed conflict. Its purpose was to eliminate protectionist trade policy on an international scale.

This introduction now examines the postwar evolution of the multilateral trading system, as it relates to cultural diversity, in greater focus.

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[16] Peter Holmes 'Protectionism: Who Does It Really Protect? (NATO 2009) <http://www.nato.int/docu/review/2009/financialcrisis/PROTECTIONISM/EN/index.htm> Accessed 16 December 2022.

2.2 A Shared Value of Peace: Cultural Diversity as a Human Right

The previous section notes that the GATT's original objective was to establish a foundation for peaceful resolutions to economic conflicts. Cultural diversity, many scholars argue, is a collective human right also intended to safeguard the value of peace, and States' sovereign exercise of this right forms the basis of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, or the UNESCO CDCE. Thus, the UNESCO CDCE and the GATT (now the WTO Agreement) arguably hold a fundamental value in common.

As early as 1971, David Wall noted that:

> "The United Nations Conference on Trade and Development (UNCTAD) secretariat raised, in a report on 'The Developing Countries in GATT', the following question in their conclusion:'There is no dispute about the need for a rule of law in world trade. The question is: What should be the character of that law? Should it be a law based on the presumption that the world is essentially homogenous, being composed of countries of equal strength and comparable levels of economic development, a law founded, therefore, on the principles of reciprocity and non-discrimination? Or should it be a law that recognizes diversity of levels of economic development and differences in economic and social systems?'"[17]

The question as framed above may initially seem non-pertinent to the cultural diversity concept but is related to social systems, which basically encompass the cultural diversity concept.

In 1970, UNESCO drafted a document in several chapters, entitled *Cultural Rights as Human Rights*. This document is permeated with the

[17] David Wall 'Opportunities for Developing Countries' in Harry G. Johnson (ed) *Trade Strategy for Rich and Poor Nations* (Allen and Unwin 1971) 49.

atmosphere of decolonization, and several authors enunciate UNESCO's viewpoints at that time. In the chapter 'Cultural Interaction as a Factor Influencing Cultural Rights as Human Rights', Mshvenieradze states the premise that :

> "Cultural interaction is concerned with being an effective means to save man from a technological offensive, that 'instrumentalizes' man in the process of 'industrialization and mechanization of the world'."[18]

Mshvenieradze continues:

> "The culture of a given society is determined, in the last run, by socio-economic conditions, by the level of production. Any culture has a relative independence. To consider the relative independence as absolute would lead, as a rule, to two mistakes: (a) a necessary condition is identified with a sufficient one: culture is reduced only to spiritual values. This creates an illusion that the problem of cultural interaction may be solved in a purely theoretical realm, without creation of necessary social, economic and political prerequisites for it; (b) 'cultural relativism' prevents a correct theoretical understanding of the problem, because it cannot reveal the very foundation of spiritual culture."

On the other hand, by emphasizing only the immediate relation of culture to the development of production, i.e. disregarding the complicated character of this very relation and relative independence of culture creates another illusion as if the development of production automatically leads to the solution of all problems of culture. This results in rejecting the specific features of culture, discarding the relationship between culture and humanism, the problem of an all-round and harmonious

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[18] V. Mshvenieradze 'Cultural Interaction as a Factor Influencing Cultural Rights as Human Rights' in *Cultural Rights as Human Rights* (UNESCO 1970) 42.

development of an individual…. Cultural rights and cultural interaction depend on socio-economic and political structure of society.[19]

Although the above view on 'culture' is rather old and not endorsed today by UNESCO, it shows however that, as early as 1970, UNESCO was examining the relationship between economics and culture. Mshveniernadze's observation that 'culture' is not *merely* a spiritual value but is also rooted in real-world objects that form the basis of production and trade, anticipates more contemporary references to the 'dual nature' of traded cultural goods.[20]

In the same document, future UN Secretary-General Boutros-Ghali noted:

> "A consequence of effective cultural rights is to make known to the consumer society the existence of other societies and other cultures. The question is not so much to develop peaceful and friendly relations between peoples as to bring them to a better understanding of their interdependence. Culture, as an instrument of international solidarity, may perhaps preserve our planet from a class war on a State scale, where proletarian nations would face peoples in possession."[21]

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[19] ibid, 43-44.

[20] Neuwirth writes that the 'special dual nature' of cultural products, including cultural goods, 'evince[s] problems related to the institutional competence and the general fragmentation of international law in dealing with these products'. Rostam J Neuwirth, 'The Convention on the Diversity of Cultural Expressions and Its Impact on the "Culture and Trade Debate"', in Toshiyuki Kono and Steven Van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Intersentia 2012) 230. See also John Morijn *Reframing Human Rights and Trade: Potential and Limits of a Human Rights Perspective of WTO Law on Cultural and Educational Goods and Services* (Intersentia 2010) 26.

[21] B. Boutros-Ghali 'The Right to Culture and the Universal Declaration of Human Rights' in *Cultural Rights as Human Rights* (UNESCO 1970) 74.

Boutros-Ghali's reference to cultural diversity as a safeguard for the interests of peace between nations recalls the Preamble of the UNESCO CDCE, which states that "cultural diversity, flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, is indispensable for peace and security at the local, national and international level".

The term 'cultural diversity' makes a notable appearance in the 1970 document's concluding 'Statement on Cultural Rights as Human Rights': "There must be a full recognition of the diversity of cultural values, artefacts and forms wherever these appear".[22] This language is again familiar from the UNESCO CDCE's Preamble: "*Recognizing* the diversity of cultural expressions, including traditional cultural expressions, is an important factor that allows individuals and peoples to express and to share with others their ideas and values".

The concluding Statement notably contains this characteristically strident opinion:

> "One of the characteristics of our contemporary world is the domination of men by strong centralized nation States which have the power to increase cultural uniformity and homogeneity within their borders and outside. While such cultural uniformity and homogeneity is understandable from the point of view of the political and economic interests of the ruling groups of such societies, means have to be found to mobilize those cultural traditions the richness of which can provide people with a sense of belonging to coherent groups and which can contribute to the development of a sense of personal identity in the face of forces which often tend to alienate or estrange men from the organized centres of power. While most of us may agree with this article of faith-that elements of traditional culture should not be lost and

[22] UNESCO 'Statement on Cultural Rights as Human Rights' in *Cultural Rights as Human Rights* (UNESCO 1970) 105.

> means should be found to clarify their relevance-it is probably a task for the future to deal with these problems systematically and concretely."[23]

Although the tone of 'Cultural Rights as Human Rights' is markedly not obvious in more contemporary UNESCO work on the interaction between trade and culture, the concerns remain constant to a certain degree. The expressly stated concern was that strong States would culturally overpower weaker ones, and thus produce a violent reaction: "We cannot underwrite a status quo which fails to grant these rights, and by its failure invites a violent response from those who are deprived".[24] This language explicitly parallels that of the Preamble of the *Universal Declaration on Human Rights*, which states: "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

Such an outlook was consistent with the purpose of UNESCO within the postwar system of global governance. Francioni points out that UNESCO's mission is to promote science, culture and education as the basic pillars of a stable peace among nations.

> "…[T]he celebrated fifth preambular sentence of the UNESCO Constitution…proclaims that: 'a peace based exclusively on the political and economic arrangements of governments would not be a peace which could secure the unanimous lasting and sincere support of the peoples of the world, and that peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind'."[25]

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[23] ibid 106.

[24] ibid.

[25] Francesco Francioni 'Introduction' to Part II: From Constitutional Objectives to Legal Commitments in Abdulqawi Yusuf (ed) *Standard-setting in UNESCO*

The 'Statement on Cultural Rights as Human Rights' equally benefited from precedent within UNESCO. Donders notes:

> "Following its mandate to contribute to peace by promoting collaboration through culture, in November 1966 the General Conference of UNESCO adopted the Declaration of Principles of International Cultural Cooperation. According to the Preamble, the Declaration was inspired by the idea that ignorance of the life, customs and culture of communities was considered to be an obstacle to friendship among nations and to peaceful cooperation. International cultural cooperation could contribute to a better understanding and, consequently, to the building and maintenance of peace. The Declaration encourages states to cooperate in the field of culture…and to find a '(…) balance between technical progress and the intellection and moral advancement of mankind (…)'"[26]

Article 1 of the Declaration has become a well-known provision:

> "1. Each culture has a dignity and value which must be respected and preserved.
> 2. Every people has the right and duty to develop its culture.
> 3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind"….

This idea is also reflected in the 2005 Convention, in which Article 2(3) states the principle of the equal dignity of and respect for all cultures.[27]

Volume I: Normative Action in Education, Science and Culture (UNESCO/Nijhoff 2007) 109.

[26] Ellipses in original.

[27] Yvonne Donders 'The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions' in Hildegard Schneider

Article 4 of the 2001 *Universal Declaration on Cultural Diversity* -a document which this introduction will show was a direct antecedent to the UNESCO CDCE, thus indicating the intent of the latter document's drafters- states that "The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples."

Wouters and Vidal, in turn, mark the significance of the *Universal Declaration on Cultural Diversity* for the relationship between cultural diversity and human rights, safeguarding the integrity of international law. They write:

> "The Declaration's wide scope of application is underscored by its attention to cultural pluralism within modern societies (Article 2), its positive attitude *vis-à-vis* inclusive policies and its emphasis on the fact that cultural pluralism is 'indissociable from a democratic framework.' In this way, the Universal Declaration contributes to strengthening the importance of democracy in modern international law. The Declaration also displays a rights-based approach to cultural diversity: while the defense of human rights is a guarantee for cultural diversity, the latter cannot be invoked to infringe on the former or to limit their scope…Consequently, the Universal Declaration is firmly embedded in the universally accepted human rights framework set up by the United Nations system; and fears that UNESCO's work in this field could be used by certain States to violate human rights, in particular the freedom of expression and information, seem rather groundless….[T]he proclamation of cultural

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and Peter Van den Bossche (eds) *Protection of Cultural Diversity from a European and International Perspective* (Intersentia 2008) 5-6.

goods…as 'commodities of a unique kind' (Article 8) is clearly designed to oppose the proponents of the pure logic of trade."[28]

As for the UNESCO CDCE, Macmillan adds:

"The location of the Convention within the stable of human rights instruments, which is suggested in the Preamble, is reinforced by a number of the operative provisions of the Convention. Two such provisions are of particular note in this respect. One is the first of the Convention's so-called guiding principles in Article 2.1, which provides:

'Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed'.…

The other relevant article, however, provides the clearest invocation of the authority and relevance of the pre-existing human rights instruments. This is Article 5.1, which is concerned with the obligations of the parties to the Convention:

'The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, re-affirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.'

By drawing together the various strands from the UDHR and the Covenants to the UN Charter that make up the composite right to cultural self-determination, the UNESCO Convention

[28] Jan Wouters and Maarten Vidal, 'UNESCO and the Promotion of Cultural Exchange and Cultural Diversity' in Abdulqawi A. Yusuf (ed) *Standard-Setting in UNESCO Volume I: Normative Action in Education, Science and Culture* (UNESCO/Nijhoff 2007) 162.

> may be conceptualised as a particular, if rather Byzantine, instantiation of the right to cultural self-determination."[29]

The United Nations General Assembly supports a similar reading of the instruments related to cultural diversity. Obuljen records:

> "Another important document, adopted in February 2000, is the *United Nations General Assembly Resolution 54/160: Human rights and cultural diversity.* This resolution provides a clear link between cultural diversity and basic human rights recognised in international instruments…. This resolution is very important for understanding the context in which advocates of the Convention were building support for the idea. The Resolution gives a necessary link between the protection of cultural diversity and the protection of human rights as enshrined in the *Universal Declaration on Human Rights*…. In December 2000 the Council of Europe adopted the *Declaration on Cultural Diversity*. A year later, in November 2001, the UNESCO General Conference unanimously adopted the *Universal Declaration on Cultural Diversity*, as well as the *Action Plan*, the main lines of action for the implementation of this declaration."[30]

There are several conclusions to be drawn from this discussion. First, the concerns articulated in the UNESCO CDCE are not new. Rather, a reading of the literature confirms repeated and unequivocal attempts to

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[29] Fiona Macmillan 'The UNESCO Convention as a New Incentive to Protect Cultural Diversity' in Hildegard Schneider and Peter Van den Bossche (eds) *Protection of Cultural Diversity from a European and International Perspective* (Intersentia 2008) 166-167.

[30] Nina Obuljen 'From *Our Creative Diversity* to the Convention on Cultural Diversity: Introduction to the debate' in Nina Obuljen and Joost Smiers (eds) *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work* (Institute for International Relations 2006) 26-27.

identify cultural diversity as a human right. This concern is both historical and contemporary.

Although some scholars note their opinion that the connection is tenuous, historical efforts to establish cultural diversity as a human right have clearly stated one purpose of such an identification: to demonstrate that cultural diversity is of equal value to trade in the global community. If human rights are protected under trade regulations (and chapters 3 and 5 argue differing ways in which they might be), then the trade framework also protects cultural diversity by virtue of its status as a human right and is also linked to sustainable development.

Second, the UNESCO CDCE, which is based on the *Universal Declaration on Cultural Diversity*, establishes a historical lineage for the argument that culture is not *simply* a matter of values, practices, and meanings, but is also linked with production and trade. The UNESCO CDCE crystallizes this recognition when it identifies, for instance, cultural goods as one of the categories of 'cultural expression'.

Finally, the historical identification of cultural diversity as a human right clearly has the goal of decreasing the cultural bases for conflict between societies. While the GATT 1947 and the 1970 UNESCO 'Statement on Cultural Rights as Human Rights' are perhaps more rudimentary by comparison, their inheritors in the 1994 WTO Agreement and the 2005 UNESCO CDCE -as chosen for this study- are arguably more refined and contemporary in their provisions.

The GATT was created with the recognition that a multilateral trading system could produce a recognition of economic interdependence that would forestall armed conflict. However, UNESCO recognised as early as the 1970s, that the same multilateralism in trade may also foster cultural homogenization, to the benefit of economically stronger States whose products may dominate the market. This trend is likely to produce resentments and conflicts that undermine the interests of peace.

Thus, the purpose of 'protecting' cultural expressions, including cultural goods, is not simply to safeguard cultural diversity *from* trade, but *in cooperation with* the multilateral trading system toward the shared objective of preserving peace. The historical grounding of the UNESCO CDCE and its text (especially Article 20) in addition to the principles of Vienna Convention, and also of the WTO Agreement establish that the two documents are complementary components of a common system designed to avoid international conflict.

2.3 Globalization and Neoliberalism: New Foundations for the International Legal Order

2.3.1 Globalisation

The common use of the term 'globalisation' in the academic arena can be traced back to the fall of the Berlin Wall in 1989, marking the collapse of the Union of Soviet Socialist Republics (USSR) and its communist economic model. This era marked the emergence of the United States as the sole economic superpower. Thereafter, the term was not limited to economic or political discourses, but it started to enter all aspects of social sciences.

'Globalisation' has become one of the most common terms in different scholarly domains, garnering the attention of researchers in fields as varied as politics, economy, sociology, and cultural studies. As an increasingly large proportion of States endorsed the basic principles of trade, a rapid development of cultures, unlimited worldwide communication, and global interdependence of economic and cultural activities ensued. Such technological changes paved the way for further conceptualizations about globalisation in the academic arena.

Different aspects of the phenomenon produced new developments in the missions and aims of the international organisations. However, the

way that each international body entered the discussions was different, as each had different objectives in mind.

The Organization for Economic Cooperation in Development (OECD) provides this definition:

> "the phenomenon by which markets and production in different countries are becoming increasingly interdependent due to the dynamics of trade in goods and services and the flows of capital and technology."[31]

In 2000, the International Monetary Fund (IMF) identified several aspects of globalisation:

> "Economic 'globalization' is a historical process, the result of human innovation and technological progress. It refers to the increasing integration of economies around the world, particularly through trade and financial flows. The term sometimes also refers to the movement of people (labor) and knowledge (technology) across international borders."[32]

For the World Health Organization, the effects of globalisation on people is more crucial:

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[31] OECD, 'Intra-Firm Trade' (OECD 1993) 7 cited in R. Brinkman and J. Brinkman 'Corporate Power and the Globalization Process' 29(9) *International Journal of Social Economics* 730-752 (730-731) 2002. Cited in Nayef R.F. Al-Rodhan and Gérard Stoudmann 'Definitions of Globalization: A Comprehensive Overview and a Proposed Definition' <https://www.studocu.com/en-gb/document/university-of-dundee/international-relations/definitions-of-globalization-a-comprehensive-overview-and-a-proposed-definition/1566906> Accessed 16 December 2022.

[32] 'Globalization: Threats or Opportunity'(International Monetary Fund 2000) <https://www.imf.org/external/np/exr/ib/2000/041200to.htm#II> Accessed 16 December 2022.

> "Globalization, or the increased interconnectedness and interdependence of people and countries, is generally understood to include two interrelated elements: the opening of borders to increasingly fast flows of goods, services, finance, people and ideas across international borders; and the changes in institutional and policy regimes at the international and national levels that facilitate or promote such flows. It is recognized that globalization has both positive and negative impacts on development."[33]

Henderson describes globalisation as "free movement of goods, services, labour and capital thereby creating a single market in inputs and outputs; and full national treatment for foreign investors (and nationals working abroad) so that, economically speaking, there are no foreigners."[34]

During a 2006 speech in Chile, WTO Director-General Pascal Lamy stated that

> "globalization can be defined as a historical stage of accelerated expansion of market capitalism, like the one experienced in the 19th century with the industrial revolution. It is a fundamental transformation in societies because of the recent technological

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[33] World Health Organization Website, 'Health Topic: Globalization' <http://www.who.int/topics/globalization/en/>Accessed 4 June 2017.

[34] David Henderson 'The MAI Affair: A Story and Its Lessons' (The Royal Institute of International Affairs 1999)
cited in M. Wolf *Why Globalization Works* (Yale 2004) 14. Cited in Nayef R.F. Al-Rodhan and Gérard Stoudmann 'Definitions of Globalization: A Comprehensive Overview and a Proposed Definition'
<https://www.studocu.com/en-gb/document/university-of-dundee/international-relations/definitions-of-globalization-a-comprehensive-overview-and-a-proposed-definition/1566906> Accessed 16 December 2022.

> revolution which has led to a recombining of the economic and social forces on a new territorial dimension."[35]

By the 1990s, this phenomenon came to the public sphere through anti-globalisation movements, mainly in Western societies. Criticism from grassroots intellectual currents of international institutions, such as the WTO and IMF emphasised either the economic inequalities in the globalised market or the western centrism of globalisation ideologies. Such social movements aimed to protect the minor players of the globalised world.

2.3.2 Neoliberalism and International Free Trade

Globalisation has had multi-dimensional effects on various aspects of human life, but discussions of the concept have taken shape around the notion of neoliberalism. Liberalism was introduced to scholars in 1776 by the Scottish economist, Adam Smith. In his book *The Wealth of Nations*, Smith explained that the 'invisible hand' could sufficiently regulate the market. According to Smith:

> "As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to

[35] WTO, 'Humanising Globalization' <http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm> Accessed 16 December 2022.

promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it.

What is the species of domestic industry which his capital can employ, and of which the produce is likely to be of the greatest value, every individual, it is evident, can, in his local situation, judge much better than any statesman or lawgiver can do for him. The statesman who should attempt to direct private people in what manner they ought to employ their capitals would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it."[36]

Smith thus believed that minimal regulations and government intervention could promote prosperity.

However, this economic approach included the boom and bust cycle, including recession and depression. The economic order following the Great Depression and World War II instituted State controls over markets to avoid the worst possibilities of the liberal economic model. State monopolies and public works programs, in particular, formed part of this postwar trend. This school of economic thought was largely associated

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[36] Adam Smith *The Wealth of Nations* 349-350 (Meta Libri 2007). <https://www.ibiblio.org/ml/libri/s/SmithA_WealthNations_p.pdf> Accessed 16 December 2022.

with the work of John Maynard Keynes, and its dominant position lasted into the 1970s. Thorsen and Lie, citing Palley, note that

> "neoliberalism has replaced the economic theories of John Maynard Keynes and his followers. Keynesianism, as it came to be called, was the dominant theoretical framework in economics and economic policy-making in the period between 1945 and 1970, but was then replaced by a more 'monetarist' approach inspired by the theories and research of Milton Friedman. Since then, we are led to believe that 'neoliberalism' i.e. monetarism and related theories, has dominated macroeconomic policy-making, as indicated by the tendency towards less severe state regulations on the economy, and greater emphasis on stability in economic policy rather than 'Keynesian' goals such as full employment and the alleviation of abject poverty."[37]

By the late 1980s, Thatcher and Reagan had begun to promote this new trend of a liberal political economy. Their first mission was to reduce the State's expenses and cut off the State from the market. Based on the free trade notions of their forerunners, neoliberals started a new trend in the last quarter of the century to free the market from governmental controls. Technological changes have facilitated freer movement of goods, capital, and people across national borders and regions. In other words, technological and political changes at the end of the twentieth century opened the space for neoliberalism to dominate the political and economic discourse.

The theory of neoliberalism on free trade regards cultural characteristics as traits that are worth consideration merely to the degree that they affect consumers' preferences. To attain a higher level of prosperity and

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[37] Dag Einar Thorsen and Amund Lie 'What is Neoliberalism' (Department of Political Science, University of Oslo n.d.) 8 <https://jagiroadcollegelive.co.in/attendence/classnotes/files/1589998418.pdf> Accessed 16 December 2022.

development, neoliberals believe, the global market (and even national markets) should generally leave marginal or non-dominant cultural matters aside, due to their failure to attract large numbers of consumers. Based on this assumption, globalisation would be a process of cultural homogeneity in favour of the cultures of Europe or North America that are seeking to expand in the world because of their economic power and influence. The critiques of neoliberalism stress the necessity of policies favouring cultural diversity to guard and support marginal cultures in the free global market. Such a protectionist approach toward national and even indigenous cultures challenges the neoliberal claims about free international trade.

Neoliberalism's purely economic approach has been criticised from various viewpoints, including the perspective of cultural diversity. Notably, former World Bank senior vice-president and chief economist and OECD Co-Chair of the High-Level Expert Group on the Measurement of Economic Performance and Social Progress, Joseph E. Stiglitz, has pronounced neoliberalism 'dead'. In his 'Globalization and Its New Discontents', published in 2016, Stiglitz wrote:

> "Under the assumption of perfect markets (which underlies most neoliberal economic analyses), free trade equalizes the wages of unskilled workers around the world. Trade in goods is a substitute for the movement of people. Importing goods from China – goods that require a lot of unskilled workers to produce – reduces the demand for unskilled workers in Europe and the US.
>
> This force is so strong that if there were no transportation costs, and if the US and Europe had no other source of competitive advantage, such as in technology, eventually it would be as if Chinese workers continued to migrate to the US and Europe until wage differences had been eliminated entirely. Not surprisingly, the neoliberals never advertised this consequence of trade liberal-

> ization, as they claimed – one could say lied – that all would benefit.
>
> The failure of globalization to deliver on the promises of mainstream politicians has surely undermined trust and confidence in the 'establishment.' And governments' offers of generous bailouts for the banks that had brought on the 2008 financial crisis, while leaving ordinary citizens largely to fend for themselves, reinforced the view that this failure was not merely a matter of economic misjudgments."[38]

Such a conclusion, from one of the foremost former expositors of neoliberalism, indicates a serious challenge, felt at all levels, on a global scale. To safeguard global governance, additional aspects of sustainable development -such as cultural diversity- may complement solely economic notions of the concept.

2.4 Primary Instruments Examined in this Work

2.4.1 The WTO Agreement and the Non-Discrimination Principle

The WTO's establishment in 1995 coincided with the beginning of the era of globalisation. The organisation inherited the legacy of the GATT, an agreement on international trade concluded in 1947. As seen previously, the GATT emerged from the context of postwar reconstruction, resulting from the tendency of international trade to conflict with the goals of self-interested States to protect their domestic markets.

Until the foundation of the WTO, the GATT was considered the central global agreement that regulated trade, including trade in goods. Eight rounds of trade negotiations were set up to support trade liberalisa-

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[38] Joseph E. Stiglitz 'Globalization and Its New Discontents' *Project Syndicate* (Aug 5 2016) <https://www.project-syndicate.org/commentary/globalization-new-discontents-by-joseph-e--stiglitz-2016-08> Accessed 16 December 2022.

tion with an emphasis on decreasing tariffs and eliminating obstacles that hindered trade. A mechanism also existed to resolve trade conflicts among its contracting parties.

According to Davey,[39] the GATT was successful in eliminating barriers to trade in goods, but had several drawbacks. Firstly, the lack of a formal organisational structure in the GATT was viewed as a drawback. Secondly, several side accords on subjects such as valuation of customs, dumping, subsidies, standards, import licensing, dairy, and meat were only adopted by some industrialized contracting parties. Thirdly, although GATT regulations were primarily applied to trade of all products, over time two main domains of trade, namely agriculture and textiles, remained effectively outside GATT regulations. Such disintegration in the application of an accorded discipline was regarded as a breach in the idea of the GATT. Fourthly, the GATT regulations did not cover services, this was also an issue. Finally, while the GATT's dispute settlement system was managed relatively well, some noticeable problems existed in its performance. The need for consensus in the GATT's decision-making resulted in a lack of effectiveness.

Despite the preceding issues, the general achievement of the GATT in decreasing trade barriers and increasing international trade was significant. All of these problems were eventually taken into account in the eighth round of GATT trade negotiations —the Uruguay Round from 1986-1994— which created the WTO.

Petersmann details some of the WTO's history from the GATT onward, highlighting the organisation's power to shape sovereign State policy with regard to trade:

> "The non-ratification of the 1948 Havana Charter for an International Trade Organization left the post-war 'international eco-

[39] William Davey 'The World Trade Organization: A Brief Introduction' in Andrew T. Guzman and Joost H.B. Pauwelyn *International Trade Law* (Aspen 2009) 83-84.

> nomic constitution', based on the 1944 Bretton Woods Agreements and the 'GATT 1947' incomplete.… Even in areas covered by GATT law–such as trade in agricultural, steel, and textiles products–governments often gave in to protectionist pressures for departures from their GATT obligations of open markets and non-discriminatory competition…. As a global integration agreement, which regulates international movements of goods, services, persons, capital and payments in an integrated manner, the WTO Agreement reduces the current fragmentation of separate international agreements and organizations… Even more so than the IMF and the World Bank, whose statutes include only few substantive rules for the conduct of governmental policies and for the rule-oriented settlement of international disputes, the WTO was designed to serve also constitutional functions…and rule-making functions…, in addition to its executive functions, surveillance functions and dispute settlement functions for the foreign economic policies of member states."[40]

Davey further notes that the Marrakesh Agreement, the constitutive document of the WTO, occupies several functions. Article III (Functions of the WTO) indicates that the purpose of the WTO is firstly to facilitate the implementation, administration, and operation of trade agreements, and secondly, to present the opportunity for discussions amongst its Members regarding their mutual trade relations. Thirdly, it directs the perception of regulations and procedures that manage the Dispute Settlement Understanding (DSU). Fourthly, it governs the Trade Policy Review Mechanism (TPRM), an institutionalized transparency exercise.

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[40] Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer 1997) 45, 47.

Fifthly, the organisation monitors cooperation with various other international economic institutions.[41]

The WTO approaches the liberalisation of trade and addresses the remaining trade barriers via negotiations. The GATT's primary means of avoiding protectionism is the principle of non-discrimination, expressed in its Most-Favoured Nation (MFN) and National Treatment (NT) clauses. These provisions require that all 'like' goods should be treated equally, (subject to certain exceptions). When it assumed jurisdiction over the GATT in 1994, the WTO enshrined these mechanisms in its non-discrimination principle (as expressed in the phrase that completes the third Recital of the Preamble to the Marrakesh Agreement Establishing the World Trade Organization: "the elimination of discriminatory treatment in international trade relations").

2.4.1.1 The Most Favoured Nation Principle

Article 1 of the GATT contains the MFN clause, providing that any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

In other words, GATT members pledged to extend the same treatment to products of all other GATT Members, on the condition that the products were comparable in several key aspects—that is to say they were 'like products'. Chapter 3 will further examine the concept of like products.

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[41] William Davey 'The World Trade Organization: A Brief Introduction' in Andrew T. Guzman and Joost H.B. Pauwelyn *International Trade Law* (Aspen 2009) 88.

2.4.1.2 The National Treatment Principle

GATT Article III:4 contains a similar clause to that in Article I, this time on NT. It begins: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin."

Thus, with a view to avoiding conflicts, for markets, GATT members would guarantee equal treatment between foreign goods, and 'like' goods that had been produced domestically, within their national markets, the obligation included in Article III of GATT as 'National Treatment'.

2.4.1.3 Effects of the Non-Discrimination Principle on Culture

Here, the cultural, social and political meaning attached to cultural goods came into play. As seen above, WTO regulations do not permit nationally based discrimination for like products in the same market. At present, neither do they permit an interpretation of their provisions that would translate such a subjective and unique form of meaning as 'culture' into the language of the covered agreements. Gaining the advantages of WTO membership meant, for many States, a loss of sovereignty over culture, and the potential for a corresponding decrease in cultural diversity. With regard to legal impact of the WTO on Diversity of Cultural Expressions, Schrijver discusses the following:

> "In the field of cultural rights, UNESCO has recently developed two normative instruments expressly dedicated to cultural diversity: the Universal Declaration on Cultural Diversity and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions….Both instruments contain several elements with a potential impact on international law. First, these legal instruments are the first to proclaim cultural diversity as the 'common heritage of humanity', to be 'cherished and preserved

> for the benefit of all'. Second, the instruments link cultural diversity to the concept of sustainable development… Third, Article 2, Paragraph 2 of the Convention confirms the sovereign right of States to 'adopt measures and policies to protect and promote the diversity of cultural expressions within their territory'. This is an interesting provision in light of the national treatment principle included in the WTO agreement."[42]

2.4.2 The UNESCO CDCE

From the Uruguay Round, when the WTO Members were unsuccessful in reaching a consensus on an audiovisual services agreement, several proposals have emerged to protect cultural expressions. One organisation, the International Network of Cultural Policy, composed of the cultural ministers of several Parties to UNESCO, was principally successful in developing an outline that developed into the current UNESCO CDCE.

On 20 October 2005, 148 Members of the UNESCO adopted the Convention. The Convention allows contracting parties to protect cultural diversity expressions, such as expressions of domestic culture—books, magazines, TV programmes, music, and theatre performances. On 18 March 2007, the UNESCO CDCE entered into force. This was three months after the thirtieth instrument of ratification was deposited with UNESCO. As of January 2020, the Convention has been ratified by 148 States and by the European Union. Three months after the deposit of an instrument of ratification, accession, approval or acceptance, the

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[42] Nico Schrijver 'UNESCO's Role in the Development and Application of International Law: An Assessment' in Abdulqawi A. Yusuf (ed) *Standard-Setting in UNESCO Volume I: Normative Action in Education, Science and Culture – Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (UNESCO/Nijhoff 2007) 375.

contracting parties are legally bound by the provisions of the Convention.

2.4.2.1 From the 2001 Declaration to the 2005 UNESCO CDCE

The UNESCO CDCE's immediate predecessor is the *Universal Declaration on Cultural Diversity* adopted in November 2001. The declaration emphasises identity, diversity, pluralism, and issues of cultural diversity as related to creativity, human rights, and international solidarity. Peter-Tobias Stoll, Sven Missling, and Johannes Jürging note the language of the Preamble of UNESCO CDCE, which states:

> "'*Referring* to the provisions of the international instruments adopted by UNESCO relating to cultural diversity and the exercise of cultural rights, and in particular the Universal Declaration on Cultural Diversity of 2001'
>
> With this recital, the Preamble especially points to the fact that the 2001 UDCD provided the original incentive for the drafting process of the Convention. The UDCD was adopted unanimously by the General Conference of UNESCO in 2001 as an immediate reaction to the terrorist attacks of 11 September 2001. The Declaration has been considered to be 'an opportunity for States to reaffirm their conviction that intercultural dialogue is the best guarantee of peace and to reject outright the theory of the inevitable clash of cultures and civilizations."[43]

The UNESCO CDCE thus may be interpreted as furthering the previously noted value of preserving peace that the original GATT and UNESCO were intended to safeguard, in yet a new era of global interactions.

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[43] Peter-Tobias Stoll, Sven Missling, and Johannes Jürging 'Preamble' in Sabine von Schorlemer and Peter-Tobias Stoll (eds) *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (Springer 2012) 57.

Stoll, Missling, and Jürging continue:

> "In April 2003, at its 166th Meeting, the UNESCO Executive Council finally decided to put the question on legal and technical aspects of the desirability of a standard-setting instrument on cultural diversity on the provisional agenda of the 32nd General Conference. As a result, on 17 October 2003 a resolution by acclamation materialized."[44]

The trends and decision to focus on the diversity of cultural context and artistic expressions, is only reflected on Articles 8 to 11 of Universal Declaration on Cultural Diversity. The general reference to interrelated aspects of the diversity of cultural context and artistic expressions appears in the CDCE.

On 20 October 2005, after more than three years of sharp debates and discussions, the 33rd Session of the UNESCO General Conference adopted the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. While 148 countries approved the Convention, two countries (the US and Israel) voted against it, and four countries abstained. It entered into force on 18 March 2007. This Convention responded to a growing concern about the consequences of globalisation. UNESCO emphasised that

> "the Convention takes note of the fact that cultural creativity, which constitutes one facet of cultural diversity, has been bestowed on the whole of humanity. It paves the way to strengthening human relations in a globalized world that sometimes lacks compassion."[45]

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[44] ibid 4.

[45] UNESCO 'Ten Keys to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted by the General Conference of UNESCO at its 33rd Session, 2005' 11.

According to Neil, the original proponents of the UNESCO CDCE envisaged creating a legal shield for trade in cultural goods and services. The Convention validated the dual nature of cultural goods as having both economic and cultural value. Moreover, the Convention was considered an imperative political instrument for cultural development. By outlining a range of actions that countries could exercise to advance the capacities of their national culture, drafters hoped it might operate as a model for States which had not developed their cultural policies at that moment.[46]

UNESCO developed and adopted the CDCE, the text of which endorses States' "sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions". In this respect, the Convention's goal is to preserve global cultural diversity and empower nations to protect their own cultures by, among other measures, restricting the import of competing cultural goods and services from other countries. Furthermore, the Convention frames common rules and principles for cultural diversity at the global level, recognises the legitimacy of public policies in both protecting and promoting cultural diversity, and affirms sovereign rights in the cultural arena.

Germann is of the viewpoint that the UNESCO CDCE would not generate any substantial results since it has no real mechanism to develop case law, nor to defend its objectives on a level playing field vis-à-vis the conflicting objectives of effectively enforceable trade agreements. In practice, Germann did not state the whole reality. The 2001 UDCD is described as the ancestor of the CDCE, and thus, as other declarations could be considered as an important step towards the CDCE. However,

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[46] Garry Neil 'The Convention as a Response to the Cultural Challenges of Economic Globalization' in Nina Obuljen and Joost Smiers (eds) *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Institute for International Relations 2006) 41-70 (68-69).

the UNESCO CDCE, in some ways, has moved towards developing parts of the concerns expressed in the UDCD.

A report of experts on a preliminary draft of the UNESCO CDCE records:

> "The appropriate terminology to be used to express the rights and obligations of States Parties under the Convention was the subject of an important debate. Out of respect for the principle of State sovereignty, the use of verbs such as 'must', 'shall', and 'undertake' with States as subjects, and of expressions implying the obligation to perform specified actions (such as 'States Parties are under the obligation [or have a duty] to…') was questioned. In response to this concern, the experts were reminded that the mandate given to the expert group was to produce a draft Convention and that, as a result, it was necessary to use terms expressing with some force the commitments of the States under the Convention. In the absence of the terminology appropriate to such an instrument, the document would become a series of statements of principles that would have the impact of a simple declaration. In view of the existence of the UNESCO Universal Declaration on Cultural Diversity, some members insisted on the need to go beyond the document adopted in 2001 by giving to the future Convention a binding character particularly expressed in the chapter on rights and obligations, which should be regarded as the core of the legal document under discussion."[47]

Despite the expectation mentioned in the above report to go beyond the UDCD by adapting a binding convention, the finally ratified Convention that is mandatory for its parties according to its opening lines,

[47] UNESCO 'Report of the Second Meeting of Experts (Category VI) on the Preliminary Draft of the Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions of 30 March' (UNESCO 3 April 2004) General Conference 33rd session, Paris 2005 33 C/23 8.

does not create many obligations in its substance. In addition, as Germann touched upon, the worldwide endorsement of this instrument would have re-invigorated the doctrine of 'cultural exception' that was expressly rejected when the WTO Members concluded the Marrakesh Agreement some twenty years prior.[48]

Germann, as a promoter of cultural diversity, states the unconventional view that the refusal of the United States and its allies to adapt the UNESCO CDCE constitutes grounds of cultural diversity,[49] though in practice some principles are applied, even by the US.

2.4.2.2 State Sovereignty and Cultural Diversity

As this work explains in more detail below, the UNESCO CDCE attempts to provide a legal framework that recognises the particular needs of cultural goods within the regime of international trade. According to Graber, given

> "the lack of flexibility of the WTO law with regard to cultural purposes, and the need felt by many States to create a cultural counterbalance to the WTO, many observers acclaimed the entry into force of the UNESCO *Convention on Cultural Diversity* (CCD) [in this thesis, the UNESCO CDCE] on 18 March 2007 as the beginning of a new era. Notwithstanding certain shortcomings, the CCD has been praised as being a first step towards fill-

[48] Christophe Germann 'Towards a Global Cultural Contract to Counter Trade Related Cultural Discrimination' in Nina Obuljen and Joost Smires (eds), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Institute for International Relations 2006) 11.
[49] ibid.

ing the existing lacuna for cultural values and interests in international law."[50]

First, the UNESCO CDCE entrenches the principle of sovereignty. Its guiding principles in Article 2(2) note: "States have, in accordance with the *Charter of the United Nations* and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory." These rights of sovereignty, and the significant inclusion of the word 'protect', need to take into account during the CDCE negotiations. This indicates a policy at odds with the broad interpretation of and potential application of WTO rules, such as the MFN and NT principles. This work will elaborate on this below.

Second, Article 5(2) delimits the UNESCO CDCE's sphere of jurisdiction: "When a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention." This provision thus claims authority to govern the cultural expressions, including cultural goods from the perspective of cultural policies and measures.

Article 7 of the UNESCO CDCE is one of the provisions that sums up the document's purpose, in stating that "the Parties shall endeavor to create in their territory an environment which encourages individuals and social groups…to have access to diverse cultural expressions from within their territory as well as from other countries of the world." The UNESCO CDCE thus acknowledges that promoting cultural diversity, as UNESCO wishes, requires untrammelled international distribution.

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[50] Graber Christoph Beat 'Trade and Culture'in Rüdiger Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (OUP 2010) 4 <https://ssrn.com/abstract=1656980> Accessed 16 December 2022.

This is compatible with the WTO's regulations prescribing free international trade,[51]which is also stated in the CDCE's principles.

The UNESCO CDCE's Article 3 states: "This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions." The scope appears to include essentially any action involving cultural expressions. This is reinforced by the descriptions provided in Article 4 and moreover by the alterations to the preliminary draft in December 2004. First, Article 4(3) outlines cultural expressions as "expressions that result from the creativity of individuals, groups and societies, and that have cultural content". Article 4(2) indicates 'cultural content' as a "symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities."

It was thus in the context of globalising trade, and States' responses in their efforts to protect national culture, that cultural goods took on a double meaning. One of the effects of this change was the creation of a new legal regime, under the auspices of UNESCO, to reaffirm State sovereignty over culture. In a tone reminiscent of the Brundtland Report, Shi explains the causes and effects of this duality.

Over and above their commercial and commoditised characteristics, cultural products exhibit unique characteristics. Cultural products play a pivotal role in affecting individual development as well as fostering a strong national culture… In short, the intrinsically different social nature of cultural products calls for distinct policy regimes.

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[51] For instance, the Japanese audience became more familiar with the situation in the former Yugoslavia by watching Danis Tanovic's *No Man's Land*, and thus enjoyed one of the advantages of cultural diversity. The Nippon public could see this film only because it was distributed in Japan. Vice-versa, the Bosnian moviegoer obtained a better insight into the dark sides of the contemporary Japanese society by watching Hirokazu Kore-Eda's *Nobody Knows*, provided that this movie was released or broadcasted in their country.

Even the forces of globalisation cannot rescind the sovereign right of each state to devise measures for defending cultural identity. The UNESCO Convention on Cultural Diversity [in this thesis, the UNESCO CDCE] reaffirms the sovereign right of governments to formulate and implement cultural policies and to adopt measures to protect and promote cultural diversity.[52]

The UNESCO CDCE specifically protects cultural goods in their role as vehicles for cultural expressions. In the *Declaration*, UNESCO claims the "specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods".[53] Shi adds,

> "In parallel to the duality of cultural products, cultural policies are endowed with dual missions, both industrial (or economic) and cultural. On the one hand, the specificity of cultural products justifies the cultural mission of cultural policies and measures…. On the other hand, culture is an industry in modern time and cultural products are commodities…. [T]rade in cultural products is often motivated by profit. The overall vitality of national culture is often associated with the financial health of domestic cultural industries. Trade negotiations are traditionally about economic interests, and the suggestion that cultural value should be taken into account in determining trade rules is likely to be dismissed."[54]

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[52] Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Hart 2013) 57-58.

[53] UNESCO *Universal Declaration on Cultural Diversity* Article 8 (2 November 2001) <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html> Accessed 16 December 2022.

[54] Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Hart 2013) 57-58.

Without a mechanism to resolve differences between the two, the UNESCO CDCE's guarantee of the right of States to protect cultural goods is not coherent with the WTO Agreement's principle of non-discrimination, which basically, does not allow Members to apply any specific protective measure to this aspect of trade. The WTO does not presently consider 'cultural expressions' to be a legal basis for States to exempt a good from its status as a 'like' product. A situation of 'legal fragmentation' (potential disagreements over interpretation or approaches to enforcement) thus prevails today.

2.4.2.3 Protection, Preservation and Promotion of the Diversity of Cultural Expressions

Richieri Hanania and Ruiz Fabri show that the terms 'protection', 'preservation', and 'promotion' are three essential words which, when applied in the UNESCO CDCE, can influence theoretical and practical engagements with it. When examined closely, one can see that these terms are not clearly defined in the Convention and "[t]he Convention does not establish a clear differentiation between the "protection" and the "preservation" of cultural expressions."[55] The two terms 'protection' and 'preservation' in Article 8[56]contain more force to 'preserve' and

[55] Lilian Richieri Hanania and Hélène Ruiz Fabri 'Article 8: Measures to Protect Cultural Expressions' in 'Part IV: Rights and Obligations of Parties' in Sabine von Schorlemer and Peter-Tobias Stoll (eds) *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (Springer 2012) 226.

[56] CDCE, Article 8 – MEASURES TO PROTECT CULTURAL EXPRESSIONS 1. Without prejudice to the provisions of Articles 5 and 6, a Party may determine the existence of special situations 6 where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding. 2. Parties may take all appropriate measures to protect and preserve cultural expressions in situations referred to in paragraph 1 in a manner consistent with the provisions of this Convention. 3. Parties shall report to the Intergovernmental Committee referred to in Article 23 all measures taken to

'safeguard' cultural expressions. Therefore, they refer to the role of the Convention in maintaining the existing situation of a certain culture, while the term 'enhancement' is closer to 'promotion'.[57]

Regarding understanding the term 'protectionism', Morijn contends that

> "Claims based in social-cultural concerns are… typically approached by the WTO Secretariat…as code for 'trade protectionism' or at least as a potential 'trade barrier'. Moreover, invariably the more formal point is made that it has been (and will be) States themselves that eventually voluntarily agree(d) to subject these issues to international trade discipline. Criticism, therefore, is better addressed to the States rather than the international organizations set up to implement their priorities. In short, the WTO… response is that complaints by GATT… critics are overstated as a result of poor understanding of WTO law, and in any event addressed to the wrong actor, the WTO as an international organization."[58]

Nonetheless, Bernier concludes (as Voon does) "that the best forum for resolving conflicts between culture and trade remains the WTO itself".[59]

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meet the exigencies of the situation, and the Committee may make appropriate recommendations.

[57] Lilian Richieri Hanania and Hélène Ruiz Fabri, ibid.

[58] John Morijn *Reframing Human Rights and Trade: Potential and Limits of a Human Rights Perspective of WTO Law on Cultural and Educational Goods and Services* (Intersentia 2010) 5.

[59] Ivan Bernier 'The Convention on the Diversity of Cultural Expressions: A Cultural Analysis' in Toshiyuki Kono and Steven Van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Intersentia 2012) (95-126) 123.

According to Shi:

> "WTO jurisprudence has not yet been clarified with respect to the relationship between WTO rules and the UNESCO Convention. Since the WTO's system of mandatory dispute settlement is a relatively strong enforcement mechanism, WTO law is likely to prevail in the case of conflict."[60]

In passing, it is worth mentioning that these arguments explain this work's focus on the WTO Agreement than on the UNESCO CDCE in some places. However, the present work proposes strategies that balance between the two treaties, in ways that the foregoing arguments do not allow for.

Chapter 3 addresses using a mutually supportive interpretation to reconcile the two agreements' perspectives on 'protection'. Richieri Hanania and Ruiz Fabri show that differentiating between 'promotion' and 'preservation' is difficult in practice, since any act of cultural preservation under Article 8 could lead to its 'promotion'. This interplay between the two terms generated some discussion during the negotiations with warnings about the possibility of 'protectionist' behaviour in favour of some cultures, which would undermine cultural diversity.[61]

Richieri Hanania and Ruiz Fabri conclude that in Article 8, the side-by-side use of the terms 'protection' and 'promotion' can help to reduce such protectionist concerns and would lead to more compatibility with 'openness to exchange' and 'opposition to trade protectionism'. However, the term 'safeguard' used frequently in the preceding UNESCO Con-

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[60] Jingxia Shi *Free Trade and Cultural Diversity in International Law* (Hart 2013) 270.

[61] Lilian Richieri Hanania and Hélène Ruiz Fabri 'Article 8: Measures to Protect Cultural Expressions' in 'Part IV: Rights and Obligations of Parties' in Sabine von Schorlemer and Peter-Tobias Stoll (eds) *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (Springer 2012) 227.

ventions provide the reasons for such fears. Without a clear demarcation between 'protection' and 'protectionism', the Convention would undermine the free market trade of the cultural goods and services.[62]

2.4.2.4 The 'Para-binding' Character of the UNESCO CDCE

While cultural diversity remains outside the WTO's ambit (though, as Chapters 3 and 5 argue, it could conceivably fall under the 'public morals' exception contained in GATT Article XX(a)), from a legal perspective the failure of the CDCE to subject its Parties to obligatory commitments renders it a relatively weak convention. The Convention mainly focuses on the creation of an 'enabling environment' for governments to implement guidelines that shield cultural diversity with respect to importations of foreign goods. Burri writes:

> "The UNESCO Convention has been celebrated as an exceptional success in international treaty-making–as it was the first legally binding instrument on trade-related cultural matters, with a record of incredibly wide support and swift ratification….it is however questionable whether the UNESCO Convention provides a sufficient toolkit to achieve any of these goals. The criticisms of the Convention are well documented, and its drawbacks can be grouped into three categories, relating to (i) the lack of binding obligations; (ii) its substantive incompleteness; (iii) its ambiguous relations towards other international instruments."[63]

Similarly, Richieri Hanania notes that

> "Significant challenges remain to the effectiveness of the CDCE [i.e. UNESCO CDC], stemming notably from the fact that politi-

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[62] ibid.

[63] Mira Burri, 'The Trade Versus Culture Discourse: Trading its Evolution in Global Law' in Valentina Vadi and Bruno de Witte (eds.) *Culture and International Economic Law* (Routledge 2015) 110.

> cal will of the Parties remains fundamental for its implementation…. The strongest obstacle to its full implementation seems to result from the weakly binding wording of its provisions."[64]

This work identifies certain particular difficulties in reconciling the UNESCO CDCE's obligations with those of the WTO Agreement. For example, the 'General Rule' illustrated by Article 5[65] of the Convention, states that parties to this Convention "reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention".[66] The second paragraph of this provision states that "[w]hen a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention".

The General Rule does not impose a duty to undertake actions to safeguard cultural diversity. Rather, it stipulates that if State parties to the UNESCO CDCE were to adopt such policies or approve such ac-

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[64] Lilian Richieri Hanania 'General Conclusions and Recommendations' in Lilian Richieri Hanania (ed.) *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Routledge 2014) 297.

[65] CDCE, Article 5 – GENERAL RULE REGARDING RIGHTS AND OBLIGATIONS 1. The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention. 2. When a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention.

[66] UNESCO CDC, Article 1.

tions, they should do so in conformity with the Convention's requirements. The Convention suggests a single focal privilege for member States (the authorization "to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention"[67]). The Convention comprises a non-exhaustive list of procedures that may be used to protect and promote the diversity of cultural expressions.[68] This structure implies that one of the Convention's main purposes is to offer a 'counterweight' to the liberalisation provisions of the WTO, also bilateral and regional trade agreements.

However, those involved in the concession procedure resulting in the Convention were not comfortable expressing the understanding that the Convention would primarily be employed to safeguard markets from external importations of cultural goods and services. Arguably, the provisions in the final version of the UNESCO CDCE favour the right of Parties to implement cultural 'guidelines'. The Convention defines a difference amongst obligations at the domestic level and obligations involving collaboration at the global level.

The obligations of the member States subject to the UNESCO CDCE concerning international collaboration primarily involve a commitment to 'endeavour' to reinforce bilateral, regional and international collaboration for the formation of circumstances favourable to the advancement of cultural diversity. In addition, member States should attempt to incorporate culture within their development policies.[69]Lastly, developed

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[67] UNESCO CDC Article 5(1)

[68] UNESCO CDC Article 6(2)

[69] Articles 13 and 14. This provision includes strengthening the cultural industries in developingcountries, performing capacity-building and technology-transfer and providing financial support (inter alia through the establishment of an International Fund for Cultural Diversity [UNESCO CDC Article 18]). Partnerships between and within public and private sectors and non-profit organiza-

countries should attempt to enable cultural interactions with developing States by allowing for preferred measures for their artists, cultural goods and services.[70]None of these obligations are very extensive, and it does not appear probable that other member States subject to the Convention would hold a member State accountable for a violation of such an obligation.

Certainly, the dispute settlement arrangement stipulated in the Convention (specifically, a conciliation process conducted by a Conciliation Commission) is perhaps not highly functional (Parties to a dispute must merely 'consider in good faith' the suggestions by the Conciliation Commission), if the member States were to have to resort to it in first instance.[71]However, during the negotiation to establish the conciliation procedure, there were attempts to include a persistent obligation in the Convention. Under a previous UNESCO CDCE draft, the 'duty to safeguard exposed systems of cultural expressions' was encompassed in Articles 8 and 15.[72] These articles specified that if certain cultural expressions were considered to be exposed to, or endangered by, the prospect of elimination or severe reduction, the Intergovernmental Committee[73]requires the member States to undertake suitable actions.

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tions with the objective of enhancing the capacities of Developing Countries to protect and promote cultural diversity should be encouraged (Article 15).

[70] Article 16. The provision states that this should be done 'in accordance with their international obligations'. Preferential treatment will thus have to comply with the relevant obligations in the WTO agreement.

[71] Michael Hahn considers this system 'a classroom example for a treaty-based dispute settlement regime protecting primarily state sovereignty and less so the integrity of the treaty-based legal obligations'. M. Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law' (2006)9, *Journal of International Economic Law*, 537.

[72] See Articles 8 and 15 of the so-called 'Composite Text' of the Convention.

[73] The Convention establishes an Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions ('Intergovernmental Committee').

Thus, where the WTO Agreement primarily comprises actions that restrict the policy area, UNESCO CDCE is primarily concentrated on supporting parties to the Convention in implementing policies and measures to safeguard cultural diversity. While the UNESCO CDCE merely reaffirms the sovereign rights of States, the WTO Agreement potentially restrains these rights. Thus, a WTO Member could respect the WTO Agreement by refraining from engaging in an action, though depending on the actual obligations of each Member, that is permitted subject to the UNESCO CDCE. It thereby also respects the Convention since it is not obliged to adopt measures to protect cultural diversity. Consequently, it seems apparent that the provisions of the WTO Agreement and UNESCO CDCE may genuinely avoid conflict, as long as WTO Members who are also Parties to the Convention refrain from implementing their rights under the latter. It is to be considered, that such analysis depends on the actual obligation undertaken by Members within the WTO and other trade agreements, in addition to many possible policies and actions beyond market access. These considerations place the UNESCO CDCE in a very weak position.

In the particular case of the UNESCO CDCE and WTO Agreement, the 'soft' nature of the UNESCO CDCE makes it possible to respect both by simply derogating from the Convention's permissions. However, this outcome is equally unacceptable, since it would result in the failure to protect cultural goods. The compromise to the system of international law would remain, because the object and purpose of one treaty would have been defeated through an overly strict application of its provisions.

Nonetheless, some perspectives may view the CDCE's 'soft' provisions as precursors to 'harder' obligations; others may emphasise the understated significance of the softer constructions' 'para-binding' nature. Fazio notes:

> "In addition to forms of soft legislation intended to constitute 'soft law rules', many soft rules may be embodied in instruments that adopt the form of a treaty, which could make one presuppose that they contained legally binding and enforceable rights and obligations However, with an attentive analysis of its contents it may be concluded that they are of a non-binding nature…. The soft nature of instruments is governed by the content of an instrument rather than by its form….
>
> Such characteristics indicate that soft law does not contain the requisite elements to be considered binding law. Soft law, indeed, does not contain (or is not intended to contain) the necessary legal maturity to be binding, but –as several authors have maintained–it may constitute a prior or earlier stage of binding legislation….
>
> Soft law creates the expectation for the parties involved in its formulation that their subject area has been sufficiently regulated and that their provisions will be respected. Such 'expectation' created by soft laws should not be underestimated due to its possible 'para-binding' effect."[74]

The UNESCO CDCE's 'weaker position' and flexibility regarding its relationship with the WTO Agreement may be a source of stability. Its rules use the form of a treaty, but adopt content that more closely resembles soft law. Without using 'hard' and binding constructions that would place it in direct conflict with the WTO Agreement, the Convention adopts a 'para-binding' stance that may influence State behaviour, given that the field of trade in cultural goods has now been sufficiently regulated.

This study advances the proposition that, although the UNESCO CDCE may indeed be the pioneer to a 'harder' treaty at a later date, its

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[74] Silvia Fazio *The Harmonization of International Commercial Law* (Kluwer 2007) 19-21

potential to influence the behaviour of States and international organisations make such a step unnecessary. Indeed, 'harder' constructions would contain the potential for conflict, and the difficult requirement for amendments,[75] where none need exist. Chapter 5 will explore 'mutual supportiveness through soft law', which proposes a route that builds on the strengths and avoids the weaknesses of a hard law approach to the UNESCO CDCE and its relationship with the WTO legal regime.

The dichotomy of 'hard law' versus 'soft law' should thus not be viewed in such black-and-white terms as may seem apparent at first glance. Instruments such as the UNESCO CDCE belong closer to the middle of a spectrum of means for influencing States and organizational behaviour.

2.5 Free Trade under the WTO Agreement versus Cultural Diversity Expressions under the UNESCO CDCE

2.5.1 International Free Trade

International trade has become an undeniable aspect of the modern economy. A comparison between countries with a high degree of integration in the world economy and countries with isolated economies shows a positive correlation between international trade on the one hand, and economic growth and development on the other.

International trade flows have increased dramatically since 1995 with an average annual growth rate of 6.2%, much faster than the growth in world production (which averaged only 2.8% over the same period).[76] Such a growing tendency for export and domination on the

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[75] See ibid 18, and Chapter 3 of this work.

[76] 'International Trade' in C Pass, L Davies, and B Lowes (eds)*Collins Dictionary of Economics* (Collins 2006) Available at: <http://search.credo

global market leads to a higher level of competition and further competitive pricing in the market. This trend may have a damaging effect on the competitiveness of cultural goods. While both developed and developing economies produce cultural goods, the deleterious effect of such international competition particularly affects developing countries' economies.

International trade has expanded in parallel with technological evolution. In the pre-modern period, supra-regional trade was limited to the technological problems raised by natural geographical obstacles. Naval industries had limited power to transport goods across the globe, and caravans could only travel continental routes with difficulty. According to Ortiz-Ospina and Roser, the share of global trade never exceeded 10% of the entire sum of world trade before 1900, while it is more than 50% today.[77]

The industrial revolution of the nineteenth century brought forth the first wave of globalisation. Technological advancements in telecommunications, the naval industry, the invention of the steam engine, etc. paved the way for the faster expansion of transnational trade. Meanwhile, the new imperial powers acquired peripheral regions, from which they channeled large quantities of raw materials to the markets and refining industries of European countries.

These advancements in modernity facilitated the steady flow of global transactions around the globe. In the period between 1800 and 1913, global trade grew by more than 3% per year.[78] However, by the start of the World War I, this wave of globalisation came to an end. The decline of liberalism and the rise of nationalism was the result of a growing tendency among States to interfere in the market and tighten

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reference.com/content/entry/collinsecon/international_trade/> Accessed 16 December 2022.

[77] Esteban Ortiz-Ospina and Max Roser 'International Trade' *Our World in Data* (2016) <https://ourworldindata.org/international-trade/> Accessed 16 December 2022.

[78] ibid.

national boundaries. Therefore, new trends of protectionism prevailed over internationalism.

The second wave of globalisation started after World War II. A new shift toward liberalism began not only through the efforts of economists, but also of politicians. This trend resulted from changes to both State interactions and the global market. States believed that international economic integration could prevent international catastrophes like the two world wars.

Guzman and Pauwelyn track the progress of this strategy. They note that global exports have increased ten times since 1960, alongside a dramatic decrease in tariffs since the early 1980s, spurred by the "establishment of the…GATT in 1947 and 1980. Besides lower tariffs on trade, the cost of trading has also fallen dramatically thanks to new and cheaper methods of transportation and communication".[79] Guzman and Pauwelyn conclude that these changes to State policies and technology have contributed significantly to these increases in trade flows.

Vadi and de Witte, in turn, state "the increase in global trade… has determined the creation of legally binding and highly effective regimes which demand that States promote and facilitate trade". Such regimes include the one codified in the WTO Agreement. Nonetheless, the authors ask, "Has an international economic culture emerged that emphasizes productivity and economic development at the expense of the common wealth?"[80]

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[79] Andrew T Guzman and Joost Pauwelyn *International Trade Law* (Aspen 2009) 1, 4.

[80] ValentinaVadi and Bruno de Witte 'Introducing Culture and International Economic Law' in Valentina Vadi and Bruno de Witte (eds) *Culture and International Economic Law* (Routledge 2015) 1.

2.5.2 Diversity of Cultural Expressions

In addition to this work, Broude asks pertinently: what have such economic trends of globalisation done to 'culture'?[81] Around the world, local cultures have withstood economic forces, even as they adjust to new influences and even 'invasions'. Culture has always been the result of a process of exposure to fresh ideas and knowledge that fuse with the old, replacing it while creating something new. In a postmodern trend, national cultures may have "reconceived themselves in order to persist in an era of intensified globalisation."[82] Broude further states that

> "[c]ulture is an inherently fluid term, not only in its content and evaluation, but in its very delimitation….[C]ulture, as a value, contains an internal paradox: it wishes for all the gravitas of constancy, even permanence, but at the same time is characterized by constant, unplanned change and dynamic development'. The interaction of culture with international (or, less formalistically, with 'intercultural') trade (and surely trade itself is part of human culture), provides opportunities for cultural evolution."[83]

Lee records how UNESCO uses a definition of culture developed by Raymond Williams. Considering anthropological perspective, she writes:

> "UNESCO defines culture as 'the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, not only art and literature, but lifestyles, ways of living together, value systems, traditions and

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[81] Tomer Broude 'Conflict and Complementarity in Trade, Cultural Diversity and Intellectual Property Rights' Research Paper 11-07 International Law Forum (Hebrew University of Jerusalem 7 July 2007), 5. <http://www.ssrn.com/abstractid=1001869> Accessed 16 December 2022.

[82] ibid 6.

[83] ibid 11-12.

> beliefs'…. Although the World Commission on Culture and Development which was established by the United Nations and UNESCO in 1991 noted that 'the notion of culture is so broad and polysemic', it chose to view culture as 'ways of living together' in that report. On one hand, scholars have commented that the UNESCO definition of culture is 'ambiguous' as it does not indicate whether it is intended to protect a community's cultural expressions or rather its characteristic forms of social organization. On the other hand, accepting a variety of meanings in culture, others perceive the ambiguity as the inherent multinature of culture, prevented UNESCO's approach to culture from being 'univocal'.…UNESCO has performed its role of being guidance to cultural policy through various standard-setting instruments."[84]

Having accepted the UNESCO definition of culture for the purposes of this book, Chapter 2 now turns to examine the related term, 'cultural diversity'. Shi describes five aspects of cultural diversity in her work. The first element she identifies, the 'coexistence of a multiplicity of cultural identities', also includes 'freedom of choice'. The second, recognising that 'differences in human societies are involved in complex systems and relationships', notes that "[c]ultural diversity creates a climate in which different cultures can engage in a mutually beneficial dialogue" related to "the belief held by the founders of UNESCO that cultural exchange is one of the best guarantees of peace in our world". Shi's third element of cultural diversity observes that 'cultural diversity as a value to be safeguarded goes beyond the value of a single cultural object and aims to prevent domestic culture from undue foreign influence. Her fourth states that "[c]ultural diversity provides a crucial link between these two dimensions of development [tangible or quantifiable

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[84] Juneyoung Lee *Culture and International Trade Law: From Conflict to Coordination* (PhD Thesis HEID 2013) 31.

measurements, and intangible or spiritual components such as participation and empowerment], by guaranteeing the survival of multiple visions of the 'good life', and of a range of concrete ties between cultural values and material well-being'. Finally, Shi asserts, 'since humans are culturally embedded beings, they have a right to that culture".[85]

On one hand, diversity is encouraged through enhanced contact with cultural expressions. On the other, such increased contact may result in reduced diversity through cultural alterations that, in general, leads to homogenization of cultures. Accordingly, cultural diversity is best served when contact and exposure are developed without any decrease in existing cultural expressions.[86]

Protecting cultural diversity would undermine basic principles of free trade. Although trade liberalisation aims at increasing choice, diversity is not in and of itself an objective of trade liberalisation. Liberalisation would resist State intervention or civil society activism to support a group of cultural commodities in the market.[87] Thus, trade and culture are mutually supportive as far as diversifying contact and exposure is concerned but might clash with each other if the interaction between the two were to involve economic protection to safeguard diversity. Such a problematic situation opens new complexities both for supporters of free trade and cultural diversity.[88]

Shi states that cultural products are grounded in cultural rights and freedom of expression, rather than operating as a mask for protectionism.[89] For freedom of expression to exist, cultural diversity must also exist. A platform where "intellectual and emotional content in the form of artistic expressions, which may include entertainment and political

[85] Jingxia Shi *Free Trade and Cultural Diversity in International Law* (Hart 2013) 93-94.
[86] ibid 17.
[87] ibid.
[88] ibid 15.
[89] ibid 273.

information, is disseminated"[90] must be nurtured. With this intent in mind, it is important for States to safeguard the exchange of information and art from a range of diverse bases.

While the manufacture of cultural goods may be eligible for consideration under the extremely unstable category of 'prototype industries', the benefit of possessing a robust domestic cultural industry is not restricted simply to financial elements. It also provides a platform for the cultivation of cultural identity and, therefore leads to collective unity. Specially, cultural businesses can "contribute substantially to identity building, especially in nations that are not culturally homogeneous".[91] In addition, "this public policy objective benefits from the inherent values of cultural identity and diversity as public goods".[92] If deprived of a protected sense of identity in the progression towards globalisation; people may turn to isolationism, ethnocentrism or intolerance.[93]

However, taking into account the significant concerns mentioned, the UNESCO CDCE may be seen as not adequate for the task. Germann recommends "a radical paradigm shift based on a new legal instrument establishing the cultural non-discrimination principles of Cultural Treatment and Most Favored Culture".[94] Also, the decision to generate voluntary fund contributions by the parties under the UNESCO CDCE

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[90] Christophe Germann 'Towards a Global Cultural Contract to Counter Trade Related Cultural Discrimination' in Nina Obuljen and Joost Smires (eds), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Institute for International Relations 2006) 334.

[91] ibid.

[92] ibid.

[93] D Ayton-Shenker 'The Challenge of Human Rights and Cultural Diversity' United Nations Background Note 3. <https://digitallibrary.un.org/record/205090?ln=en> Accessed 16 December 2022.

[94] Christophe Germann 'Towards a Global Cultural Contract to Counter Trade Related Cultural Discrimination' in Nina Obuljen and Joost Smires (eds.) *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Institute for International Relations 2006) 335.

certainly has disadvantages.[95] Germann then goes on to explain that this shift in paradigms will possibly "face resistance from those conservative private and public players within the cultural industries who are satisfied with the status quo, i.e. the private players dominating the markets and the rich States granting subsidies to implement cultural policies that weaker economies cannot afford."[96]

If we accept such a paradigm shift, one could say that its viability relies on the ability and determination of those advanced players who play a part in promoting cultural diversity. Thus, "if the conservative forces should prevail over the progressive ones, the creative people and publics from all cultural origins, especially from transitional, developing and least developed countries, would be the big losers, and with them society at large".[97]

UNESCO prioritizes the preservation, protection, and promotion of cultural diversity. UNESCO's *Universal Declaration on Cultural Diversity* defines four sets of justifications for supporting cultural diversity within the UN framework. First, UDCD considers the variety of identities as a rich source of common heritage of humanity that could also open new opportunities for growth and development. Moreover, the expression of 'variety of identities' promotes cultural pluralism, including cultural diversity. Second, the concept of variety of identities embraces the right to access the common heritage of humanity, which is

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[95] Ivan Bernier 'An Important Aspect of the Implementation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions: The International Fund for Cultural Diversity' 10 <https://www.researchgate.net/publication/300224341_Article_18_International_Fund_for_Cultural_Diversity> Accessed 16 December 2022.

[96] Christophe Germann 'Towards a Global Cultural Contract to Counter Trade Related Cultural Discrimination' in Nina Obuljen and Joost Smires (eds.) *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Institute for International Relations 2006) 44.

[97] ibid 335.

considered an essential aspect of human rights. Third, it is a thriving source of creativity that can produce unique cultural goods and commodities. Finally, it could prepare new capacities for cooperation and solidarity worldwide and, also between the public sector, the private sector and civil society.[98]

The issue of cultural diversity is rather intricate, and its actual importance continues to be understated. The UNESCO CDCE commends "the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the *Universal Declaration of Human Rights* and other universally recognised instruments".[99] The UN *International Covenant on Economic, Civil, Social, and Political Rights* states that the 'right to participate in cultural life' includes access to cultural goods.[100]

Kono and Uytsel comment on the relationship between human rights and cultural diversity, noting that human rights and trade already have an established relationship. "Human rights are called upon to defend cultural diversity, because defending cultural diversity is inseparable from respect for human dignity. Thus, the history of enhancing coherence between human rights and trade may serve as a model for a coherent legal relationship between cultural diversity and trade."[101]

Marceau further notes that if the applicable WTO law cannot be interpreted so as to avoid conflict with human rights provisions, WTO adjudicating bodies would not be able to enforce non-WTO provisions

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[98] UNESCO *Universal Declaration on Cultural Diversity* Article 11.

[99] UNESCO CDC Preamble, fifth recital.

[100] UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 21, Right of Everyone to Take Part in Cultural Life (Art 15, Para 1a of the Covenant on Economic, Social and Cultural Rights)* 21 December 2009, E/C.12/GC/21.

[101] Toshiyuki Kono and Steven Van Uytsel (eds.) *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Intersentia 2012) 27.

or give them direct effect in the WTO applicable law. This is because the superseding provision would set aside, add to, diminish or amend the rights and obligations provided in the WTO's covered agreements.[102] Both systems of State responsibility operate in parallel, a condition of non-interaction that demonstrates the lack of coherence in today's international jurisdictional and judicial systems.[103]

Some scholars like Donders' perspective on the UNESCO CDCE, views cultural rights as human rights[104] and examines the cultural dimensions of human rights. She concludes that under the Convention, "cultural rights are neither promoted or protected, nor seen as the guardian of cultural diversity". She further argues "the only positive offspring of the Convention on the Diversity of Cultural Expressions for cultural rights is its increased visibility as a human right".[105] One may say that, protection and promotion of cultural rights is not the objective of the CDCE, therefore could not be expected to bear such express terms. However, in my view, protecting and promoting the diversity of cultural expressions lead to the right to practise cultural expressions, which encompasses cultural rights.

However, Modoux notes the pitfall of such an approach, by stating regarding Article 2, paragraph 1 of the UNESCO CDCE:

> "Indeed, one can fear that a large number of signatory States, notably known for the lack of respect of human rights, have deliberately turned a blind eye to the 1st paragraph of the article 2 which stresses unequivocally that "Cultural diversity can be pro-

[102] Gabrielle Marceau 'WTO Dispute Settlement and Human Rights' (2002) 13 EJIL (753-814) 797.

[103] ibid.

[104] International Covenant on Civil and Political Rights, which adopted on 1966, in its preamble, Articles 1, and 27 touched the cultural right as a Human Right.

[105] Toshiyuki Kono and Steven Van Uytsel (eds.) *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Intersentia 2012) 40.

> tected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed.".
>
> […] This guiding principle is truly the keystone of the whole edifice of the Convention. Its strict respect by the signatory states should not only strengthen the legitimacy of the treaty, but also give it all its credibility."[106]

Modoux presents perhaps the most direct reason to classify cultural diversity as a human right: the widespread acceptance of the UNESCO CDCE reinforces the parties' mandate to uphold other, more fundamental, human rights that risk being infringed.

In turn, Throsby elaborates on the relationship between sustainable development and the UNESCO CDCE, asserting that the Convention is based on this principle. He shows how the UNESCO CDCE promotes cultural diversity through an analysis of several of the Convention's articles. He criticises the UNESCO CDCE as seemingly "a cultural policy convention rather than a convention on the diversity of cultural expressions".[107] In other words, Throsby sees the instrument's true function as not to *protect* the diversity of cultural expressions, but rather to promote certain cultural policies within the States that have signed the Convention.

Friedrich examines the role of non-binding instruments in shaping interpretation, particularly as they relate to environmental protections

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[106] Alain Modoux 'L'action normative de l'UNESCO dans le domaine de la culture. Un sujet à suivre' in Michel Mathien (ed) *L'expression de la diversité culturelle : Un enjeu mondial* (UNESCO/Bruylant 2013), 252-253.

[107] Toshiyuki Kono and Steven Van Uytsel 'The Convention on the Diversity of Cultural Expressions: Beyond a Trade and Culture Convention' in Toshiyuki Kono and Steven Van Uytsel (eds.) *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Intersentia 2012) 41.

under GATT Article XX. He notes that such instruments may facilitate international and inter-institutional cooperation, claiming that "[n]onbinding instruments play a significant role in the development of international law".[108] Friedrich's considerations form a substantial basis for the arguments of Chapter 5 in this book.

2.5.3 Discussion of Hard Law, Soft Law, and Non-Discrimination

Before this chapter's discussion of the legal instruments on which this work bases its investigation, an explanation of the terminology used to classify them is necessary. Chapter 4 will explore the concept of 'hard law', and Chapter 5 that of 'soft law', more fully. However, this section will set the stage for the discussion of instruments in this chapter, in preparation for the material that Chapters 4 and 5 address.

Nakagawa writes,

> "Conventional studies of international law and international economic law have, as a rule, been concerned only with 'hard law'. For some non-legally binding international instruments, such as resolutions by the United Nations General Assembly regarding the new international economic order, the concept of 'soft law' has been proposed to draw attention to their actual legal impact. This has met with criticism from the mainstream of international law and international economic law scholarship as relativizing or rendering ambiguous the legal force of international law, and failing to discern the peculiar status of functioning of law in the international sphere as a decentralized order. Phenomena branded

[108] Jürgen Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013), 214.

as 'soft law' have thus been omitted from consideration and failed to be confronted as analytical tasks."[109]

The WTO Agreement is indisputably an instrument of hard law. Its language, including that of the GATT, mostly seems clear and its enforcement mechanisms are highly effective. Formally, the UNESCO CDCE is also an instrument of hard law. However, as the following section discusses, its wording and enforcement 'soften' the effect that it has on State behaviour.

2.5.4 Perspectives on the Relationship of Fragmentation between the WTO Agreement and the UNESCO CDCE

Despite the understanding that the cultural field is a commercial enterprise similar to many others, this work has already noted the shared opinion of several scholars that cultural goods do hold non-commercial qualities, thus distinguishing these goods from generic commercial goods. Considering that such a vast number of countries are receptive to the formation of agreements to protect culture, the question arises why nonetheless this notion has incited contentious discussions. There are numerous rationales.

The United States protested against the formation of the Convention, referring to the treaty as being "'deeply flawed', protectionist, and a threat to freedom of expression".[110]Second, and even more challenging, there is an ambiguity as to the interaction mechanisms between the UNESCO Convention and the laws of WTO. This would generate prob-

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[109] Junji Nakagawa *International Harmonization of Economic Regulation* (Jonathan Bloch and Tara Cannon [trs] OUP 2011), 360.

[110] Joost Pauwelyn 'The UNESCO Convention on Cultural Diversity, and the WTO: Diversity in International Law-Making?' 9: 35 (*American Journal of International Law* 2005) 1 <https://www.asil.org/insights/volume/9/issue/35/unesco-convention-cultural-diversity-and-wto-diversity-international-law> Accessed 16 December 2022.

lems in the instance of a conflict between WTO Members. An action by one country following from the UNESCO Convention might be incompatible with a WTO commitment.

Notwithstanding the above observation, similar matters have previously been deliberated within the WTO Committee on Trade and Environment (CTE) concerning multilateral environmental agreements (MEAs). Presently, these deliberations have been subject to the Doha Mandate, paragraph 31(i). Regrettably, WTO Members have not reached an agreement on the legal relationship between MEAs and the WTO Agreement.

In the 1990s, when attempts to integrate a 'cultural exception' into multilateral agreements under the WTO Agreement proved ineffectual, the rivalry amongst States that endorsed actions to protect cultural identity and the States that endorsed the free trade of cultural goods and services remained the subject of several exhaustive debates.[111] Many authors agree that, in theory, a WTO Member can implement measures that restrict the importation of certain goods and services that hold cultural and commercial value, so as to protect and support native culture and its manufacturers.[112] It can be argued that currently the GATT 1994 does not favour such equilibrium between the cultural and commercial aspects of traded cultural goods.

In contrast to WTO regulations, the UNESCO CDCE entails many rights and nearly no obligations. A party may invoke a right under the UNESCO CDCE, and thus risk breaching a duty entailed in a trade agreement. However, parties are free to forgo these rights in the case of conflict with their trade obligations. When trade regulations (including

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[111] Jan Wouters and Bart De Meester *Cultural Diversity and the WTO: David versus Goliath?* (Leuven Centre for Global Governance Studies 2007), 3.

[112] Tomer Broude 'Taking "Trade and Culture" Seriously: Geographical Indications and Cultural Protection in WTO Law' (2005) 26 (4) *Journal of International Economic Law*, 641.

those falling under the WTO dispute settlement mechanism) come up against conflicting State responsibilities under the UNESCO CDCE, there is no incentive to negotiate between culture and trade interests.[113] Rather than infringing the provisions of the WTO Agreement, a party to both agreements is more likely to forgo its rights under the UNESCO CDCE.

Yet, if States do not recognise culture as part of sovereignty, there can be no genuine cultural exchange: the politically and economically stronger States will overpower the weaker. The WTO's multilateralism helps overcome this difficulty. Within a multilateral arrangement, more vulnerable Members can form coalitions that permit them to mutually safeguard their welfare. States would thus be

> "in the position to negotiate advantages in other trade areas. In this light, multilateralism as applied by the WTO appears as a safeguard against the 'law of the jungle', i.e. the law of the stronger party, whether this party is the more powerful economic lobby on the domestic level, or the economically wealthier country on the international level, or, as is most often the case, a combination of both."[114]

Germann holds the less credible position that the UNESCO CDCE "does not promote multilateralism since, in fact, it 'nationalizes' cultural

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[113] According to a more optimistic scenario, the UNESCO Convention's soft-law approach may have some effect based on 'name and shame' pressure, as described in the context of implementing and enforcing WTO rules on special and differential treatment by the Organisation for Economic Co-operation and Development (OECD). *Special and Differential Treatment in the Global Trading System: Status and Prospects of Doha Round Proposals* TD/TC (2005)8/FINAL (30 March 2006) 50–52.

[114] Christophe Germann 'Towards a Global Cultural Contract to Counter Trade Related Cultural Discrimination' in Nina Obuljen and Joost Smires (eds.) *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Institute for International Relations 2006), 15.

diversity by allocating full sovereignty for cultural diversity questions to its Parties".[115] In fact, cultural diversity is also based on the recognition and acceptance of different cultures. Mutual recognition of sovereignty favours cultural exchange and allows cultural diversity to flourish.

Simplifying the complexity surrounding issues of legal coherence requires finding best practices and thorough methods of resolving potential incompatibilities. Here, a discussion of interpretation is essential. Voon examines 'real conflict' between WTO law and the UNESCO CDCE, believing that the "presence of explicit exceptions in WTO law…may resolve several potential clashes".[116] Such exceptions permit, for instance, subsidies,[117] a mechanism that Chapter 4 explores in some detail. She believes that "both international instruments leave enough leeway to successful prevent serious conflicts between their respective rights and obligations".[118]

In contrast, one of Neuwirth's most relevant observations on the interpretation of the UNESCO CDCE is that "most provisions appear rather programmatic rather than strictly legal or normative in nature". This insight is further clarified when he quotes Vlassis's statement that:

> "most provisions support the characterization of the *Convention on the Diversity of Cultural Expressions* as a 'sheep in a wolf's

[115] ibid

[116] Tania Voon 'Substantive WTO Law and the Convention on the Diversity of Cultural Expressions' in Toshiyuki Kono and Steven Van Uytsel (eds.), *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Intersentia 2012) (273-290) 281.

[117] ibid 288.

118 Toshiyuki Kono and Steven Van Uytsel (eds.), The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law (Intersentia 2012) (95-123) 40.

> clothing' or legally speaking as a 'hard legal instrument' with a 'soft legal content'."[119]

Neuwirth goes on to note:

> "Ultimately, we find that the relationship between international hard- and soft-law instruments cannot be characterized in a universal or invariant fashion. Rather, we contend that the respective power of the key players, the degree of distributive conflict among them, the constellation and character of regimes within a given regime complex, and the distinct politics of implementation."[120]

Uytsel and Kono argue that "the soft wording of the obligations in the Convention on the Diversity of Cultural Expressions will prevent potential conflicts".[121] While this may seem to contradict Neuwirth's contention, Chapter 3 of this book, drawing on Uytsel and Kono's assertion, observes that interpretation may easily reconcile provisions of the UNESCO CDCE and the WTO Agreement, due in part to the wording of the Convention. Chapter 4 also notes that States may avoid conflict by choosing to forgo rights and obligations under the UNESCO CDCE. Like Uytsel and Kono, Richieri Hanania and Ruiz Fabri believe that due to the UNESCO CDCE's weak construction, its provisions will not affect the existing international trade obligations.[122] These strategies, however, pose the problem that strict conformity with this 'soft' wording may not yield useful protection of cultural goods.

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[119] Rostam J. Neuwirth, 'The Convention on the Diversity of Cultural Expressions: A Critical Analysis of the Provisions' in Toshiyuki Kono and Steven Van Uytsel (eds), The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law (Intersentia 2012) (45-70), 69.

[120] ibid.

[121] ibid 40.

[122] ibid 41.

This book began by observing that the situation of incoherent norms governing trade in cultural goods, administered by two different international regimes, is one of fragmentation. Neuwirth writes that the 'special dual nature' of cultural products, including cultural goods, "evince[s] problems related to the institutional competence and the general fragmentation of international law in dealing with these products". This assertion in certain sense conveys the fundamental problem of this study.

2.5.4.1 Definition of 'Fragmentation'

Matz-Lück details the dual nature of fragmentation—first, as a conflict between norms; and second, as a diverging allocation of authority.

> "Fragmentation of international law…is inherent to the international legal order [in] that it allows key actors to develop the law in branches and in different directions…When defining fragmentation, one must distinguish between the *fragmentation of norms or regimes* on the one hand, and *institutions or authority* on the other.…The ILC [the UN International Law Commission] report on fragmentation [which Chapters 4 and 5 explore further] comprehensively deals with the substantive side of the issue, but explicitly excludes fragmentation of authority, e.g., the question of competence of adjudicative institutions to decide upon the application and interpretation of international law….If there were more integration concerning substantive fragmentation, this would also have an impact on the allocation of authority. Yet instances of authority fragmentation show where the true difficulties are. The practical problems of fragmentation reflect more clearly when different institutions—either with a law-making or a dispute-settlement function—make decisions that have an im-

> pact on the application and interpretation of the law."[123] (emphasis added)

Thus, the fragmentation of law governing trade in cultural goods between the WTO and UNESCO has two effects. First, it represents a fragmentation of applicable legal norms (normative incoherence) between the WTO Agreement and its covered agreements on the one hand, and the UNESCO CDCE on the other. Second, a fragmentation of institutional authority (institutional overlap) means that the two organisations both claim the authority to govern the same category of goods, using these divergent norms to prescribe State behaviour, without any guidelines for cooperation between them. The CDCE negotiations took into account the WTO Agreement with significant efforts to prevent conflict or fragmentation and due to its weak binding language, there is no incoherence as such. However, this work seeks to study the potential conflict of overlapping or interacting aspects of cultural goods. It follows that practical efforts to defragment the administration of cultural goods must address both the normative and institutional planes.

Relying on Matz-Lück's notion, this study thus claims that there are three possible means to address fragmentation within each principle of legal inquiry mentioned above:

1) A solely normative approach;
2) A solely institutional approach; and
3) An approach combining normative and institutional features.

Under normative incoherence, fragmentation involves two categories of norms: hard law and soft law (explored in Chapters 4 and 5, respectively). This study thus further hypothesizes that normative incoherence may be resolved in three ways:

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[123] Nele Matz-Lück in Jacob Katz Cogan 'The Idea of Fragmentation' (2011) 105 *Proceedings of the Annual Meeting (American Society of International Law)* 125-127.

1) Interpretation (which has no intrinsic relationship to either hard or soft law, being equally applicable to both);
2) Harmonization through hard law; and
3) Mutual supportiveness through soft law.

This work therefore examines each of these—interpretation, harmonization through hard law, and mutual supportiveness through soft law—in its ability to provide solely normative solutions, solely institutional solutions, or solutions combining normative and institutional aspects, to the problem of legal fragmentation between the WTO Agreement and UNESCO CDCE as they affect trade in cultural goods.

2.5.4.2 General Definition of 'Goods'

In general (rather than within any specific legal terminology), 'goods' may be understood as "objects that can be bought and "consumed" (enjoyed or used by the buyer)".[124]Towse importantly defines 'public goods' as

> "both 'non-rival' in consumption, meaning that one person's use or enjoyment is not reduced by another person's, and 'non-excludable', meaning that the user cannot be prevented from 'free-riding'–getting the benefit of the good or service and so cannot be made to pay for it…. Accordingly, the state or a non-profit organization with the ability to raise funds has to provide the public good. Subsidy from public funds is the most common way of responding to the problem but it is not the only one; some public goods are provided by private organizations."[125]

The status of goods as 'consumable' items indicates their subjective meaning to the buyer—of which culture may form an aspect. Also, the status of goods as objects that can be bought indicates that they may also

[124] Ruth Towse *Advanced Introduction to Cultural Economics* (Elgar 2014) 2.
[125] ibid 16.

be traded. The definition of a given good as a 'public good' may result from its cultural component. If a State chooses to use a subsidy to protect such a good, this choice has effects under the GATT and SCM Agreement.

2.5.4.3 Intersection of the WTO's GATT with the UNESCO CDCE as they affect Cultural Goods

Ad Article XVII, paragraph 2 reads: "The term 'goods' is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services." While this indication is deemed to be more as a clarification on the concept of "goods" and not a definition, there is no indication to the definition of "Cultural Goods" in the GATT.

On the WTO side, Morijn records:

> "The WTO legal regime contains various provisions through which current trade in aspects of culture…is regulated, or can come to be regulated in the future. GATT covers, in principle, cultural…goods (such as films…)."[126]

On the other hand, Article 4(4) of the UNESCO CDCE defines 'cultural goods' as "those…goods…, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have". In turn, Article 4.3 defines the Convention's term 'cultural expressions' as "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content".

However, the UNESCO notion of 'cultural goods' still lacks definite content regarding what makes a good 'cultural'. For further elaboration of the concept of cultural goods, this study refers to Lee's analysis.

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[126] John Morijn, *Reframing Human Rights and Trade: Potential and Limits of a Human Rights Perspective of WTO Law on Cultural and Educational Goods and Services* (Intersentia 2010), 3.

2.5.4.4 UNESCO's Definition of 'Cultural Goods' in its Framework for Cultural Statistics

Lee's work overcomes the methodological weaknesses inherent in interpreting the legal provisions of the UNESCO CDCE to determine whether a good qualifies as 'cultural'. She notes that

> "no standard definition globally exists for culture that is used for statistical purposes, and therefore 'varied approaches for measuring culture are possible'…. [Thus,] the UNESCO approach will be introduced into this thesis as it is a relatively new (2009) parameter designed by a credible international organization with an international mandate. Additionally, UNESCO also encourages countries to collect data according to this framework which has the benefit of an established knowledge management database where all countries are treated equally and therefore the authority and reliability of the gathered information is high. Therefore, the UNESCO approach will be adopted by the Author in the invention of the Spectrum of Cultural Products."[127]

Lee bases her on the UNESCO *Framework for Cultural Statistics*, the 2009 'parameter' she refers to above. She specifically notes: "This Spectrum…bears in mind that when a related dispute arises in the WTO, [it] potentially aids for identifying whether the product concerned could claim…cultural aspects in… trade law".[128]

Lee's methodology places products on a spectrum between 'indefinite' and 'definite' status as cultural products, subdivided into six broad categories taken from UNESCO's *Framework for Cultural Statistics*.[129]

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[127] Juneyoung Lee, *Culture and International Trade Law: From Conflict to Coordination* (PhD Thesis Graduate Institute 2013), 51-52. Punctuation errors have been reproduced from the original.

[128] ibid 64.

[129] All UNESCO categories, sub-categories, and definitions are contained in Lee's chart (ibid 54-56).

Of those categories, two apply to goods. Category C comprises 'Visual Arts and Crafts', while Category D includes 'Books and Press'.[130] (Category E, 'Audiovisual and Interactive Media', would be relevant as services.)

Lee also charts the UNESCO *Framework*'s definitions of Visual Arts and Crafts. The Framework includes in its definition of the Visual Arts and Crafts category 'commercial places where the objects are exhibited, such as commercial art galleries'. This category includes several sub-categories: fine arts (paintings, drawings, and sculpture); photography; and crafts or artisanal products. This final sub-category contains an extensive definition:

> "Those produced by artisans, either completely by hand or with the help of hand-tools or even mechanical means, as long as the direct manual contribution of the artisan remains the most substantial component of the finished product. The special nature of artisanal products derives from their distinctive features, which can be utilitarian, aesthetic, artistic, creative, culturally attached, decorative, functional, traditional, religiously and socially symbolic and significant."[131]

Lee goes on to note that

> "UNESCO-ITC (1997) identified six broad categories of artisanal products based on the materials used–baskets/wickers/ vegetable fibre-works; leather; metal; pottery; textiles and wood.
>
> UNESCO-ITC (1997) further identified stone, glass, ivory, bone, shell, mother-of-pearl, etc. as materials in craft production

[130] Also, impact on services: printing, press agencies, etc...

[131] ibid 54-56.

> that are either very specific to a given area, or rare, or difficult to work."[132]

The category 'Books and Press' comprises books, newspaper and magazines, other printed matter, libraries (including virtual libraries), and book fairs. Lee notes that for each sub-category, "No further exemplary list was given".[133]

Lee's work to consolidate UNESCO's definitions of cultural products and analyse these products on a spectrum of cultural content also notes several limitations to the *Framework for Cultural Statistics*. While these qualifications are important, they lie outside the scope of this work.

Thus, GATT definitions of goods within the WTO Agreement, and the UNESCO CDCE's definition of 'cultural goods' overlap. This duality occurs where GATT maintains jurisdiction over 'goods' that, as Morijn notes, have cultural components. The intersection of GATT's 'goods' and the UNESCO CDCE's 'cultural goods' is the textual point from which the relationship of legal fragmentation, as this study addresses it, arises.

2.6 Sustainable Development: Foundation of the Present International Legal Order

With the end of the Cold War, the negative objective of the postwar legal order—that of avoiding conflict—underwent a transformation. Preserving peace was no longer the major preoccupation of the international legal system. The basis for a renewed international order emerged as the positive goal of 'sustainable development'. In accordance with the Appellate Body's classifications in paragraph 123 of the *Hormones* case, this work views sustainable development as a *general principle* of inter-

[132] Ibid.

[133] Ibid.

national law. Not only has it achieved widespread usage among the international legal system, but it has been codified in several documents. In effect, without the shared value of 'sustainable development', the international legal order would be fundamentally different: it would lack its present moorings, possibly rendering the task of reducing fragmentation difficult or impossible.

2.6.1 Sustainable Development in the Bruntland Report

'Sustainable development' made its first major appearance in the 1987 *United Nations World Commission on Environment and Development Report: Our Common Future*, also known as the Bruntland Report. Its definition was primarily environmental, but contained a broader context of application for the concept. The significance of the Bruntland Report's commentary to this work justifies a lengthy quote from the original text.[134]

> "27. Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs. The concept of *sustainable development does imply limits - not absolute limits but limitations imposed by the present state of technology and social organization* on environmental resources and by the ability of the biosphere to absorb the effects of human activities. But technology and social organization can be both managed and improved to make way for a new era of economic growth. The Commission believes that widespread poverty is no longer inevitable. Poverty is not only an evil in itself, but *sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a*

[134] Paragraph numbers are reproduced here from the original text, but emphasis added.

better life. A world in which poverty is endemic will always be prone to ecological and other catastrophes.

28. Meeting essential needs requires not only a new era of economic growth for nations in which the majority are poor, but an assurance that those poor get their fair share of the resources required to sustain that growth. Such equity would be aided by political systems that secure effective citizen participation in decision making and by *greater democracy in international decision making.*…

30. Yet in the end, *sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change* are made consistent with future as well as present needs. We do not pretend that the process is easy or straight forward. Painful choices have to be made. Thus, in the final analysis, *sustainable development must rest on political will*.

31. The objective of sustainable development and the integrated nature of the global environment/development challenges pose problems for institutions, national and international, that were established on the basis of narrow preoccupations and compartmentalized concerns. Governments' general response to the speed and scale of global changes has been a reluctance to recognize sufficiently the need to change themselves. The challenges are both interdependent and integrated, requiring comprehensive approaches and popular participation.

32. *Yet most of the institutions facing those challenges tend to be independent, fragmented, working to relatively narrow mandates with closed decision processes.* Those responsible for managing natural resources and protecting the environment are insti-

> tutionally separated from those responsible for managing the economy. The real world of interlocked economic and ecological systems will not change; the policies and institutions concerned must."[135]

As early as 1987, therefore—in the first emergence of the term 'sustainable development'—the Bruntland Report outlined several aspects of 'sustainable development' to the United Nations General Assembly (which had commissioned it). Sustainable development, it stated, had economic and political, *as well as* environmental components directed toward the goal of reducing global poverty. In particular, the authors explicitly note that the concept entails 'greater democracy in international decision-making'; essentially, a meaningful assertion of State sovereignty. This work will take up that concept throughout, in particular as the UNESCO CDCE expresses it.

Equally importantly, however, the Bruntland Report identified that a major obstacle to realizing the goal of sustainable development was *the fragmented nature of the international system*, which was incapable of adequately dealing with a 'real world' where economic and non-economic (here, environmental) concerns overlap and are intrinsically connected.

2.6.2 Sustainable Development in the WTO Agreement

The objective of sustainable development also figures prominently in the Marrakesh Agreement. The first Recital of the Preamble to the Marrakesh Agreement holds WTO Member States to a standard in which relations in the field of trade and economic endeavour should be con-

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[135] *Report of the World Commission on Environment and Development: Our Common Future* (1987) <http://www.un-documents.net/our-common-future.pdf> Accessed 17 December 2022.

ducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources *in accordance with the objective of sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development. (emphasis added)

> "In its notes on the 'Legal relevance of the Preamble', the WTO's Analytical Index cites the notable *US–Shrimp* decision, which views the term through an environmental lens in the context of GATT Article XX exceptions. It reads:
>
> While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO agreement which informs not only the GATT 1994, but also the other covered agreements explicitly acknowledges 'the objective of sustainable development'…
>
> We note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO agreement, in this case, the GATT 1994."[136]

[136] WTO Analytical Index: Marrakesh Agreement

Marceau recorded the pivotal moment when coherence became necessary in the area of WTO-environmental treaty relationships. In "A Call for Coherence in International Law: Praises for the Prohibition Against 'Clinical Isolation' in WTO Dispute Settlement" she wrote:

> "The pressing call for States to evolve within the parameters for 'sustainable development' is another expression of this need for greater co-ordination and coherence between trade, development and environment policies. If the initial rationale for trade liberalization was peace and economic growth, sustainable development is about ensuring continued peace and the effective well-being of future generations. This article focusses the discussions on the call for coherence between the areas of trade, development and environment as part of this broader concern for sustainable development in the context of the World Trade Organization (WTO) dispute settlement.
>
> Incorporated into the preamble of the Agreement Establishing the World Trade Organization, the concept of sustainable development, as defined in the Rio Declaration and Agenda 21, emphasizes both environmental protection and the eradication of poverty. Many people are challenging the existing General Agreement on Tariffs and Trade (GATT)/WTO system as being impermeable to this need for sustainable development. Although arguably insufficient and outdated, the old basic provisions of Article XX were, and still are, a recognition that tensions may exist between market access rights and other legitimate policies (such as environment) and constitute a call for some coherent approach to resolving these tensions.

<https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm#pA> Accessed 17 December 2022.

> The issue of WTO trade disputes involving environmental policies is complex, as it subsumes many diverse but interrelated aspects of human, animal and plant survival together with the urgency for a far-reaching solution to the alleviation of poverty and human economic misery. For a variety of reasons, many countries have resisted further consideration of environmental issues at the WTO. Concern has been raised that environmental standards may be used as a form of disguised protectionism. Developing countries, in particular, note that high, and sometimes discriminatory, standards reduce market access and impose costs that affect their development. This, in turn, may reduce the resources available to implement enforce strong national environmental policies. While these concerns are valid, the spectre of protectionism should not undermine efforts to negotiate provisions, increase the coherence of trade, development and environmental laws and policies called for by the WTO dispute settlement mechanism."[137]

Marceau's observations set the stage for examining the relationship between the WTO Agreement and the UNESCO CDCE. Many of the concerns she outlined, such as environmental concerns serving as a mask for protectionism, are the same as those for cultural diversity today.

Boisson de Chazournes and Mbengue noted the same development that Marceau recorded, observing the International Law Commission's treatment of the subject matter of coherence. However, in "A 'Footnote as a Principle': Mutual Supportiveness and Its Relevance in an Era of Fragmentation", they indicate a need to go further:

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[137] Gabrielle Zoe Marceau 'A Call for Coherence in International Law: Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33(5) *Journal of World Trade* (87-152) 87-88.

> "One might argue that there is already a certain coherence among trade agreements (in particular WTO agreements) and MEAs. In both cases, the objective of sustainable development is explicitly stated. However, the coherence which is sought in today's international relations goes beyond the traditional approach of coherence as mere 'compatibility' between legal regimes…. Nevertheless, coherence entails and even requires a further step: that is for trade agreements and MEAs to be 'mutually supportive' or 'mutually reinforcing' legal regimes."[138]

Boisson de Chazournes' and Mbengue's examination of the relationship between harmonization and mutual supportiveness in this article constitutes the architecture of Chapters 4 and 5 of this book. Again, the concept of sustainable development, as applied to the environment, has implications for cultural diversity. Chapter 5's examination of the UNESCO CDCE's definition of the concept will demonstrate this in greater detail.

2.6.3 Sustainable Development in the UNESCO CDCE

Similarly to the WTO Agreement, the concept of sustainable development also undergoes modifications and clarification in the UNESCO CDCE. Nonetheless, the additional concepts (that are discussed below) arguably remain within the limits that the Bruntland Report indicates.

The third paragraph of the UNESCO CDCE's preamble states the awareness of Parties that

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[138] Laurence Boisson de Chazournes and Makane M Mbengue, 'A "Footnote as a Principle": Mutual Supportiveness and Its Relevance in an Era of Fragmentation' (7 October 2011) 2 *Coexistence, Cooperation and Solidarity - Liber Amicorum* Wolfrum Rüdiger 1615-1638 (1619) Holger P Hestermeyer and others (dir.) Springer <https://ssrn.com/abstract=2336979> Accessed 17 December 2022.

> "cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for *sustainable development* for communities, peoples and nations."[139]

The UNESCO CDCE thus adds diversity of cultural expressions which includes cultural goods into the component aspects of 'sustainable development'. The Preamble explicitly emphasises

> "the need to incorporate culture as a strategic element in national and international development policies, as well as in international development cooperation, taking into account also the United Nations Millennium Declaration (2000) with its special emphasis on poverty eradication."

Recalling the Bruntland Report's call for greater democracy at the international level, UNESCO CDCE Article 2(2) asserts that

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory."

This in turn reinforces Article 1(h), stating that one of the Convention's objectives is to

> "reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory"

Finally, for the purposes of this section, the Convention Preamble also addresses the economic/cultural duality of cultural goods, incorporating them into the notion of diversity of cultural expressions and this kind

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[139] Emphasis added.

of inclusive and multidimensional view to the economic development is based on the concept of sustainable development:

> "cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value."

As Sustainable Development is based on recognition of different aspects of development, not only economic and commercial aspects, one could conclude that it is a fundamental value of the UNESCO CDCE, integrating it into the fabric of the international legal order. Cultural diversity, according to UNESCO, forms part of sustainable development.

2.6.4 The UN 2030 Agenda and Sustainable Development Goals

On 1 January 2016, the United Nations officially adopted 17'Sustainable Development Goals'[140] (or SDGs) as part of its 2030 Agenda for Sustainable Development. This programme of international goals inherited the legacy of the UN's 'Millennium Development Goals' from the year 2000, which the UNESCO CDCE referred to in its preamble.

SDGs therefore also form part of the contemporary definition of 'sustainable development' in the context of the present international legal order. They must also be integrated into the understanding of the shared value of sustainable development, common to both the regime of free trade under the WTO Agreement and that of cultural diversity under the UNESCO CDCE.

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[140] UN 'Sustainable Development Goals: 17 Goals to Transform Our World' <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> Accessed 17 December 2022.

2.6.5 Preliminary Conclusions on the Significance of Sustainable Development in the Present International Legal Order

'Sustainable development' is a fundamental general principle of the post-Cold War international legal order.[141]Between 1945 and approximately 1989, that common value was 'peace'. From about 1989 to the present day, the concept of 'sustainable development' has permeated every major international system: both the WTO Agreement and the United Nations system—in particular the UNESCO CDCE—hold it up as a primary objective. As the Bruntland Report implicitly foresaw, reducing fragmentation between these two instruments is a recognition of the systemic overlap of two aspects of an international system.

Thus, the UNESCO CDCE and WTO Agreement continue to share the same relationship as did their institutional predecessors. Protecting cultural diversity under the Convention does not merely mean protecting cultural goods against the economic interests of the Agreement, but rather allows collaboration between two large systems, safeguarding a common value upon which the international system is based.

2.7 Conclusion

Chapter 2 has provided a brief and general conceptual background of this book. Traded cultural goods are the fundamental unit of analysis for this work, delimiting its scope and providing its rationale. The dual nature of traded cultural goods, as 'traded goods' and as a vehicle for 'cultural expressions', places them under the jurisdiction of two international entities, with two different legal regimes.

The WTO Agreement governs their identity as traded goods, while the UNESCO CDCE governs their cultural aspects. The two norms prescribe divergent treatment for this category of goods: with the WTO advocating non-discrimination, while UNESCO prescribes protection.

[141] Chapter 3 notes that Kristy holds this view.

The situation is therefore one of fragmentation. The objective of the work is to determine whether coherence between the two regimes is possible, on both normative and institutional levels.

This chapter has also defined 'fragmentation' and 'coherence', noting three possible routes to enhance coherence: interpretation, harmonization, and mutual supportiveness. It furthermore notes that harmonization and mutual supportiveness may address solely normative, solely institutional, or a combination of normative and institutional considerations.

Chapter 2 has presented the essential concepts, definitions, and general historical context that underlie the central problem of this book. This chapter explains the terminology 'hard law' and 'soft law', as essential concepts for the book. Chapter 2 also notes the historical and contemporary values of 'peace' and 'sustainable development' which underpin the international system and inform the relationship between the treaties.

Globalisation and neoliberalism present a challenge to the interests of cultural diversity. The texts of the WTO Agreement and UNESCO CDCE crystallize these trends in legal instruments. This work considers free trade and cultural diversity to be two central pillars that uphold the shared objectives of promoting peace and sustainable development.

CHAPTER 3

INTERPRETATION THROUGH ANALOGICAL REASONING

Route I

Interpretation

Fragmentation arises, in part, from the fact that while all treaties are simultaneously binding on the States that have ratified them, each treaty may include provisions that are incoherent with the provisions of other treaties.

The issue how to interpret the relationship and potential conflicts between the WTO Agreement and UNESCO CDCE, in the context of trade in cultural goods, arises from the dual nature of cultural goods. They are in the first instance subject to trade, but they also hold a parallel status as vehicles for cultural expressions. Interpretation determines not only whether this apparent conflict is real, but also whether it is possible to resolve such fragmentation.

The International Law Commission's Report on Fragmentation (paragraphs 47-55) notes three situations leading to fragmentation: (1) fragmentation through conflicting interpretation of general law, (2) fragmentation through the emergence of special law as exception to the general law, and (3) fragmentation as differentiation between types of special law. As paragraph 412 notes, assessing the nature of conflict between international legal norms requires a preliminary answer to the question of whether the norms at stake do, in fact, conflict: for “interpre-

tation does not intervene only once it has already been ascertained that there is a conflict. Rules appear to be compatible or in conflict *as a result of interpretation*".[142]

Thus, interpreting what the treaties say *prima facie*, and what they are intended to say or to accomplish, is the fundamental step to ascertaining whether there is a relationship of conflict between any two given texts. Paragraph 23 furthermore notes that "as a result of interpretation, the relevant treaties [may] seem to point to different directions in their application by a Party".[143]Interpretation thus may alternately resolve, or give rise to, fragmentation.

Using interpretation to resolve fragmentation is well established in the history of international law. For instance, the principle that *lex specialis derogate legi generali* (a special law derogates from a general law), establishes a hierarchical relationship between two laws addressing the same subject matter, based on their relative scope. As the Latin terminology suggests, this principle dates back to Roman times. The rules of 'good faith', 'context', and 'object and purpose' all form part of the 1969 VCLT. According to Article 26 of the *Vienna Convention on the Law of Treaties* (VCLT), "every treaty in force is binding upon the Parties to it (*pacta sunt servanda*) and must be performed by them in good faith". Thus, States may *not* choose to enforce treaties selectively.

Chapter 3 therefore proceeds by analogy with pre-existing examples that already demonstrate the feasibility of interpretation to enhance coherence. It first shows that interpretation may be able to enhance coherence on its own merits—possibly by identifying terminology and

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[142] International Law Commission, *Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* para 412. Finalized by Martti Koskeniemmi. 58th Session (1 May-9 June and 3 July-11 August 2006) Geneva. <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> Accessed 17 December 2022.

[143] ibid para 23.

concepts between treaty texts as identical with one another, or by employing traditional principles such as 'good faith' and *lex specialis derogat legi generali*.

Chapter 3 also shows how 'broad' or 'narrow' definitions of what constitutes a 'conflict' may shed light on whether the UNESCO CDCE and the WTO Agreement do conflict. In particular, this chapter will demonstrate that if 'harmonization' and 'mutual supportiveness' have become general principles of international law (as suggested by some authors), the use of such general principles can help to reconcile these potential conflicts—via the rules on interpretation, and in particular Article 31.3(c) VCLT.

Section 3.1 explains interpretation. Examining in turn each category of fragmentation that the ILC describes, this section investigates which of them apply to the relationship between the WTO Agreement and UNESCO CDCE.

Section 3.2 examines how interpretation may reduce or increase fragmentation, and outlines the limits of its ability to enhance coherence between the trade and cultural regimes on its own. It proceeds by an examination of WTO panel and Appellate Body reports that are relevant for the protection of cultural goods, and for classification of 'like' goods.

Section 3.3 proposes possible interpretations of GATT terms, such as the 'public morals' and 'national treasures' exceptions under Article XX, which could permit Members to protect cultural goods while retaining WTO consistency. By interpreting cultural goods of different origin as not being 'like' generic products that they share tangible characteristics with, States would be able to restrict trade affecting cultural goods. Section 3.3 similarly highlights possible interpretations of the UNESCO CDCE's terminology of 'protect' and 'protection, along with 'sustainable development', in a mutually supportive fashion with similar terminology in GATT and the Marrakesh Agreement.

Section 3.4 concludes by pointing out how different interpretations of the relationship between the two treaties, and of the kind of conflict that may exist between them, yield different principles to enhance coherence. Each flows either from the principle of harmonization, or from the principle of mutual supportiveness that States could follow for interpretation when applying both the WTO Agreement and the UNESCO CDCE.

3.1 Perspectives on Interpretation

3.1.1 Interpretive Guidelines in the VCLT

Under Article 3.2 of the WTO DSU, a function of the dispute settlement system is 'to clarify the existing provisions of WTO Agreement in accordance with customary rules of interpretation of public international law'. VCLT Articles 31 and 32 provide the initial foundation for this examination of interpretation. Describing the VCLT as 'a prime achievement of the International Law Commission', Aust explains:

> "For the first 10 years [of drafting the Convention] the ILC saw its task as being the production of an expository code, setting out what the ILC considered to be the customary international law on the subject. But in 1961 the ILC decided that such a code would not be so effective for the purpose of restating the law, particularly as so many new States had by then emerged, and were continuing to emerge. Codification through a multilateral treaty would give the new States the opportunity to take part in the formulation of the law, so placing the law of treaties on the widest and most secure foundation."[144]

[144] Anthony Aust, 'Vienna Convention on the Law of Treaties (1969)' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2006).

Thus, as a system of rules on treaty interpretation, the interpretive guidelines that the VCLT provides constitute a nearly universal standard. Article 31(1) holds that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. This section examines the elements of 'good faith', 'context', and 'object and purpose' in turn. It then explains Article 31(3)(c)'s requirement to apply 'relevant rules of international law applicable in the relations between the Parties'.

3.1.1.1 Good Faith

In his contribution to the *Encyclopedia of Public International Law*, D'Amato notes that the concept of 'good faith'

> "figures prominently in the Vienna Convention on the Law of Treaties, which by virtue of its careful draftsmanship and wide ratification has assumed an authoritative place in international law on questions relating to the interpretation and enforcement of treaties....[Its] references to context and purpose demonstrate that the substance of the principle of good faith is the negation of unintended and literal interpretations of words that might result in one of the parties gaining an unfair or unjust advantage over another party."[145]

He continues that the term's meaning also includes the commitment of States to ratify treaties that their diplomatic agents have signed. Finally, D'Amato notes, 'good faith' contains the idea that having undertaken them, States must execute their treaty obligations. He goes on to clarify that the concept also contains the obligation to avoid an 'abuse of rights', where 'a State may not exercise its international rights for the

[145] Anthony D'Amato, 'Good Faith' *Encyclopedia of Public International Law* (1992)599-601

sole purpose of causing injury, nor fictitiously to mask an illegal act or to evade an obligation'.

Mitchell states that WTO Tribunals

> "may use the principle of good faith not merely to interpret WTO provisions, but also in the exercise of their inherent jurisdiction, such as when employing the doctrine of estoppel, which is one particularization of good faith. However, the use of good faith in the WTO dispute settlement entails three important considerations and qualifications. First, the principle should not be used to overwhelm the provisions of the WTO that appear to be based on concepts similar to those underlying the principle of good faith, such as non-violation complaints, which are subject to detailed rules. Second, the principle should not be confused with other principles that may appear to be related, particularly due process. Third, in my view, WTO Tribunals have no legal basis for finding that a Member has violated a principle of good faith independent of a violation of a WTO provision."[146]

Thus, interpretation requires at least one subjective element: 'good faith', a standard of State conduct that does not attempt to circumvent the letter or spirit of a rule by knowingly interpreting that rule in a way that is incorrect or selective. Violations of good faith may arise only when a State violates a treaty provision it has ratified. In a slightly different context, however, Jonas and Saunders outline the functional problem with the good faith requirement:

> "Although the bad faith test is phrased as a subjective test, practitioners cannot delve into the subjectivity of a state or its leaders. Instead, they must rely on objective evidence; they must rely on

[146] Mitchell Andrew D, *Good Faith in WTO Dispute Settlement* (2006) 7(2) *Melbourne Journal of International Law* 1 <http://www.austlii.edu.au/au/journals/ MelbJIL/2006/14.html> Accessed 17 December 2022.

> the state's external manifestations of bad faith.... Under a bad faith test, a state violates [a treaty provision] if its actions are unwarranted or condemnable.... Any such test raises the problem of defining which actions actually demonstrate bad faith or the manifestation thereof. It is often a qualitative problem rather than a quantitative one, and lowering the standard of proof does not solve the problem."[147]

3.1.1.2 Context

VCLT Article 31(2) states that:

The context, for the purpose of interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

The wording 'shall comprise' appears immediately as an imperative and exhaustive formulation, giving this Article greater weight than some other elements of interpretation in the VCLT. 'Shall' indicates a categorical obligation, while 'comprise' denotes a complete list of indicators.

As an example, for clause (a) above, one may consider the decisions made by the UNESCO conference in 2003. For clause (b) above, an example could be the definition of the CDCE scope. So, this Article indicates that interpreting any provision depends on other agreements

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[147] David S Jonas and Thomas N Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' *Vanderbilt Journal of Transnational Law* 43(3) (2010) (565-609) 602-3 <https://scholarship.law.vanderbilt.edu/vjtl/vol43/iss3/1/> Accessed 17 December 2022.

connected to the principal treaty in question, if such agreements have been concluded.

3.1.1.3 Object and Purpose

Further ambiguities abound with the VCLT Article 31(1) phrase 'object and purpose'. Describing the eight uses of the term in the VCLT, Jonas and Saunders assert that

> "object and purpose is a term of art without a workable definition.... Those who have attempted to [create such a definition] admit 'with regret' that it remains an 'enigma' that, '[i]nstead of reducing the potential of future conflicts...[,] plants the seed of them'."[148]

Specifically, with respect to the phrasing of Article 31(1), they say that:

> "This may be the vaguest invocation of the phrase object and purpose in the Vienna Convention, and scholars have commented on its puzzling circularity. The text of a treaty must be interpreted in light of the treaty's object and purpose, but the treaty's object and purpose must be discovered through interpretation of the text itself."[149]

Certainly, if interpretation is truly such a vague process, then using interpretation to improve coherence between treaties becomes a near impossible task! Nonetheless, the authors propose a general practical method of resolving the ambiguity surrounding the term:

> "To simplify, the search for a treaty's meaning can be understood as a series of steps. At Step One, we review the specific provisions of a treaty looking for common themes and ideas. (We do

[148] ibid 567.

[149] ibid 573-4.

> this tentatively and with caution, aware that at first reading, the full import and nuance of each article may not be apparent.) At Step Two, we examine the general themes and ideas that came forward in Step One. We try to reconcile these themes with one another, checking whether they fit together easily or whether they compete and conflict. Based on this comparison, we formulate a tentative statement of a treaty's object and purpose. At Step Three, we return to the specific articles of the treaty, reexamining them in the light of our tentative statement of the object and purpose, making notes of conflicts and anomalies. At Step Four, we return to the general themes, and, based on the conflicts and anomalies discovered in Step Three, we revise and refine our statement of the treaty's object and purpose. And so on...."[150]

Jonas and Saunders are clear that their methodology

> "does not guarantee a single, clear result. Different interpreters will come to different results depending on how the analysis is conducted."[151]

Thus, even interpretations may conflict with one another—they may add to fragmentation. Most importantly, Jonas and Saunders state, '[l]eaving such a vital term [as 'object and purpose'] undefined risks undermining the strength and legitimacy of international law'.[152]

Reinforcing the strength and legitimacy of international law, this study holds, is also the precise object and purpose of VCLT Article 31(3)(c).

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[150] ibid 582.

[151] ibid.

[152] ibid 569.

3.1.1.4 Relevant Rules of International Law

VCLT Article 31(3)(c) reads:

There shall be taken into account, together with the context…any relevant rules applicable in the relations between the parties.

Writing on the contested history of Article 31(3)(c), Merkouris notes a particularly lively discussion of the phrase 'general principles of international law'. This phrase was not included in the final draft of the VCLT, but it is understood to be encompassed in the wording 'rules'.

Some members of the ILC considered that the term 'rules' was either completely erroneous, since not all rules, but only the 'basic principles of international law which had a bearing on the treaty', were applicable in its interpretation, or outright too general, since such a term would encompass treaty-based rules, which consisted the vast majority of internationally binding rules.

Another group, however, considered this term advantageous compared to 'principles' for exactly the same reasons. In interpreting a treaty provision, the interpreter should bear in mind, not only the principles but all the relevant rules, be they of treaty or customary nature. Treaties were not created in a legal vacuum and the totality of these rules provided the necessary contextual background for the interpretative process.[153]

Merkouris notes saliently that

> "[r]ecent jurisprudence seems to confirm the preliminary findings as to what the term 'rules' of Article 31(3)(c) includes. For instance the WTO Panel in the *EC-Biotech* case explicitly recognized that the term 'rules of international law' encompasses: '(i) international conventions (treaties), (ii) international custom

[153] Panagiotis Merkouris 'Article 31(3)(c) of the VCLT and the Principle of Systemic Integration' (PhD Thesis, Queen Mary University of London School of Law, 2010) 29 <https://www.legal-tools.org/doc/cdb056/pdf/> Accessed 17 December 2022.

(customary international law), and (iii) the recognized general principles of law'."[154]

Similarly, the ILC Report on Fragmentation notes:

"The A[ppellate] B[ody] also referred in support of this construction to Agenda 21and to the resolution on assistance of developing countries adopted in conjunction with the *Convention on the Conservation of Migratory Species of Wild Animals*. In so doing, it emphasized that the chapeau of article XX was 'but one expression of the principle of good faith', which it found to be a general principle of international law. 'Our task here', said the Tribunal expressly relying on article 31 (3) (c), 'is to interpret the language of the chapeau, seeking interpretative guidance, as appropriate, from the general principles of international law'….

One sometimes hears the claim that this might not even be permissible in view of the express prohibition in the DSU according to which the '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements' (DSU 3:2 *in fine*). Such a view would, however, presume that the covered agreements are 'clinically isolated' precisely in the way the AB has denied. Two considerations are relevant here. First, when article 31 (3) (c) VCLT is used, it is used with the specific authorization of the DSU itself. But second, and more important, interpretation does not 'add' anything to the instrument that is being interpreted. It constructs the meaning of the instrument by a legal technique (a technique specifically approved by the DSU) that involves taking account of its normative environment."[155]

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[154] ibid 36

[155] International Law Commission *Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising*

Thus, Article 31(3)(c) requires States to take into account general principles of international law. This provision provides coherence and stability to the international legal system, by requiring the judge to consider the broader legal environment of a provision. Article 31(3)(c), according to Tzevelekos, may therefore be seen to play the role of an 'anti-fragmentation tool':

> "This provision (the customary nature of which is uncontested), when read in the broader framework of Article 31 of the VCLT, enables the judge of any court or tribunal to integrate general international law into her judicial reasoning, along with any 'relevant' and 'applicable' special legal obligations which are binding on the parties. In other words, Article 31(3)(c) functions as 'a "master key" to the house of international law' and renders possible the inclusion of sources external but relevant to the norm under interpretation, thus allowing the judge to take into account the broader normative environment. It goes without saying that this should always be done following the so-called 'principle of harmonization', according to which, when a plurality of norms affects the same subject the interpretation should always attempt to achieve conciliation…In this role Article 31(3)(c) *deus ex machina* introduces a legal principle: since international treaties are the product of international law and part of its respective legal order, they should always be interpreted in a way that, by taking into consideration the broader normative environment, will avoid fragmenting it."[156]

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from the Diversification and Expansion of International Law' paras 443, 447. Finalized by MarttiKoskeniemmi. 58th Session (1 May-9 June and 3 July-11 August 2006) Geneva. <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> Accessed 17 December 2022.

[156] Vassilis P Tzevelekos 'The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loop-

This section concludes by noting that the most important aspect of this discussion is the obligation that the word 'shall' confers in Article 31(3)(c). This *requires* the adjudicator to consider, for the purposes of this work, relevant rules (and thus, general principles of international law) in efforts to resolve disputes arising from fragmentation. The next section explores the concept of 'general principles' as it relates to the structure of this study's argument.

3.1.2 Discussion of 'General Principles' of International Law

States are obliged to use general principles of law when they interpret treaties. However, not all principles have acquired the status of 'general principles of international law'. This created a part of the definition of 'rules' related to the governing relationship between Parties, under VCLT Article 31(3)(c).

Concepts that regularize and legitimize international law are composed of general principles of international law. Using the foregoing logic, this work shows, that harmonization and mutual supportiveness are general principles of international law. Given their status as general principles, ICJ Statute Article 38(1) and VCLT Article 31(3)(c) *require* States to take harmonization and mutual supportiveness into account when addressing situations of a normative conflict.

This work demonstrates that harmonization and mutual supportiveness—because they make a fundamental contribution to the viable existence of the international legal order—constitute such 'general principles of international law'. This is demonstrably true via a sequence of logic that begins with a self-evident axiom: the premise that reduces fragmentation upholds the stability and legitimacy of the international legal order.

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hole for the Reinforcement of Human Rights Teleology?' (2010) 31(3) *Michigan Journal of International Law* (621-690) 631.

Left unaddressed, fragmentation, depending on the situation, may require States to violate at least one treaty when they are signatories to both. Fragmentation thus makes fulfilling the principle of *pacta sunt servanda* unachievable, undermining the essential element of good faith (enshrined in the VCLT) on which such agreements are based.

This work first holds that a given concept or axiom becomes a 'general principle' of international law when its existence is essential to uphold the stability and legitimacy of a given international legal order. Lacking such general principles, the international order would not exist, or would be so different as to be incommensurable with the present legal order.

Furthermore, research in this chapter demonstrates that States need the tools of harmonization and mutual supportiveness as general principles to reduce genuine conflict during situations of legal fragmentation. Without such concepts, States (and the judicial authorities which they invest with the power to interpret treaties) would lack the two most important mechanisms that enable them to fulfil their obligations to comply with all treaties simultaneously, under the principle of *pacta sunt servanda.*

This study will first show in the current chapter that harmonization as a general principle allows States to reduce fragmentation by harmonized interpretation of the treaty texts. Then, it will explain that mutual supportiveness again, is a general principle allowing States to reduce fragmentation by interpreting treaties in the light of mutually shared principles.

Chapters 4 and 5 will assess harmonization and mutual supportiveness as approaches under customary international law to reduce fragmentation and enhancing coherence between the treaties.

These alternative means of reducing fragmentation allow States to uphold the principle of *pacta sunt servanda*. Since *pacta sunt servanda* is an expression of 'good faith' (which the VCLT requires), harmoniza-

tion and mutual supportiveness allow States to uphold all their obligations simultaneously, thereby complying with the good faith obligation. Without its foundation of good faith, the international legal order would lack all legitimacy and become inherently unstable.

However, the particular tools of harmonization and mutual supportiveness are essential to reduce fragmentation in cases of conflict. In return, reducing fragmentation safeguards the stability and legitimacy of the international legal order. As a result, harmonization and mutual supportiveness serve to stabilize and legitimize international law.

This understanding of 'requirement' involves nuance, however. Are these principles binding during WTO dispute settlement, in the case of an external agreement like the UNESCO CDCE? Marceau has clarified this type of relationship in her work on human rights and WTO dispute settlement. She explains:

> "Article 31(3)(c) provides that: 'There shall be taken into account, together with the context, (c) any relevant rules of international law applicable in the relations between the parties….The requirement that any such rule be 'applicable in the relations between the parties' implies that the international law rule must be binding on the parties. But which parties? One narrow interpretation would read 'parties' as meaning all WTO members. In other words, for a non-WTO rule of international law to be used to interpret WTO obligations, it and the WTO agreement would require identical membership. This may be particularly problematic for treaties….While this approach provides a conceptually clear standard, it suffers from a number of problems. It would reduce the number of outside treaties and legal principles that could be used to interpret WTO obligations under Article 31(3)(c), and this leads only to inconsistencies and incoherence between systems of law. Few international agreements, if any, will have identical memberships, although some may include all WTO Mem-

> bers or even a wider membership than the WTO. But to require that such a non-WTO treaty have at least the WTO Membership would also create illogical situations. As WTO Membership grows, fewer international agreements will match its membership. This is especially so since the WTO admits non-sovereign members….This would lead to the paradoxical result that the WTO would, at least in theory, become more isolated from other international systems of law as its membership grows. In addition, there may be principles and provisions in an international treaty (with smaller membership than that of the WTO) which have become a customary rule of international law binding on all countries, even if non-signatory to that treaty (the treaty becomes evidence of this custom)."[157]

Chapter 5 will demonstrate that mutual supportiveness, enshrined in Article 20 of the UNESCO CDCE, constitutes an example of the situation that Marceau outlines here. However, where she suggests the example of a general principle of customary international law, the concrete situation is stronger: that of a general principle, according to this study's contention. Marceau continues:

> "It seems true that the rule of international law to be used for interpreting the WTO Treaty must be of 'relevant international communality' but that the rule's membership is no guarantee of its authentic relevance….From a technical point of view, this interpretation is supported by the different usage of 'parties' throughout Article 31 in general and in Article 31(3)(c) in particular….In other words, Article 31(3)(c) would potentially reach a series of international norms. What finally determines which international law rules are to be used for the interpretation of a spe-

[157] Gabrielle Marceau *WTO Dispute Settlement and Human Rights* (2002) 13(4) EJIL 753-814 (780-781).

> cific treaty is rather the relevance of the particular rule of international law in light of the nature of the WTO provisions that are being interpreted in the dispute."[158]

Where disputes arise from trade in cultural goods, the UNESCO CDCE's relevance would emerge from the nature of the dispute dealing with trade in cultural goods. It may even be, as noted in this chapter, a special law specifically addressing such disputes. In such cases, it would seem that the inclusion of 'mutual supportiveness' in CDCE Article 20as a required interpretive rule, would certainly classify mutual supportiveness as a 'relevant rule of international law' under Article 31(3)(c).Such an understanding would be strengthened by a reading of the instrument's history as a protection system of cultural goods, deliberately intended to shield cultural expressions (including cultural goods) from WTO trade rules. Harmonization, albeit in less explicit terms, would also be a 'relevant rule' by virtue of its status as a general principle.

Similar to VCLT Article 31(3)(c), discussed above, ICJ Statute Article 38(1)(c) also states that sources of international law include 'the general principles of law recognized by civilized nations'. This Statute does not precisely define the notion of 'general principles of law', and that definition remains a source of debate. Thus—outside of the framework previously established in this work—whether any particular axiom actually constitutes a principle may also be debated.

Nevertheless (however vague the concept may appear) under ICJ Statute Article 38, an axiom gains formal status as a principle when the international community has 'recognised' or accepted it as a principle. Paragraphs 468-469 of the ILC Report on Fragmentation state:

> "[G]eneral rules and principles are applicable as a function of their mere 'generality' and their validity is based on nothing

[158] ibid 782-783.

> grander than their having passed what Thomas Franck calls the 'but of course test' - a more or less unstable 'common sense of the international community (Governments, judges, scholars)'….
>
> The same concerns many principles identified by the ICJ, such as freedom of maritime communication, 'good faith', 'estoppel', *ex injuria non jus oritur*, and so on. Further examples include the criteria of statehood (Loizidou); the law of State responsibility (which has influenced both the reach of human rights obligations and the law of economic counter-measures in the WTO); the law of State immunity; the use of force; and the principle of good faith. *The general principles of law recognized by civilized nations perform a rather similar task in locating the treaty provision within a principled framework."*[159]

Thus, the ILC identifies a general principle as a somewhat indeterminate notion, but one which situates legal norms within a framework. The American Society of International Law states:

> "When there is no provision in an international treaty or statute nor any recognized customary principle of international law available for application in an international dispute, the general principles of law can be used to 'fill the gap'."[160]

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[159] International Law Commission, *Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'* para. 412. Finalized by Martti Koskeniemmi. 58th Session (1 May-9 June and 3 July-11 August 2006) Geneva.
<http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> Accessed 17 December 2022. [Emphasis added].

[160] James G Apple 'What are General Principles of International Law?' *International Judicial Monitor* (American Society of International Law/International Judicial Academy July/August 2007).

In the WTO's discussion of the 'precautionary principle' (the ability to take precautions to ensure health and safety in the absence of information about a given product's effects) in the *EC–Hormones* case, the Appellate Body noted:

> "The United States does not consider that the 'precautionary principle' represents customary international law and suggests it is more an 'approach' than a 'principle'. Canada, too, takes the view that the precautionary principle has not yet been incorporated into the corpus of public international law; however, it concedes that the 'precautionary approach' or 'concept' is 'an *emerging* principle of law' which may in the future crystallize into one of the 'general principles of law recognized by civilized nations' within the meaning of Article 38(1)(c) of the *Statute of the International Court of Justice.*"[161]

Thus, according to the American Society of International Law, it seems that there are three categories under which a concept may be used in this context: an 'approach', a 'customary principle', or a 'general principle' of international law. This discussion now uses the classification outlined in the *Hormones* case to explain the principles of harmonization and of mutual supportiveness.

3.1.2.1 The Principle of Harmonization

Harmonization constitutes a general principle of international law as it is one of the two applicable mechanisms available in the case of a genuine conflict between treaties. Its application allows States to comply with the good faith obligation under the *pacta sunt servanda* principle, and it is thus essential to stabilize and legitimize the international legal

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<www.judicialmonitor.org/archive_0707/generalprinciples.html> Accessed 17 December 2022.

[161] WTO *European Communities: Measures Concerning Meat and Meat Products (Hormones)* (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R [122].

order when conflict arises. The ILC agrees that harmonization is a general principle.

First, paragraph 229 of the ILC's Report, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, identifies harmonization as a principle of international law: "When two States have concluded two treaties on the same subject-matter, but have said nothing of their mutual relationship, it is usual to first try to read them as compatible (the principle of harmonization)".

Similarly, and more pertinently, Conclusion 4 (entitled 'The principle of harmonization') of the ILC's *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* is even more explicit. It states: "It is a *generally accepted principle* that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations."[162]

State-level examples of harmonization, in turn, reinforce the concept of harmonization as a general principle. Lundmark writes that harmonization of norms fosters stability, economic growth, and prosperity, in addition to benefits in the field of human rights. He adds:

> "The harmonizing aspect of comparative law is highly visible in European courts, to take just one example, for both the Court of Justice for the European Union and the European Court of Human Rights draw heavily on the domestic law of the member states in reaching their decision. The International Court of Jus-

[162] ILC 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'
<http://legal.un.org/ilc/texts/instruments/word_files/english/draft_articles/1_9_2006.doc> Accessed 17 December 2022. [Emphasis added].

> tice is even required by its organic statute to consider the general principles of law as expressly recognized by civilized nations when deciding disputes in accordance with international law."[163]

Additionally, as Chapter 4 will show, harmonization forms part of both the texts of the *Agreement on Sanitary and Phytosanitary Measures* (SPS Agreement, Article 3) and the *Agreement on Technical Barriers to Trade* (TBT Agreement, Articles 2.4-2.6). Both are WTO covered agreements, and thus have been ratified by over 160 Member States.

These examples serve to uphold the ILC's conclusion that harmonization is a general principle of international law. However, harmonization's status as a general principle comes from the fact that it is essential to the stability and integrity of the international legal system as a whole. It places value on the notion that coherence, and the resulting stability and integrity of the system, are better than fragmentation, conflict, and instability.

Wherever the principle of harmonization is used—whether for national or international norms—it is recognised as a general principle. Under the ICJ Statute and the VCLT, therefore, States *must* consider the route of harmonization as a principle when attempting to reconcile apparently conflicting treaty norms. Thus, since harmonization is a general principle of international law (particularly given paragraph 229 of the ILC Report and paragraph 4 of the Conclusions to the ILC Report), the analytical framework it sets must be taken into account when reading two treaties whose provisions appear incompatible as a result of interpretation (given paragraph 412 of the ILC Report and VCLT Article 31(3)(c)).

This book in chapter 3 accepts and uses the ILC's recognition of harmonization as a general principle of international law. In chapter 4 the work goes further and tries to show that harmonization is a general

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[163] Thomas Lundmark *Charting the Divide between Common and Civil Law* (OUP 2012) 14.

principle of international customary law that has an intrinsic relationship with hard law, and as hard law can only be modified by amendment, harmonizing genuinely conflicting norms means amending at least one treaty text. The chapter will show this through State practice of harmonization of national norms with those of other States under treaties that mandate harmonization.

However, there are times when it may be impossible to amend one or both conflicting treaties. This section therefore turns from accepting harmonization as a general principle to establishing that mutual supportiveness is also a general principle of international law.

3.1.2.2 The Principle of Mutual Supportiveness

Harmonization and mutual supportiveness are two different approaches that are used to ensure legal coherence that will be discussed in chapter 4 and 5. However, this chapter advances the notion that mutual supportiveness is a general principle for interpretation. It is essential because it upholds the stability and legitimacy of the international order—just like the harmonization principle.

This work states that according to the argument that justifies harmonization as a general principle, mutual supportiveness is a general principle of international law. First and foremost, as the ILC Report on Fragmentation has established, mutual supportiveness is a form of interpretation. The ILC notes in paragraph 412 of the Report on Fragmentation, there are times when it is not possible to apply the principle of harmonization. As the second mechanism applicable in the case of a genuine conflict between treaties, its application allows States to comply with the good faith obligation under the *pacta sunt servanda* principle. Mutual supportiveness is thus essential to stabilize and legitimize the international legal order, in cases when conflict arises and harmonization lacks feasibility. Under ICJ Article 38(1) and VCLT Article 31(3)(c), therefore, States *must* take it into account in cases of normative conflict.

Several researchers agree that mutual supportiveness is a general principle of international law and a component of sustainable development. In her doctoral thesis, *The evolution of sustainable development in public international law: How does it inform the application and interpretation of WTO agreements covering the domestic regulation of trade in goods?*, Kristy discusses the components of the principle of sustainable development as the means of implementation to operationalize the interaction between environmental protection and social and economic development and to help achieve the application of the principle of sustainable development. These components include integration, sustainable use, precautionary approach, special and differential treatment, public participation and mutual supportiveness.[164]

This study accepts Kristy's classification (based on previous foundational work by Boisson de Chazournes and Mbengue) that mutual supportiveness constitutes a principle of international law, and that it upholds sustainable development. As Chapter 2 showed, sustainable development is a fundamental principle of the international legal order part of the matrix that gives it its present form. Therefore, Kristy argues, if mutual supportiveness contributes to the operationalization of that order, then it is a principle that aids in achieving the aim of sustainable development. This thesis shares her perspective.

On the other hand, paragraph 123 of the Appellate Body's *Hormones* decision established that:

> "The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators, and judges. The precautionary principle is

[164] Michelle Ayu Chinta Kristy *The evolution of sustainable development in public international law: How does it inform the application and interpretation of WTO agreements covering the domestic regulation of trade in goods?* (Joint Doctoral Thesis defended at University of Geneva and Maastricht University on 29 April 2021) 98.

> regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by members as a principle of general or customary international law appears less than clear….[T]he precautionary principle…still awaits authoritative formulation."

However, according to paragraph 123 of the *Hormones* decision, international law contains 'approaches' and 'general principles of customary international law'. If mutual supportiveness is a general principle, then under ICJ Statute Article 38(1)(c) and VCLT Article 31(3)(c), States and international organisations *are obliged* to consider it as an interpretive technique to enhance coherence between treaties. It then resides on the same level of importance as the principle of harmonization. If it is a general principle based on customary international law[165], however, it may be taken into account, but its use would not be mandatory. If however mutual supportiveness is an 'approach' (as Canada argued was the case with the precautionary principle in *Hormones*), this technique might merely be applied on a case-by-case basis as the need arose.

Under VCLT Article 31(3)(c), "There shall be taken into account, together with the context:… Any relevant rules and conventional obligation of international law applicable in the relations between the Parties". Such rules include general principles of international law: the ILC explicitly mentions harmonization as a general principle. Under ICJ statute Article 38(1)(c), "the general principles of law recognized by civilized

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[165] 'Customary international law is one component of international law. Customary international law refers to international obligations arising from established international practices, as opposed to obligations arising from formal written conventions and treaties. Customary international law results from a general and consistent practice of states that they follow from a sense of legal obligation.' <https://www.law.cornell.edu/wex/customary_international_law> Accessed 17 December 2022.

nations" constitute a source of international law. This chapter has noted the presence of mutual supportiveness in several treaties and has established that these uses surpass the standard of an 'approach' or a 'principle' (as a customary principle in international law under the nomenclature of the *Hormones* decision). Thus, mutual supportiveness is also a general principle of international law, and as such, this principle must be taken into account when interpreting terms of the WTO Agreement or of the UNESCO CDCE.

Nonetheless, if mutual supportiveness is to be considered a customary principle (as the American Society of International Law mentioned), it is still relevant insofar as the concerned States agree to use this principle. The States concerned have explicitly agreed to do so in signing the UNESCO CDCE, under Article 20—as well as in other treaties that this chapter has mentioned. This study argues, however, that the principle's presence in multiple treaties, signed by many (if not most) of the world's nations, negates its status as customary and affirms its status as a general principle.

Boisson de Chazournes and Mbengue elevate mutual supportiveness to a general principle in its own right that may reduce fragmentation: again, a perspective that this work shares. These scholars contrast the concept with that of harmonization, noting:

> "[T]here is no doubt that mutual supportiveness is rooted in legal principles capable of rationalizing fragmentation. Furthermore, mutual supportiveness benefits from more solid legal ground–in terms of its quantitative and qualitative incorporation in international instruments–than the so-called 'principle of harmonization' which has extensively been referred to and supported by the ILC in its study on fragmentation of international law.
>
> 'Harmonization' is intrinsically linked to the 'presumption against normative conflict'. Mutual supportiveness is inherently linked to a principle (not a presumption!) of normative cohesion

> or normative interconnection between different regimes. In other words, the concept of harmonization implicitly accepts that normative conflicts may arise if the presumption against conflict is rebutted while mutual supportiveness 'plays down that sense of conflict', not to say excludes *in toto* the idea of conflict. No international instrument embodying the principle (or concept) of mutual supportiveness gives credence to the idea of conflict. They all refer to a 'relationship' between different treaty regimes, or to 'common' objectives pursued by different treaty regimes or to the absence of 'policies contradiction'."[166]

Here, Boisson de Chazournes and Mbengue contrast the utility of harmonization with that of mutual supportiveness by identifying these principles as perspective lenses through which to view the problem of fragmentation. These differing perspectives on fragmentation yield very different choices of strategy to approach the problem of normative incoherence.

On one hand, harmonization is linked once the presumption against normative conflict has been rebutted. On the other hand, mutual supportiveness relies on a more important principle, that all international instruments share common values. These relationships will be developed more fully toward the end of this chapter.

Pavoni establishes the importance of mutual supportiveness for the stability and legitimacy of the international system. He introduces his article on mutual supportiveness (he abbreviates the words as 'MS') with the following statement:

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[166] Laurence Boisson de Chazournes and Makane M Mbengue, 'A "Footnote as a Principle": Mutual Supportiveness and Its Relevance in an Era of Fragmentation' (7 October 2011) 2 *Coexistence, Cooperation and Solidarity - Liber Amicorum* Wolfrum Rüdiger 1615-1638 (1619) Holger P Hestermeyer and others (dir.) Springer <https://ssrn.com/abstract=2336979> Accessed 17 December 2022.

"First, the practice examined in the following sections will make it clear that MS is a principle according to which international law rules, all being part of one and the same legal system, are to be understood and applied as reinforcing each other with a view to fostering harmonization and complementarity, as opposed to conflictual relationships. This is indeed how MS has usually been characterized, i.e., as an *interpretative principle or technique* sharing the same rationale and addressing similar concerns to those underlying the more familiar notions of systemic integration, harmonious interpretation, and presumption against conflicts. Secondly, MS should not be taken as a mere restatement of the just recalled well-settled principles of interpretation. There is added value in it, insofar as it is also denoted by an important *law-making dimension*, i.e., it is increasingly relied on as a reference notion requiring and orientating adjustments and changes in the law in respect of those 'hard cases' where all efforts at reconciling competing rules have been exhausted, thereby endangering the integrity of international law. These cases may obviously jeopardize the integrity of international law, either because states which are parties to colliding treaties will be unable fully to respect the *pacta sunt servanda* rule or because one of the colliding norms protects fundamental values of the international community and is therefore sustained by a strong claim to hierarchical superiority *vis-à-vis* lower ranking norms. In this connection, I will submit that MS translates into a specific obligation of conduct incumbent upon states, i.e., a duty to pursue good faith negotiations aimed at achieving formal modifications in the law which are necessary to restore the integrity of the international legal order."[167]

[167] ibid. Emphasis added.

Pavoni thus establishes two important characteristics of mutual supportiveness. First, it is a concept of a reciprocal relationship between two systems of legality, where *each reinforces the objectives of the other*. Second, it has deeper legal effects than the principle of interpretation: where all other efforts have failed, it may maintain the integrity of international law because it *obliges States to maintain an attitude of good faith*. Pavoni adds a practical consideration to the flexibility of mutual supportiveness, in the context of WTO law's relationship to other regimes:

> "[T]he principle of MS finds reflection in WTO practice also at the level of implementation of dispute settlement rulings, where negotiations aiming at mutually agreed solutions may result in an accommodation of competing internationally-protected interests and values underlying the case at hand. Secondly, and most importantly, the spread of allegedly *contra legem* agreements, such as the EU–US *Hormones* deal, is however a setback for the integrity and predictability of the WTO legal system. This should induce WTO members to anticipate issues of reconciliation with competing regimes, by undertaking in good faith law-making processes directed at the conclusion of specific instruments providing guidance and legal certainty…Observance of the principle of MS should be the key conceptual benchmark in respect of these negotiating processes."[168]

Pavoni warns that being so flexible as to permit *contra legem* (formally WTO-inconsistent) solutions may reduce the integrity and predictability of the WTO system in particular. Nonetheless, this work holds that this flexibility on the part of such a strong treaty is precisely

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[168] R. Pavoni, 'Mutual Supportiveness As A Principle Of Interpretation And Law-Making: A Watershed For The 'WTO-And-Competing-Regimes' Debate?' (2010) 21 *European Journal of International Law*, 678.

what may stabilize the international legal system in dealing with conflict between its component parts.

In general, Pavoni reinforces the concept that mutual supportiveness may uphold the coherence and stability of international law in general. Nonetheless, this study disagrees on the fact that mutual supportiveness should play the role of a secondary alternative to harmonization. Rather, its relationship with soft law means that it is likely to institute uncoerced State practices that may make harmonization, and thus amendments to hard law, unnecessary. Similarly, this work will show that patterns of informal, or 'soft', practice may often pave the way for 'hard' legislation. As a result, 'soft' methods relying on mutual supportiveness may actually be a viable first recourse in the case of normative conflict. Chapter 5 will elucidate this in detail.

Based on the foregoing, mutual supportiveness arguably holds a legal foundation superior even to the principle of harmonization—rooted, as Boisson de Chazournes and Mbengue argue, in a more fundamental relationship between instruments. In its particular application to this study, UNESCO CDCE Article 20(1)(a) explicitly provides mutual supportiveness. The WTO's use of the technique is not so overt, but is nonetheless fundamental to understanding the Organization's behaviour in several arenas, such as environmental law.

Given its fundamental role in upholding the stability and coherence of international law, which Pavoni argues for, mutual supportiveness cannot be considered a mere 'approach' to be used on a case-by-case basis. Furthermore, mutual supportiveness enjoys increasingly widespread use among international organizations in enhancing coherence between treaties (as this chapter shows). It is present—in writing—in several recent treaties accepted by an overwhelming majority of the world's nations (including the UNESCO CDCE). Thus, this work holds that mutual supportiveness has surpassed the standard of customary usage.

If mutual supportiveness has become a recognised general principle of law, then it must govern the relationship between the WTO Agreement and UNESCO CDCE. Indeed, under VCLT Article 31(3)(c), considerations of mutual supportiveness must form part of the interpretation of apparent conflicting treaties.

However, if mutual supportiveness is not yet recognised by all as a general principle of law, then it cannot be forced on States. As Chapter 3 shows, VCLT Article 31(3)(c) exists to reduce fragmentation—but, if it is not a general principle of international law, States would use it only if they preferred to. Such principle could and should still be used as a recommended means of enhancing coherence between the WTO and UNESCO regimes regarding trade in cultural goods.

Mutual supportiveness is a general principle of international law because it fills the gaps in fragmentation that the previous two routes in reducing fragmentation cannot respond to. Interpretation is a purely textual exercise, and, in some cases, it may prepare the ground for harder forms of coherence under harmonization. It is therefore essential to the stability and legitimacy of the international legal system.

The principle of mutual supportiveness holds a similarly indeterminate status. This study holds the perspective, however, that mutual supportiveness is a general principle of international law. Without the principle of mutual supportiveness, certain conflicts between provisions could never be resolved. In such cases, the route of interpretation would first have established the existence of a normative conflict. Any attempts to follow the route of harmonization would have shown that States cannot simultaneously respect both provisions without amending at least one of them; the cumbersome amendment process would make this amendment unlikely. The State would therefore be in violation of at least one treaty. Thus, the integrity and stability of the international legal system as a whole would have been compromised, through unresolved

fragmentation pitting norms and institutions against each other within a given sphere of activity.

Therefore, given its importance for the stability and coherence of international law, and given that its presence in several written treaties surpasses the standard of customary usage, this work concludes that *mutual supportiveness is a general principle of international law*. Indeed, it should be attempted before harmonization.

3.1.3 The ILC on Possible Relationships Between Treaties: 'General' and 'Special' Laws

The ILC Report on fragmentation investigates interpretation thoroughly. Among its many descriptions of the principle is that

> "Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose. Far from being merely an 'academic' aspect of the legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators. This results precisely from the 'clustered' nature in which legal rules and principles appear. But *it may also be rationalized in terms of a political obligation on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer*."[169] (emphasis added)

[169] International Law Commission *Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'* para 35. Finalized by Martti Koskeniemmi. 58th Session (1 May-9 June and 3 July-11 August 2006) Geneva <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> Accessed 17 December 2022.

This statement is perhaps the most relevant for considerations of potential conflict between regimes respectively governing trade and protecting cultural goods. The UNESCO CDCE, as this chapter shows below, emerged from the political will of the community of States to protect their 'cultural activities, goods, and services' (as the 19th paragraph of the document's preamble states).

Recital 18 of the Preamble conveys the Parties' conviction that 'cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value'. The protection and promotion of such 'identities, values, and meanings' constitute 'preferences and expectations' held by the communities whose interests States represent. In the context of treaties, these States are the 'law-appliers' that the ILC Report describes.

Based on the language of the ILC Report, therefore, efforts at interpreting any apparently incoherent provisions between the UNESCO CDCE and the WTO Agreement will be informed by the 'preferences and expectations' of those States, and by UNESCO CDCE Article 1[h], which "reaffirm[s] the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory".

Nonetheless, accession within the WTO agreements implies that the Parties to the UNESCO CDCE have voluntarily ceded some sovereignty to the WTO regulations governing State conduct. Interpretation must thus furthermore resolve the question of how much sovereignty States have actually yielded to the WTO rules, when they became (usually later) also signatories to the UNESCO CDCE.

Next, using the ILC's framework, this chapter seeks to demonstrate what type of fragmentation exists between the WTO Agreement and the UNESCO CDCE.

3.1.3.1 Is the Relationship between the WTO Agreement and UNESCO CDCE one of Fragmentation between Two General Laws?

While examining its first category of fragmentation, i.e. where two general laws conflict, the ILC Report again notes that interpretations may themselves be fragmented. It cites the difference between the 1986 ICJ case *Nicaragua*, and that of the 1999 *Tadic* case by the International Criminal Tribunal of the Former Yugoslavia, when interpreting the phrase 'effective control'. Paragraph 50 of the Report states:

> "The contrast between Nicaragua and Tadic is an example of a normative conflict between an earlier and a later interpretation of a rule of general international law. Tadic does not suggest 'overall control' to exist alongside 'effective control' either as an exception to the general law or as a special (local) regime governing the Yugoslav conflict. It seeks to replace that standard altogether."[170]

It is certainly possible to read the WTO Agreement and the UNESCO CDCE as two competing general laws. Neither one maintains any explicit institutional relationship to the other, and each claims sole competence in its field of application.

However, (momentarily leaving aside the more intricate details of the historical reasons for drafting the UNESCO CDCE that appear below and in Chapter 2), does the UNESCO CDCE genuinely seek to entirely replace general WTO norms, such as the Most-Favoured Nation and National Treatment principles, regarding trade in goods? This seems

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[170] International Law Commission, *Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'*. Finalized by Martti Koskeniemmi. 58th Session (1 May-9 June and 3 July-11 August 2006) Geneva <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> Accessed 17 December 2022.

unlikely. The document does not address 'trade' as such, but apparently seeks to protect cultural expressions in the context of trade.

The relationship between the WTO Agreement and UNESCO CDCE does not appear to have the characteristic of a relationship between two general laws. The WTO Agreement is grounded on international trade law; on the other hand, UNESCO CDCE is founded on cultural law. These two agreements belong to two different legal environments. Consequently, an interpretation of the UNESCO CDCE would not modify or replace an interpretation of the WTO Agreement. In such a situation, interpretation cannot resolve conflicts that may exist between the two.

3.1.3.2 Is the Relationship between the WTO Agreement and the UNESCO CDCE one of Fragmentation between a General Law and a Special Law?

The ILC turns very briefly to its second category of fragmentation, that of a conflict between a general law and a special law. Calling on the example of the 1988 *Belilos* case at the European Court of Human Rights (ECHR), the ILC Report notes the Court's statement:

> "[A] fundamental difference in the role and purpose of the respective tribunals [i.e. of the ICJ and the ECHR], coupled with the existence of a practice of unconditional acceptance […] provides a compelling basis for distinguishing Convention practice from that of the International Court."[171]

Thus, the ECHR identifies two conditions for treating one system as the special law within another system that constitutes general law, which the ILC does not dispute. First, a 'fundamental difference' should exist in the role and purpose of the respective tribunals (for the purposes of this work, the WTO dispute settlement mechanism (DSM), and the UNESCO Conciliation Commission) should exist. Second, it requires the existence of a 'practice of unconditional acceptance'.

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[171] ibid para 53.

Clearly, a 'fundamental difference' does exist between the authority of the WTO DSM and that of the UNESCO Conciliation Commission. The former exists to resolve disputes related to trade, including trade in goods.[172] The latter exists to resolve disputes regarding the protection of cultural expressions, including cultural goods. As the WTO Agreement has so far avoided the mention of 'culture' as an aspect over which it claims the authority to govern, it is a treaty that governs goods in general, thus potentially constituting a general rule.

The CDCE explicitly states that it does not modify previous treaties, including WTO treaties. The UNESCO CDCE is not a convention on trade, rather an agreement on cultural policies and international cooperation having potential trade impact. It restricts its application to culture but only applies in situations where cultural goods have been traded. It is a treaty that protects cultural goods within a framework other than the WTO trade regime. Plus, the objective pursued when negotiating the CDCE outside the WTO and particularly within UNESCO was precisely not to address the exchanges of cultural goods and services within a trade context/framework. So, they do not cover the same subject-matter. Also, the Parties that drew up both agreements were not the same.

The UNESCO CDCE thus potentially functions as a special law. Here, therefore, the maxim that *lex specialis derogate lex generalis* would give precedence to this agreement in resolving disputes over trade in cultural goods.

In turn, the 'practice of unconditional acceptance' is particular to the facts of the *Belilos* case. Here, Switzerland had attempted to insert a reservation into its system of ratification of the *European Convention on*

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[172] The argument for the authority of the Conciliation Commission may nevertheless be weakened by the opt-out provision under Article 24(4). It states:
Each Party may, at the time of ratification, acceptance, approval or accession, declare that it does not recognize the conciliation procedure provided for above. Any Party having made such a declaration may, at any time, withdraw this declaration by notification to the Director-General of UNESCO.

Human Rights. The ECHR found that this violated, *inter alia*, Article 46 (1) of the Convention, which states that "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties". While analogous declarations exist in the WTO DSU and UNESCO CDCE Article 25, the force of Article 46(1) comes from its status as a treaty on human rights—some of which are non-derogable (*jus cogens*). This condition, therefore, need not apply to a general consideration of the status of a treaty as a general law or a special law.

The ILC furthermore clarifies that this sort of fragmentation is rooted in:

> "the emergence of exceptions or patterns of exception in regard to some subject-matter, that deviate from the general law and that are justified because of the special properties of that subject-matter."[173]

Does this logic of 'exceptions or patterns of exception' transfer to WTO and UNESCO legal regimes? Certainly, the history of WTO decisions such as *Canada-Periodicals* and *China-Audiovisuals* indicates that this may be the case.

Thus, using the logic of the ILC, taken from previous decisions in international law, this work outlines one framework for interpreting fragmentation between the WTO Agreement and the UNESCO CDCE, which seem to have the potential to address a conflict between a general law and a special law. But the CDCE states that it cannot modify previous treaties including the WTO Agreement and not the same subject nor

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[173] International Law Commission *Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'* para 54. Finalized by Martti Koskeniemmi. 58th Session (1 May-9 June and 3 July-11 August 2006) Geneva <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> Accessed 17 December 2022.

the same Parties. Therefore, in the next section the relationship between the two agreements will be assessed as one of fragmentation between two special laws.

3.1.3.3 Is the Relationship between the WTO Agreement and the UNESCO CDCE one of Fragmentation between Two Special Laws?

The foregoing discussion indicates the difficulty in delineating between a general and a special law. In turn, using the *EC–Hormones* case to illustrate, the ILC sums up the problem in resolving fragmentation between two special laws. It stated that the Appellate Body

> "concluded that whatever the status of that principle 'under international environmental law', it had not become binding for the WTO. This approach suggests that 'environmental law' and 'trade law' might be governed by different principles. Which rule to apply would then depend on how a case would be qualified in this regard. This might seem problematic as denominations such as 'trade law' or 'environmental law' have no clear boundaries. For example, maritime transport of oil links to both trade and environment, as well as to the rules on the law of the sea. Should the obligations of a ship owner in regard to the technical particularities of a ship, for instance, be determined by reference to what is reasonable from the perspective of oil transport considered as a commercial activity or as an environmentally dangerous activity? The responses are bound to vary depending on which one chooses as the relevant frame of legal interpretation."[174]

Substituting 'international cultural law' for 'environmental law' in the above citation does not alter its applicability. It is possible to use the framework of a relationship between two special laws to guide interpretations of the WTO Agreement and UNESCO CDCE as they relate to

[174] ibid para 55.

one another. If 'trade law' is indeed a special law with equal status to 'cultural law', no clear delineation exists between the two, and the maxim of *lex specialis* is irrelevant. According to the ILC, it is the framework that one chooses that determines the outcome of the investigation.

UNESCO's first foray into developing this solution was to implement a binding *Universal Declaration on Cultural Diversity* in 2001. Subsequently, an introductory study[175] at the October 2003 General Conference of UNESCO established that the protection of cultural diversity—particularly diversity of cultural content and artistic expressions—would be subject to an international convention.[176] The *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, or UNESCO CDCE, followed on 20 October 2005—entering into force on 18 March 2007.[177]

However, the UNESCO CDCE does not address trade, its purpose of 'protection and promotion' can only reference trade in the context of a perceived threat to cultural interests. One could say that UNESCO CDCE is a reaction to the societal and political effects of WTO and regional trade agreement principles. It is also considered as an expression of the 'preferences and expectations' of the community of States in this regard. Again, the historical reason for drafting the UNESCO CDCE indicates that in spite of its outward posture as an instrument of

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[175] UNESCO, Executive Board, 'Preliminary Study on the Technical and Legal Aspects Relating to the Desirability of a Standard-Setting Instrument on Cultural Diversity' (12 March 2003) 166 EX/28.

[176] See UNESCO, General Conference, 'Desirability of Drawing Up an International Standard-Setting Instrument on Cultural Diversity', Resolution 32 c/34 (19 September–17 October 2003).

[177] Rostam J Neuwirth, 'The Convention on the Diversity of Cultural Expressions and Its Impact on the "Culture and Trade Debate"' in Toshiyuki Kono and Steven Van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Intersentia 2012) 242.

equal standing with that of the WTO Agreement, the functional logic of the UNESCO CDCE did not provide exceptions to that treaty through a separate instrument, as expected. This opens the debate on schools of interpretation: do the history, object, and purpose of the UNESCO CDCE give reason to interpret it as a special rule to the WTO Agreement in matters of trade?

3.1.4 Schools of Interpretation

Having presented the three possible frameworks for interpreting the WTO Agreement and UNESCO CDCE, this chapter now turns to an inquiry into how such interpretation might proceed. Traditionally, interpretation may follow any of three methodologies. Referring to VCLT Article 31(1), Jonas and Saunders[178] hold that

> "This general rule of treaty interpretation highlights three sources in which practitioners may seek the meaning of a treaty: the treaty's terms, the context of those terms, and the treaty's object and purpose.... These sources—text, context, and object and purpose—reflect three schools of treaty interpretation."

The authors explain each of these.

First, the objective (textualist) school "start[s] from the proposition that there must exist a presumption that the intentions of the parties are reflected in the text of the treaty which they have drawn up, and that the primary goal of treaty interpretation is to ascertain the meaning of this text." The subjective school, by contrast, "assert[s] that the primary, and indeed only, aim and goal of treaty interpretation is to ascertain the intention of the parties[,]" and, in so doing, it is permissible to go be-

[178] David S Jonas and Thomas N Saunders. 'The Object and Purpose of a Treaty: Three Interpretive Methods' *Vanderbilt Journal of Transnational Law* 43(3) (2010) 577-578 < https://scholarship.law.vanderbilt.edu/vjtl/vol43/iss3/1/> Accessed 17 December 2022.

yond the four corners of the text. Lastly, the teleological school asserts that the practitioner "must first ascertain the object and purpose of a treaty and then interpret it so as to give effect to that object and purpose". The Vienna Convention's general rule for treaty interpretation is a compromise combining all three approaches, though textualism is dominant. According to the rule, treaty interpretation must rely primarily on the terms of a treaty while context and the treaty's object and purpose must inform its meaning.

3.1.4.1 The Textualist Method

The usual understanding regarding the first mode of interpretation of the WTO Agreement and UNESCO CDCE, called textualist method, is discussed by Van Damme when she states that

> "[t]he predominant school of thought contends that the text of the document should be the focus point. The 'textual' school neither ignores nor neglects the value of negotiating history, the intention of parties, or the object and purpose of the treaty. In fact, these interpretive means are viewed as *indicia* to confirm or support a textual analysis.... The textual school's assumption that the focus must be on the text of a treaty is hardly surprising, because where else could the interpretation of an agreement in writing start? The consent of the parties is fixed in the text of the agreement, despite the intent-based school's attraction to negotiating history. The object and purpose, or the teleology, of the treaty is equally expressed in its text. Differences between these viewpoints tend to fade once a practical example of interpretation presents itself. They are not opposed to each other; instead, they compete for significance rather than relevance."[179]

[179] I Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 *European Journal of International Law*, 617-618.

This work holds throughout that textually interpreting the WTO Agreement and the UNESCO CDCE reveals a basic conflict regarding both the jurisdiction and how to legally administer trade in cultural goods. The WTO Agreement claims jurisdiction over all traded goods—except those covered by GATT Article XX and Article IV. It prohibits national discrimination under the MFN and NT principles. The UNESCO CDCE, nonetheless, classifies some goods as 'vehicles of cultural expressions' (which are not excepted under Article XX). It claims jurisdiction over that category of goods, and explicitly prescribes that States may exercise their sovereignty to protect those goods through means, such as subsidies, which the WTO Agreement prohibits (see the section in Chapter 4 on 'Subsidies').

First, the UNESCO CDCE entrenches the principle of sovereignty. Its guiding principles in Article 2.2 note: "States have, in accordance with the *Charter of the United Nations* and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory".

These rights of sovereignty, and the significant inclusion of the word 'protect' which is often present in non-commercial treaties, indicate a policy at odds with the broad interpretation of WTO rules, such as the MFN and NT principles. (I will elaborate below.)

Next, Article 5.2 delimits the UNESCO CDCE's sphere of jurisdiction: "When a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention". This provision thus claims authority to govern cultural goods, and some interpretations may regard the UNESCO CDCE as a *lex specialis* in that regard.

Such an exercise in interpretation must make the relationship between the two treaties explicit. In the case that the UNESCO CDCE is textually read as a special law to the general law of the WTO, it takes

precedence under the practice of *lex specialis*, allowing States to invoke it to protect cultural goods. In the alternative case that the WTO Agreement and UNESCO CDCE are two special laws that compete for jurisdiction, interpretation would specify the limits of its jurisdiction with respect to the demarcation between cultural goods and non-cultural goods.

This latter framework for interpretation points out that the issue of jurisdiction is circular in manner. Jurisdiction to interpret comes from jurisdiction to administer, and jurisdiction is precisely the essential question that interpretation must resolve. Breaking through this paradox requires one of three scenarios: (1) that one body accepts the interpretation of the other, (2) that the two bodies collaborate to interpret the two treaties reciprocally, or (3) that an external body claiming universal jurisdiction (such as, perhaps, the ICJ) or having been granted authority to adjudicate the dispute (such as an arbitral tribunal) determine the authoritative interpretation of the treaty texts.

3.1.4.2 The Subjective Method

The second framework for interpretation is based on searches for the intentions of the treaty drafters. Van Damme explains this subjective method as following:

> "The intent-based school, by contrast, prioritizes the intention of the parties. This intention may be found in the negotiating history and other sources. This school defends a more flexible method of approaching treaty texts, but with the risk of negating the words of the text. The claim that '[t]he intent of the parties . . . is the law' and the belief that interpretation 'is the search for the real intention of the contracting parties in using the language em-

> ployed by them' undoubtedly reflect the orthodox wisdom underlying treaty interpretation."[180]

The UNESCO CDCE attempts to provide a legal framework that recognises the particular needs of cultural goods within the regime of international trade. Indeed, as follows from Van Damme's statement, an inquiry into the history and the 'object and purpose' of the UNESCO CDCE (as the following section records) demonstrates a particular intent on the part of its drafters to 'protect' cultural goods from WTO legislation. Bernier's paper on the history of the UNESCO CDCE, which provides extensive historical background to the intentions of the UNESCO CDCE's drafters, supports this understanding. He writes:

> "Although the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is quite clearly a cultural agreement negotiated in a cultural context and pursuing cultural objectives, it is strange to find that a majority of the legal analysis of its text realized since its adoption in 2005 address the subject from a trade law perspective, as if the Convention was of interest essentially for its implication on the trade regime. But this should not come entirely as a surprise since the Convention itself is intimately linked to a political debate concerning the interface between culture and trade that goes back to the 1920's (when European countries began resorting to screen quotas in order to protect their film industry from an influx of American films considered as a threat to their culture), that resurfaced after the Second World War in the GATT negotiations (where it was considered important enough to justify a provision recognizing the cultural specificity of cinema) and that evolved over the years, fueled by a growing number of trade disputes regarding

[180] ibid 618.

> cultural goods and services and numerous articles and conferences bearing on the interface between commerce and culture.
>
> By the end of the 1990's, however, the debate had taken a completely different direction. Until the creation of the WTO, in 1995, it had essentially focused on exempting cultural products from international trade agreements. In the following years, a paradigm shift occurred. This shift coincided with a number of events such as the decision handed down in 1997 by the WTO's Dispute Settlement Body in the case 'Canada–Certain Measures Concerning Periodicals', the failure of the OECD negotiations on a multilateral agreement on investments in October 1998 and the failure of the Seattle WTO Ministerial Conference in December 1999. It is in this context that the idea of a new international instrument on cultural diversity gradually emerged, an instrument that would no longer consider the protection and promotion of cultural diversity as an impediment to trade to be addressed from a trade law perspective, but rather as a cultural problem in itself to be addressed from a cultural perspective. A demand that UNESCO undertake the negotiation of such an instrument was formally submitted to the Organization in February 2003."[181]

In the above text, we could see that "cultural diversity gradually emerged, an instrument that would no longer consider the protection and promotion of cultural diversity as an impediment to trade to be addressed from a trade law perspective, but rather as a cultural problem in itself to be addressed from a cultural perspective". In my view, this

[181] Ivan Bernier, 'The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: A Cultural Instrument at the Junction of Law and Politics' <https://www.researchgate.net/publication/300224341_Article_18_International_Fund_for_Cultural_Diversity > Accessed 17 December 2022.

argument goes against the idea of *a lex specialis*, which is not accepted by this research.

The UNESCO CDCE thus protects cultural goods in their role as vehicles for cultural expressions, expressly intended to apply within the context of WTO trade legislation. UNESCO claims the "specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods".[182] Regarding interpretation and the WTO Agreement, Cameron and Gray note:

> "Interpreting WTO law consistently with international law and other general legal principles enhances legal security and consistency in the WTO legal system as well as the parties' tacit acceptance of third-party adjudication."[183]

Thus, increased coherence between the WTO Agreement and the UNESCO CDCE enhances the security and consistency of the WTO legal system.

It should be noted that conflict rules such as *lex specialis* are optional, applying only when treaty drafters have themselves not clarified the relationship with other treaties. The UNESCO CDCE does, however, have a conflict clause, and its history indicates the intention of the drafters. According to Wouters and De Meester,

> "During the negotiations, two main options for the conflict clause have been considered and were included in the Composite Text of the Convention. A first, weak, option (in Composite Text:

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[182] UNESCO Universal Declaration on Cultural Diversity, 2 November 2001, Article 8 <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html> Accessed 17 December 2022.

[183] James Cameron and Kevin R. Gray 'Principles of International Law in the WTO Dispute Settlement Body' (April 2001) 50(2) *The International and Comparative Law Quarterly* (248-298) 252.

> option B) stated that the Convention would not affect other existing international instruments.…[T]he basic principles of the WTO (such as MFN and national treatment) …would [not] be affected by it. It was a weak clause, whose only utility seemed to be that it could induce states that did not want to see the Convention overrule WTO rules to become a Party to the Convention.
>
> The second option for the clause (Option A), was much more ambitious. It stated:
>
> ...'2. The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions'….
>
> The second paragraph took a more nuanced stance towards other existing international norms. It claimed priority of the Convention in cases where the exercise of other rights and obligations would seriously damage or threaten cultural diversity….The language of this draft clause was inspired by the conflict clause in Article 22.1 of the Convention on Biological Diversity."[184]

Wouters and De Meester submit that option A of the Composite Text would likely have made the Convention an effective tool to foster cultural diversity and to counter-balance WTO principles. "Obviously, this clause would have applied only between Parties to the Convention. Nevertheless, this formulation was unacceptable for States that feared a curtailment of free trade in cultural goods and services".[185]

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[184] Jan Wouters and Bart De Meester, 'The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law' (2008) 42(1) *Journal of World Trade* (205-240), 235.

[185] ibid 237.

This debate, and the final choice, illuminates the intentions of the UNESCO CDCE's drafters regarding the conflict clause, and thus represents a pathway under the subjective method of interpretation that shows how they intended interpretations of conflict to proceed.

3.1.4.3 The Teleological Method

In addition to Article 1 of the UNESCO CDCE which explains the objectives, Article 7sums up the document's purpose, stating that "the Parties shall endeavor to create in their territory an environment which encourages individuals and social groups…to have access to diverse cultural expressions from within their territory as well as from other countries of the world". The UNESCO CDCE thus acknowledges that cultural diversity and globalisation are interrelated. To promote cultural diversity, in the way UNESCO wishes, means relying on international distribution. This, in turn, requires cross-border trade without undue obstacles, just as the WTO requires.[186] (This chapter's section on interpreting 'sustainable development' elaborates further on this theme.)

Under the WTO trade agreements such as the GATT, 'protection' of national goods is considered to run contrary to the spirit of international trade, and several provisions define the limits and scope of such activity. Protection of cultural goods, however, is listed as a key value of the UNESCO CDCE. Given the context of its adoption, amid the debate on globalisation, the Convention deliberately uses, and carefully defines, the word 'protect'. Bernier again clarifies:

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[186] For instance, the Japanese audience became more familiar with the situation in the former Yugoslavia by watching Danis Tanovic's *No Man's Land*, and thus enjoyed one of the advantages of cultural diversity. The Nippon public could see this film only because it was distributed in Japan. Vice-versa, the Bosnian moviegoer obtained a better insight into the dark side of contemporary Japanese society by watching Hirokazu Kore-Eda's *Nobody Knows*, provided that this movie was released or broadcasted in their country.

> "The overall goal of the Convention…is to protect and promote the diversity of cultural expressions. In the Preamble of the Convention, it is made quite clear that the diversity of cultural expressions is under pressure. Thus, in the 9th paragraph, the need is recognized 'to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment'. In the 19th paragraph, it is also noted 'that while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, they also represent a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries'. The use of the words 'protect' and 'protection' in that context was again strongly opposed by the United States. *However, it was demonstrated during the debates regarding the use of those words that it was conform to*[187] *the prior practice of UNESCO*."[188]

Thus, not only does the Convention contain the word 'protection' in its title, but Article 4.7 also defines the term:

> "'Protection' means the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions.
>
> 'Protect' means to adopt such measures.

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[187] In other words, 'was in conformity with'.

[188] Ivan Bernier, 'The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: A Cultural Instrument at the Junction of Law and Politics', http://www.unescodec.chaire.ulaval.ca/sites/unescodec.chaire.ulaval.ca/files/carrefour-du-droit_eng.pdf, Accessed 17 December 2022. Emphasis added.

Paragraph 19 of the Convention's Preamble furthermore enhances UNESCO's justification for such language: 'Recognizing the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment'.

Article 1 lists the objectives of the Convention. As noted previously, the UNESCO CDCE's definition of 'cultural expressions' drives to 'cultural goods'. Given Bernier's history of the controversy regarding the terminology of 'protection', Article 1(a) is particularly significant: 'to protect and promote the diversity of cultural expressions'. Article 1(g) explains the motivation for such protection and promotion: the need 'to give recognition to the distinctive nature of cultural…goods…as vehicles of identity, values and meaning'.

The principle of State sovereignty is a repeated theme throughout the document. Article 1(h) begins with an emphatic statement about the linkage between State sovereignty and the right to protect cultural goods, listing as its objective 'to reaffirm the *sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory*'."[189]

Article 2.2 continues the document's contention, stating as a 'guiding principle' that:

"States have, in accordance with the Charter of the United Nations and the principles of international law, the *sovereign right*

[189] Emphasis added.

> *to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory*."[190]

Article 3 then goes on to make clear its commitment to this sovereign right, by listing the sole 'Scope of Application' of the treaty: "This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions."

The Convention takes up its definition of the concept of 'policies and measures' in Article 4.6.

> "Cultural policies and measures' refers to those *policies and measures relating to culture*, whether at the local, national, regional or *international level* that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, *dissemination, distribution of and access to cultural…goods…*."[191]

The document then elaborates on this right to enact 'policies and measures' that States may use to protect cultural goods: Article 5 denotes the rights and measures of States under the treaty.

> "5.1 The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, reaffirm their *sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions* and to strengthen international cooperation to achieve the purposes of this Convention.

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[190] Emphasis added.

[191] Emphasis added.

> 5.2 When a Party *implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory*, its policies and measures shall be consistent with the provisions of this Convention."[192]

Hereby, As Van Damme concludes, could mention that the third school of interpretation derives from theological method:

> "A third school defends the proposition that the object and purpose of the treaty should be determinative of the meaning of the treaty, and accepts that the result of such interpretation may differ from one which is more focused on the intentions of the parties."[193]

The foregoing understanding of the 'object and purpose' of the UNESCO CDCE makes a nearly unassailable case to 'rationalize' (in the words of the ILC) a coherent interpretation between the WTO Agreement and UNESCO CDCE "in terms of a political obligation on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer", in cases where a State is Party to both treaties.

3.1.5 Preliminary Conclusions on Interpretation

Interpretation is double-sided in that it may resolve or deepen apparent fragmentation. It is somewhat indeterminate, since it relies heavily on a subjective element, from those who do the interpreting, and the intention of the treaty drafters. It is essential to establish the principle of good faith, the context, the object and purpose of the treaty, and what

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[192] Emphasis added.

[193] Isabelle Van Damme 'Treaty Interpretation by the WTO Appellate Body' (2010) 21, *European Journal of International Law*, 618.

relevant rules of international law govern the relationship between the Parties.

Next, how one interprets the relationship between the WTO Agreement and UNESCO CDCE depends first on their status as two general laws, one general and one special law, or two special laws. Secondly, it depends on the method of interpretation in use: textual, subjective, or teleological. Each of these factors makes interpretation a principle which can result in any number of formally correct outcomes.

Nonetheless, certain features stand out. First, the relationship between the two instruments may be one of a general and a special law, or two special laws, but this work excludes the possibility that there is a relationship between two general laws. It is possible to read the WTO Agreement as a general law, and the UNESCO CDCE as a special law to it, which would give precedence to the latter in cases where incoherence may arise between the two. This point of view goes against UNESCO CDCE Article 20.

The situation of two special laws primarily denotes indeterminate jurisdiction for each, particularly given the dual character of traded cultural goods. In this case especially, the textual method of interpretation merely highlights the need to turn to the subjective and teleological methods, as the first method reinforces the perception of apparent conflict.

Using the subjective method, Bernier's reading of the UNESCO CDCE's history displays the fully conscious intention of its drafters as directly reacting to curtail the effects of the WTO Agreement in matters of culture. Despite all efforts, this proved to be not possible according to the history of the CDCE negotiations because the course of the negotiations differed from the initial intentions.

Similarly, an investigation into the 'object and purpose' of the UNESCO CDCE shows its role as a means to delimit the scope of the WTO Agreement in matters relating to cultural expressions by asserting

the sovereign right of States to protect, *inter alia*, cultural goods. The UNESCO CDCE thus expresses the 'preferences and expectations' of the community of States that has ratified it, which is a significant proportion of the number of existing States. In turn, this fact gives the Convention a significance as an instrument through which to interpret provisions of the WTO Agreement.

3.2 Interpretation in the WTO and its Dispute Settlement Body and UNESCO CDCE

As the ILC Report on Fragmentation has noted, interpretation determines whether a conflict genuinely exists. For the purposes of this work, interpretation determines whether a conflict exists between the WTO Agreement and the UNESCO CDCE. WTO law intentionally alludes to the legality of international law, also drawing on elements of that legal regime today. The ILC Report details:

> "Although…it has sometimes been suggested that the WTO covered treaties formed a closed system, this position has been rejected by the Appellate Body in terms that resemble the language of the European Court of Human Rights, noting that WTO agreements should not be read 'in clinical isolation from public international law'. Since then, the Appellate Body has frequently sought 'additional interpretative guidance, as appropriate, from the general principles of international law'.…There seems, thus, little reason of principle to depart from the view that general international law supplements WTO law unless it has been specifically excluded and that so do other treaties which should, preferably, be read in harmony with the WTO covered treaties."[194]

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[194] International Law Commission *Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* paras 165-168.

Pauwelyn has described situations that limit the scope for a coherent interpretation between the WTO provisions and non-WTO provisions.[195] For instance, in situations where a Member invokes compliance with a Multilateral Environment Agreement (MEA) to justify breaching a WTO rule under GATT Article XX, he believes that a 'conflict' may exist between the MEA and GATT Article XI, which generally disallows trade prohibitions and restrictions other than duties, taxes or other charges, despite the existence and applicability of GATT Article XX. Nonetheless, Marceau and Tomazos invoke the now-familiar principles of 'good faith' and 'presumption against conflict' to rebut Pauwelyn: a rebuttal that this study shares:

> "Since Article XX of GATT 1994 explicitly allows Members to give priority to policies other than trade, including those policies affected by an MEA, it is erroneous to claim that there is conflict between a WTO rule that disallows trade prohibitions and restrictions and the MEA. In international law, for a 'conflict' to exist between two treaties, three conditions have to be met. First, the treaties must have some overlap in membership. Second, the treaties must cover the same substantive subject matter. Otherwise, there would be no possibility for conflict. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations.
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> The general principle of good faith in the interpretation and application of treaties call for a presumption against conflicts. The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same par-

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Finalized by MarttiKoskeniemmi. 58th Session (1 May - 9 June and 3 July-11 August 2006) Geneva. <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> Accessed 17 December 2022.

[195] Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law (Cambridge 2003) 276.

> ties, since it can be presumed that they are meant to be consistent with one another in the absence of any evidence to the contrary.
>
> Contrary to Pauwelyn's argument, no conflict exists between Article XX of GATT and the basic market access provisions of the GATT (Articles I, II, III and XI). The Appellate Body has stated that, in assessing the interpretation and application of Article XX, there is a need to maintain a 'balance' between these provisions and has referred to this 'balance' in terms of weighing the 'rights and obligations' of Members under both sets of these provisions. …
>
> Pauwelyn seems to suggest that in assessing potential conflicts, WTO panels and Appellate Body will be able to resolve the matter at issue more appropriately than if it limits itself to interpreting the WTO provision coherently with other regimes of international law. This cannot be correct."[196]

In criticising Pauwelyn, Marceau and Tomazos appear to use two elements within classical interpretation—good faith and presumption against conflict—to argue that Articles XI and XX do not conflict. Nonetheless, this logic has two innovative effects. First, such a combination of the two elements—'interpreting the WTO provision coherently with other regimes of international law'—forms an essential component of their approach to interpretation. Marceau's and Tomazos' approach falls short of mutual supportiveness but holds elements in common with it. Second, applying Article XX means including formally external MEAs within the WTO's juridical scope: for the Appellate Body must assess whether the Member is truly conforming with the MEA; however,

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[196] Gabrielle Zoe Marceau and Anastasios Tomazos, 'Comments on "Joost Pauwelyn's" paper: "How to Win a WTO Dispute Based on Non-WTO Law?"' Stefan Griller (ed) *At the Cross roads: The World Trading System and the Doha Round* (Springer 2008) (55-81), 73-76.

one could say that the assessment is always done from the perspective of the covered agreements.

3.2.1 Narrow and Broad Interpretations of 'Conflict'

In general, the notion of conflict identifies a situation when two provisions clash: when a duty under one treaty forbids the exercise of a right under another. The result is that a State cannot comply with both obligations simultaneously in good faith.

In this regard, Marceau writes:

> "A conflict may be defined narrowly or broadly. Generally, in international law, for a conflict to exist three conditions must be satisfied. First, two States must be bound by two different treaties, or two different obligations. Second, the treaties (or the obligations) must caver the same substantive subject-matter. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations….
>
> In the WTO context, this narrow definition of a conflict was confirmed in WTO law in *Guatemala-Cement*, when the Appellate Body stated, while discussing the possibility of conflict between the special and additional rules of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) for antidumping disputes, and the general provisions of the DSU:
>
> 'A special or additional provision should only be found to prevail over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them.' …
>
> There the Appellate Body was addressing what could be called an 'internal' conflict, i.e. a situation of conflicting provisions within a single treaty, the WTO agreements.

> Lorand Bartels has advocated a wider definition of conflicts. He argues that '[a] treaty which defeated the object and purpose of the earlier treaty should be seen as conflicting with this earlier treaty'.
>
> For Bartels, this interpretation of treaty conflict is confirmed by Article 41 of the Vienna Convention, which would prohibit parties to a multilateral treaty from concluding any treaty inter se that is incompatible with the effective execution of the abject and purpose of the main treaty as a whole. For him, this broad definition of a conflict is also confirmed by Article 18 of the Vienna Convention, which obliges a State that has signed but not ratified a treaty to refrain from acts which would defeat the object and purpose of a treaty."[197]

Thus, interpretation of the notion of 'conflict' has wide-ranging effects. Recall that for two provisions to be seen as conflicting in the first place, interpretation is essential. As paragraph 412 of the ILC Report records,

> "contrary to what is sometimes suggested, conflict-resolution and interpretation cannot be distinguished from each other. Whether there is a conflict and what can be done with prima facie conflicts depends on the way the relevant rules are interpreted. This cannot be stressed too much. Interpretation does not intervene only once it has already been ascertained that there is a conflict. Rules appear to be compatible or in conflict *as a result of interpretation*."[198]

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[197] Gabrielle Zoe Marceau 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and Other Treaties' (2001) 35(6) *Journal of World Trade* (1081-1131), 1084-1085.

[198] International Law Commission *Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising*

Nonetheless, as Marceau records, some conditions apply. Firstly, both instruments must bind the disputing Parties. Secondly, both instruments must address the same topic. Once these conditions have been fulfilled, the final step is to decide whether both instruments include requirements that may not cohere with each other.

The narrow perspective on conflict allows a Member to adopt a provision that is broader than one that another treaty imposes. (Such a narrow conception appears to be one logical result of the requirement to apply international treaties in a mutually supportive and consistent way.)[199]

Determining which situation is more relevant calls for an application of interpretation, and subsequently determines the kind of interpretation that will follow.

3.2.1.1. Broad Interpretation: the EC–Bananas III Case and the Principle of Harmonization

The Panel in *EC–Bananas III* (1997) addressed this issue in a dispute that concerned provisions of the GATT 1994 and two other agreements recorded in Annex 1Aof the WTO Agreement: the Agreement on Import Licensing Procedures and the Agreement on Trade-Related Investment Measures. The Panel used a broad notion of conflict between treaty provisions. It stated:

> "As a preliminary issue, it is necessary to define the notion of conflict laid down in the general interpretative note. In light of the wording, the context, the object and the purpose of this Note,

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from the Diversification and Expansion of International Law para 412. Finalized by Martti Koskeniemmi. 58th Session (1 May - 9 June and 3 July-11 August 2006) Geneva. <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> Accessed 17 December 2022.

[199] See VCLT Article 31(3)(c), which requires the interpreter to consider 'any relevant rules of international law applicable in the relationship between the Parties'.

> we consider that it is designed to deal with, (i) clashes between obligations contained in GATT 1994 and obligations contained in Agreements listed in Annex 1A where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, (ii) and the situation where a rule in one Agreement prohibits what a rule in another Agreements (allows) explicitly permits."[200]

The WTO Panel took account of the General Interpretive Note to Annex 1A which states: 'In the event of a conflict between a provision of the Agreement Establishing the WTO and a provision of any of the Multilateral Trade Agreements (including the GATT 1994), the provision of the Agreement Establishing the WTO shall prevail to the extent of the conflict'. Therefore, in this case, the WTO Agreement prevailed, because of the 'context' (in the terminology of the VCLT) that included the General Interpretive Note.

However, while this case presents a clear description of 'broad' interpretation, it refers to conflicts that are properly considered 'internal', or taking place within the WTO's single undertaking. This differs from a conflict between the WTO and another treaty. In this respect, the concept of conflict also appears in the Appellate Body Report on *Argentina–Textiles*, which noted that

> "Argentina did not show an *irreconcilable conflict* between the provisions of its 'Memorandum of Understanding' with the IMF and the provisions of Article VIII of the GATT 1994. We thus agree with the Panel's implicit finding that Argentina failed to demonstrate that it had *a legally binding commitment to the IMF*

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[200] WTO *European Communities: Regime for the Importation, Sale and Distribution of Bananas–Report of the Panel* (22 May 1997) WT/DS27/R/USA [7.159].

> *that would somehow supersede* Argentina's obligations under Article VIII of the GATT 1994."[201] (emphasis added)

According to the broad interpretation, where there is a conflict between the WTO Agreement and UNESCO CDCE, there are two possibilities for enhancing coherence. First an established hierarchy between the two, by interpreting their relationship as between a general law (the WTO Agreement, with authority over traded goods in general) and a special law (the UNESCO CDCE, with authority over traded cultural goods in particular), could resolve potential conflict. Second, textual amendments through the principle of harmonization may create coherence between them if they are found to be two general laws (a possibility which this work excludes) or two special laws. Chapter 4 will explore possibilities under the principle of harmonization (using the concept of 'hard law' as an aid to using this principle). Chapter 5 will explore the possibility of using principle of mutual supportiveness (with the concept of 'soft law' as a similar aid).

Nonetheless, previous practice indicates that the Appellate Body has already begun to chart a different route to the *EC–Bananas III* approach for treaties external to the WTO system. Specifically, the Appellate Body has already interpreted GATT Article XX (exception clauses) in light of environmental regulations external to the WTO, without a General Interpretive Note to create context for such a hierarchy.

3.2.1.2 Narrow Interpretation: MEAs, the Indonesia-Automobiles Case, and the Principle of Mutual Supportiveness

Within the framework of MEAs, Joost Pauwelyn states that "for the new environment rule to have any effect, it should be recognized that in these circumstances as well there is conflict, namely, conflict between a

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[201] WTO *Argentina: Measures Affecting Imports of Footwear, Textiles, Apparel and other Items–Report of the Appellate Body* (27 March 1998) WT/DS56/AB/R [69]. Emphasis added.

provision in the WTO and an explicit right granted elsewhere".[202] Yet, as the ILC Study Group noted, the *Shrimp–Turtles* decision yielded a positive synergy of WTO law with environmental regulation, such as "the 1992 Rio Declaration and Agenda 21, the Biodiversity Convention of 1992, and the United Nations Convention on the Law of the Sea",[203] based on the notion of evolutive (or teleological) interpretation applied to the term 'natural resources'.

In other words, these agreements are not only external to the WTO Agreement, but are also more recent than it. On the other hand, the UNESCO CDCE provided a new way to interpret a phrase within the context of sustainable development or maybe a broad concept that already existed within the body of the WTO law. The Appellate Body might similarly use the UNESCO CDCE to interpret relevant provisions of the WTO Agreement. (Such pre-existing practice does not, however, preclude the use of a General Interpretive Note to address such conflict.).

With respect to a narrow interpretation of conflict, in the *Indonesia–Automobiles* case Panel held that Indonesia could abide by its obligations under the SCM Agreement without violating its obligations under GATT, stating that "the obligations of the SCM Agreement and Article III:2 [GATT][204] are not mutually exclusive. It is possible for Indonesia

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[202] Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95, *The American Journal of International Law* (535-578), 551.

[203] International Law Commission *Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'* para 168. Finalized by Martti Koskeniemmi. 58th Session (1 May - 9 June and 3 July-11 August 2006) Geneva <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> Accessed 17 December 2022.

[204] GATT Article III:2 'The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in

to respect its obligations under the SCM Agreement without violating Article III:2".[205] The Panel implemented the narrow definition of a conflict, without referring to the broad definition that *EC–Bananas III* established. In line with this practice, paragraph 412 of the ILC Report stresses:

> "Sometimes it may be useful to stress the conflicting nature of two rules or sets of rules so as to point to the need for legislative intervention. Often, however, it seems more appropriate to play down that sense of conflict and to read the relevant materials from the perspective of their contribution to some generally shared – 'systemic'–objective. Of this, the technique of 'mutual supportiveness' provided an example."[206]

This work holds that it is possible to interpret the UNESCO CDCE using a narrow definition of conflict to reduce the possibilities of conflict between it and the WTO Agreement. Such a mode of interpretation falls under the ILC's concept of the interpretive technique of 'mutual supportiveness'. Nonetheless, this study, following Boisson de Chazournes and Mbengue, holds that mutual supportiveness is a form of

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excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.'

[205] WTO *Indonesia: Certain Measures Affecting the Automobile Industry–Report of the Panel* (2 July 1998) WT/DS54/R, WT/DS55/R, WT/DS59/R, and WT/DS64/R [14.99].

[206] International Law Commission *Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'* para 165-168. Finalized by Martti Koskeniemmi. 58th Session (1 May-9 June and 3 July - 11 August 2006), Geneva, <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf>, Accessed 17 December 2022.

interpretation that constitutes a principle in its own right. This assertion forms the subject matter of Chapter 5.

In the matter of coherence between the UNESCO CDCE's assertion that States have the sovereign right to restrict trade on cultural grounds and the GATT's non-discrimination prescriptions, Boisson de Chazournes states:

> "It is to avoid the risks of inconsistency that Article 20 of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* includes *expressis verbis* the principles of mutual supportiveness, complementarity and non-subordination with regard to other international instruments.... Another unusual aspect is that the Convention emphasizes *ex post* coordination to the point of requiring State Parties to promote its objectives and principles 'in other international forums.' This vision of *ex post* coordination and the momentum thereby created for such coordination strengthen the monitoring and supervision of the Convention. A first step in that direction would be to reinforce cooperation between UNESCO and other international organizations, especially the WTO."[207]

In addition to what the writer said, one could say that the UNESCO CDCE not only emphasises the '*ex post*' coordination between the Parties but also encourages the '*ex ante*' vision.

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[207] Laurence Boisson de Chazournes 'Monitoring, Supervision and Coordination of the Standard-setting Instruments of UNESCO' in 'Panel 1: Elaborating and Implementing UNESCO's Standard-setting Instruments', in: Abdulqawi Yusuf (ed.) *Standard-setting in UNESCO Volume I: Normative Action in Education, Science and Culture* (UNESCO/Nijhoff 2007), 70.

3.2.2 Canada–Periodicals and China–Audiovisuals as the Foreground for Future Interpretive Efforts Between the WTO Agreement and UNESCO CDCE

Similar to the WTO's interpretation of GATT Article XX using external environmental regulations, the Panel Report in *China–Publications and Audiovisual Services* is relevant on the role of both UNESCO's *Universal Declaration on Cultural Diversity* and the UNESCO CDCE in interpreting WTO regulations (Bernier has already contributed to that understanding in this chapter). However, to justify enforcing GATT provisions, this Report also relied heavily on the WTO Panel and Appellate Body decisions in *Canada–Certain Measures Concerning Periodicals* (1997). This chapter now explores the implications of the two decisions.

In its arguments to the Panel in *Canada–Periodicals*, Canada held that several procedures supporting the Canadian periodicals industry were necessary to protect the country's cultural identity. Ultimately, the Panel's decision favoured the United States' complaint, identifying Canada's measures as inconsistent with GATT provisions. The decision illustrated some of the tensions inherent between the wishes of many States to promote cultural diversity on one hand, and the requirements of trade agreements like the GATT on the other.

Neuwirth records:

> "Following the ruling in the *Canada Periodicals* case,[208] awareness of and efforts to advocate for greater cultural diversity intensified around the globe. As a result, a series of documents addressing the issue were prepared which, by and large, promoted the adoption of a legally binding document for cultural diversity. An important matter regarding the feasibility of such an instrument was the question of finding a competent international or-

[208] Neuwirth uses the case name without the usual hyphen.

> ganization for its negotiation, adoption and administration. Proposals included UNESCO and the WTO as well as a possible third way, consisting either of a combined approach of mutual cooperation between the two, or the creation of an entirely new international body. Even within the WTO, in light of the imminent services negotiations, a background note and several communications dealt with this question…. Nonetheless, despite the debate within the WTO and good reasons for the involvement of the WTO, arguments tipped in favour of UNESCO, as the competent organization to address the problem."[209]

Therefore, the next developments on the matter came from UNESCO. The two instruments that would result from this inter-institutional discussion played an extremely pertinent role in the *China–Publications and Audiovisual Services* case.

In *China–Publications and Audiovisual Services*, China and the WTO Panel shared cautious, but concurring, views that the two aforementioned UNESCO instruments could prove useful in improving the international system's approach to trade in cultural goods. The Panel raised the utility of the UNESCO CDCE's notion of 'protection and promotion of cultural expressions' in administering the category of cultural products.

Holding that China had breached three kinds of procedures concerning publications and audiovisual media, the Panel repeatedly established grounds for reaching its conclusions by citing *Canada–Periodicals*. Its Report then noted, however:

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[209] Rostam J Neuwirth, 'The Convention on the Diversity of Cultural Expressions and Its Impact on the "Culture and Trade Debate"' in Toshiyuki Kono and Steven Van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Intersentia 2012), 240-241.

> "China considers that reading materials and finished audiovisual products are so-called 'cultural goods', i.e., goods with cultural content.…China notes in this respect the UNESCO *Universal Declaration on Cultural Diversity*, which China says was adopted by all UNESCO Members, including the United States. In its Article 8, the Declaration states that cultural goods are 'vectors of identity, values and meaning' and that they 'must not be treated as mere commodities or consumer goods'."[210]

To this, the Panel responded:

> "We note China's reference to the UNESCO *Declaration on Cultural Diversity*. We observe in this respect that China has not invoked the Declaration as a defence to its breaches of trading rights commitments under the Accession Protocol. Rather, China has referred to the Declaration as support for the general proposition that the importation of products of the type at issue in this case could…have a negative impact on public morals in China. We have no difficulty accepting this general proposition, but note…that we need to focus more specifically on the types of content that is actually prohibited under China's relevant measures."[211]

China–Publications and Audiovisual Products thus contained the first reference by a WTO Panel to the UNESCO instruments dealing with cultural products—referencing both the *Declaration on Cultural Diversity* and the CDCE.[212]The Appellate Body upheld the Panel Report on 21 December 2009, thereby depriving the international community of

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[210] WTO *China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products–Report of the Panel* (12 August 2009) WT/DS363/R [7.751].

[211] ibid [7.758, footnote 538].

[212] ibid [5.61].

further talks on the role of the two UNESCO instruments in the WTO framework.

Neither China nor the Panel addressed in any kind of concrete manner the issue of fragmentation between the UNESCO agreements and the WTO covered agreements. Nor did the Panel elaborate on how such efforts toward coherence might take place. Yet, the Panel Report raised the possibility of such an effort and did not rule out future initiatives toward that purpose. The WTO Dispute Settlement Body (DSB) could thus make use of the UNESCO CDCE to interpret provisions of the WTO Agreement in the manner referred to by China and the Panel.

Van Uytsel illustrates his opinion 'to make the CDCE more effective within the WTO regime' and recommends that:

> "Considering the specificity of culture as a part of the WTO regime, States should be able to rely on the CDCE for interpreting concepts and exceptions of the WTO agreements and to formulate a defense outside the framework of the exceptions of the WTO agreements."[213]

3.2.3 Interpretation of 'Likeness' in Obligations of Non-Discrimination according to the WTO

One of the WTO's cornerstones is the principle of non-discrimination, which forbids discrimination between like products among Members. The Appellate Body's discussion of 'likeness' in general is an example of interpretation that can be useful in demonstrating how the UNESCO CDCE relates to the WTO Agreement. The fundamental question is whether goods classified as 'cultural' under the

[213] Van Uytsel, Steven, 'The CDCE and the WTO – in search for a meaningful role after China-Audiovisuals' in Richieri Hanania, Lilian (ed.), *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Routledge 2014), 50.

UNESCO CDCE are 'like' goods with non-cultural goods. Three cases involving alcoholic beverages illustrate the role of interpretation in interpreting 'likeness' as it relates to trade disputes having cultural dimensions.

Likeness is essentially the determination of a competitive relationship between products. One of the interpretive tools for this concept, which also helps to determine whether such a relationship exists, includes the consumer's perception of the product.[214] In *EC–Asbestos* (2001), the Appellate Body held that the production process may have an effect on the buyers' perception, which in turn will influence the 'likeness' (or not) of the products.[215] Thus, groups of buyers who favour, for example, a population minority or handicraft manufacturing, may affect a conclusion concerning the likeness of the products.

In *US–Clove Cigarettes* (2012), the Panel held that the wording and context of the TBT Agreement endorsed a reading of the notion of 'likeness' in Article 2.1 of the TBT Agreement that concentrated on the aims and determinations of the technical regulation, instead of the competitive relationship between and among the goods. Article 2.1 states:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

The Panel held that, in the context of this case, in the determination of 'likeness' in an Article 2.1 analysis, the weighing of the evidence relating to the 'likeness' criteria (physical characteristics, end-uses, consumer tastes and habits, and customs classifications) should acknowledge the fact that the measure at issue was a technical regulation

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[214] WTO *EC: Measures Affecting Asbestos and Asbestos-Containing Products—Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R [99-100].
[215] ibid [112-113].

intended to standardise flavoured cigarettes for public health reasons.[216] The Appellate Body rejected the Panel's purpose-based approach to the determination of 'likeness' under Article 2.1.[217] The Appellate Body in *US–Clove Cigarettes* stated:

> "Regulatory concerns underlying measure, such as the health risks associated with a given product, may be relevant to an analysis of the 'likeness' criteria under Article III:4 of the GATT 1994, as well as under Article 2.1 of the TBT agreement, to the extent they have an impact on the competitive relationship between and among the products concerned."[218]

This wording is reminiscent of GATT Article III:4, requiring 'no less favourable' treatment for foreign goods with respect to national goods.

The Panel used a 'purpose-based' approach to the determination of likeness, rather than one based in competitivity.[219] The Appellate Body noted in this context that measures often pursue a multiplicity of objectives, which are not always easily discernible. The Appellate Body also noted that the Panel's purpose-based approach to the determination of 'likeness' does not necessarily leave more regulatory autonomy for Members, because it almost invariably puts the Panel into the position of having to determine which of the various objectives purportedly pursued by the Members are more important, or which of these objectives should prevail in determining 'likeness' in the event of conflicting objectives.

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[216] WTO *US: Measures Affecting the Production and Sale of Clove Cigarettes–Report of the Panel* (2 September 201) WT/DS406/R [7.119].

[217] WTO *US: Measures Affecting the Production and Sale of Clove Cigarettes–Report of the Appellate Body* (10 January 2012) WT/DS406/AB/R [112-115].

[218] The Appellate Body explicitly referred to its approach to the determination of 'likeness' in *EC-Hormones (1998).*

[219] WTO *US: Measures Affecting the Production and Sale of Clove Cigarettes–Report of the Appellate Body* (10 January 2012) WT/DS406/AB/R [115].

It is worth noting that in the first case to come before the Appellate Body, *US–Gasoline*, the Appellate Body specified that WTO regulations must not be 'read in clinical isolation from public international law', leaving space for an evolutionary interpretation of the WTO law, more sensitive toward cultural diversity issues.[220]

As well as taking into consideration the eventual effect of the commodity on the marketplace, buyers' partiality and customs, the descriptions of the specified goods, and the determined degree of 'likeness',[221] another but supplementary requirement is the tax procedure (the subject of *Japan–Alcohol II*). The slightest modification in the rate of taxation will prompt a contravention of Article III. The rules concerning taxation are rather varied. With respect to domestic taxation, the preliminary text of Article III declares that imported goods cannot be subject to more national taxation than are the 'like' domestic products. Article III concerns goods that are not similar, but are in a defined relationship with one another, permitting an analysis of likeness.[222]

Throughout 1995, the EC, Canada, and the US brought complaints against Japan and its method of taxing alcoholic beverages. Japan subjected each one of ten classifications of beverages to a different taxation regime. The status of Japanese *shochu* was conditional on a preferential assessment, relative to other imported spirits. Japan stated that such an assessment was warranted, and thus that the distinctive alcoholic beverages were not like products. The Appellate Body dismissed Japan's argument, holding that the goal of the taxation method was protection-

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[220] WTO *United States: Standards for Reformulated and Conventional Gasoline–Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R [III(B)].

[221] See Working Party Report on Border Tax Adjustments (2 December 1970) BISD 18S/97 para 18; Won-Mog Choi, *'Like Products' In International Trade Law* (1st edn OUP 2003).

[222] GATT Annex I, Para. 1, Ad Article III.

ism.[223] The *Korea–Alcoholic Beverage* case reached the same outcome. The Korean method of taxation protected soju a drink that might be challenged by imported spirits from the West. The Appellate Body in this case recognised the cultural element of Korea's explanation, but excluded this consideration from influencing its final decision.[224]

Chile–Alcoholic Beverages varies from the above-referenced cases as its tax regime for spirits was based on *ad valorem* rates, which varied according to the alcohol content taxation of spirits. The Chilean system applied lower taxation to spirits with less than 35% of alcohol. As a result of this taxation system 75% of domestic spirits were taxed at the lower rate while 95% of imported spirits were charged at the higher rate. Although Chile argued that this method did not protect domestic manufacturing of alcohol in general, the Appellate Body determined that the Chilean method of taxation was biased.[225]

In each case, the Appellate Body did not consider cultural complexities, or the safeguarding of minorities or customs, to be factors affecting the assessment of 'likeness'.[226] While deciding if goods are like products or not, the Appellate Body so far has only considered the financial restrictions, mainly relying on the physical characteristics of the commodities and considerations of supply and demand. However, if the Appellate Body wished to take into consideration the concerns of UNESCO CDCE, it should also take into account cultural factors.

In the context of cultural industries subject to the provisions of the WTO, these cases offer a better understanding of the concept of 'likeness' as the UNESCO CDCE might wish to define it. Many WTO provisions regarding likeness in non-discrimination obligations can be in-

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[223] Krista Nadakavukaren Schefer, *Social Regulation in the WTO* (1st edn Elgar 2010) 228.

[224] M. Hahn, 'A Clash Of Cultures? The UNESCO Diversity Convention and International Trade Law' (2006) 9 *Journal of International Economic Law* 528.

[225] ibid.

[226] Ibid.

terpreted narrowly,[227] in a way that recognises the originality of cultural goods. While they formally compete with the applicable national goods, cultural goods, however, would be interpreted as having different features and different consumer perception. This would allow States to provide less favourable treatment to foreign goods. Such a narrow interpretation of the rules could prevent or mitigate several types of conflict between provisions of UNESCO CDCE and the WTO.

In conclusion, although many products may appear to be alike on first impression, the narrow interpretive approach may indicate that cultural goods are not like products to other goods. This would mean that the WTO principle of non-discrimination would not be violated, because protection measures derived from UNESCO CDCE would apply to one product. Such an interpretation would help to avoid conflict, and may therefore lend itself to legal coherence between the WTO Agreement (specifically, GATT Articles I and III) and the UNESCO CDCE.

3.3 Proposed Interpretations of GATT and UNESCO CDCE Terminology

Crucial, for the purposes of this thesis, is an examination of what makes one good 'like' another, and whether cultural goods may be considered 'like' generic goods. This determines (for instance, in Chapter 3's examination of the issue) whether discrimination between products under MFN and NT provisions has actually occurred. Therefore, this thesis turns to examine the question of 'likeness'.

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[227] Peter Van den Bossche *Free Trade and Culture: A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures* (Boekman Studies 2007) 136.

Applying the non-discrimination principle requires a notion of what makes one product 'like' another. This is true whether using a narrow or broad interpretation of the terminology.

Contemporary references to the concept of 'likeness' often begin with the *Japan–Alcohol* case (one of the first cases decided by the WTO Appellate Body)—which famously stated that likeness could be compared to an 'accordion', to be squeezed or stretched as the circumstances demanded. It stated:

> "No one approach to exercising judgement will be appropriate for all cases. The criteria in Border Tax Adjustments should be examined, but there can be no one precise and absolute definition of what is 'like'. The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply."[228]

However, Choi explains a longer history of the concept, based in GATT drafting records and tribunals. The author begins by identifying three ways to classify the relationship between goods under GATT:

1) 'identical',
2) 'similar',
3) 'directly competitive or substitutable'.

Choi writes:

> "Article 15 of the Customs Valuation Agreement provides a definitive interpretation of the concept of 'identical':

[228] WTO *Japan: Taxes on Alcoholic Beverages—Report of the Appellate Body* (4 October 1996) WT/DS8/AB/R; WT/DS10/AB/R; and WT/DS11/AB/R 20.

> 'Identical goods means goods which are the same in all respects including physical characteristics, quality and reputation. Minor differences in appearance would not preclude goods otherwise conforming to the definition from being regarded as identical.'
>
> …this interpretation is shared in Art. 2.6 of the Antidumping Agreement and Art 15.1, fn 46 of the SCM Agreement…
>
> Article 15 of the Customs Valuation Agreement provide a definitive interpretation for the concept of 'similar goods':
>
> 'Similar goods means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the existence of a trademark are among the factors to be considered in determining whether goods are similar.'
>
> This understanding seems to be shared by the Antidumping Agreement as well as by the SCM Agreement."[229]

Finally, in defining 'directly competitive or substitutable', Choi notes that

> "what was decisive for the Panel in this case [*Chile–Alcoholic Beverages*] was the 'shared common characteristic of satisfying a similar need' between the two products in question. One should note that a similar definition was adopted earlier by the Appellate Body in *Korea Alcoholic Beverages*."[230]

As an example, at one of the meetings of a London Conference on this matter, the Rapporteur from the United States 'indicated that only wheat cereals would be viewed as being "like" products' with other

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[229] Won-Mog Choi *'Like Products' in International Trade Law: Towards a Consistent GATT/WTO Jurisprudence* (OUP 2003) 12-13.
[230] ibid 14.

wheat cereals. His conclusion is that "the drafters, by excluding from the concept of the like product any cereals other than wheat cereals, did not want to extend the "like" product coverage to its broadest level so as to include the 'competitive or substitutable' product concept."[231] Choi goes on to note the GATT tribunal decisions in *Australian Subsidy on Ammonium Sulphate* and *German Sardines*, which drew the same conclusion about likeness.

Using this argument based on the aforementioned concept of 'shared common characteristic of satisfying a similar need' raises the issue of antidumping measures (case of *Chile–Alcoholic Beverages*) between two products. The same argument could be applied to protection of cultural goods. In other words, we could say that there is likeness between the cultural goods only if they share common characteristics and the goods meet similar needs. If the cultural goods are not like, discrimination by means of a subsidy could be applied to protect the cultural goods.

In discussing the likeness between 'fine products' found in the drafting of the MFN obligation, Choi records that

> "fine product distinctions have *traditionally* been accepted as an appropriate means of protecting the competitive benefits accruing from reciprocal tariff bindings. This point signals a narrow understanding of the concept. An overly broad interpretation of it might compel GATT members to extend the benefits of tariff concessions, obtained through lengthy negotiations, to a large variety of products, without any corresponding *quid pro quo.* This free-rider problem might result in an impediment to trade liberalization efforts…It should be noted, however, that after this free-rider problem was substantially reduced, the like product concept in the MFN context functioned mainly as a tool for prohibiting

[231] ibid 94.

> 'tariff specialization' aimed at discriminating between 'like' products."[232]

This statement shows that if there are no 'competitive benefits' present in the like products, tariff specialization would not be prohibited as a means of discriminating between like products. So, the same argument could be applied to cultural goods if there were no competitive benefits between 'like' cultural goods.

3.3.1 Interpretations of GATT Terminology

It is possible to argue that WTO Members already enjoy domestic freedom to protect and promote cultural goods and services, as long as they refrain from discriminating between domestic and imported cultural goods.[233] A combined 'broad' and 'evolutive' (teleological) interpretation of some GATT exceptions could protect social and non-economic aspects of cultural goods.

GATT Articles XX(a), XX(d) and XX(f) (with the chapeau) read:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> a) necessary to protect public morals…
> d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement…
> f) imposed for the protection of national treasures of artistic, historic or archaeological value…

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[232] ibid 95-96.

[233] Ibid.

Interpreting these provisions in light of the goal of coherence between the UNESCO CDCE and WTO Agreement, also based on an understanding that the Members and Parties to the treaties have political obligations to their constituent populations, forms the basis of this section.

3.3.1.1 Public Morals

GATT Article XX(a) states that "nothing in the WTO agreement shall be construed as preventing the adoption or enforcement of measures necessary for protecting public morals". Human rights agreements, as a guarantee of social well-being, arguably constitute a form of public morals.

Indeed, in some views, they would constitute a supreme system of universal morals. Wu records that

> "the original scope of the public morals clause made no reference to human rights…. In order for the exception to encompass such norms, several scholars suggested that the WTO ought to interpret the concept of public morals dynamically. Michael Trebilcock and Robert Howse argued that 'with the evolution of human rights as a core element in public morality in many postwar societies and at the international level, the content of the (public morals exception) should extend to universal human rights…'…The United Nations High Commissioner for Refugees (UNHCR) recently also endorsed interpreting the public morals clause to encompass human rights. UNHCR noted that 'the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights'. As a result, '(a) conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning'. Therefore, UNHCR suggested that there were 'strong arguments'

> for the WTO's dispute settlement body to 'accept that internationally recognized human rights norms and standards should come within the scope' of the public morals clause."[234]

The UN Economic and Social Council has recognised 'access to cultural goods' as forming part of the human right to 'take part in cultural life'. Paragraph 6 of General Comment 21 to Article 15(1)(a) of the 1966 UN *International Covenant on Economic, Civil, Social, and Political Rights* explicitly records:

> "The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State Party both abstention (i.e., *non-interference* with the exercise of cultural practices and with *access to cultural goods* and services) and positive action (*ensuring* preconditions for participation, facilitation and promotion of cultural life, and *access to and preservation of cultural goods*)."[235] (emphasis added)

By respecting their UNESCO CDCE articles to protect cultural goods, Parties can ensure the right of access to cultural goods under Article 15(1)(a) and as noted in General Comment 21. The UNESCO CDCE allows States to take positive action to protect cultural goods, and these protections help States guarantee their populations the right to take part in cultural life. As such, the UNESCO CDCE may present a set of guidelines that constitutes 'public morals'.

However, access to cultural goods is also guaranteed through trade in cultural goods. The non-discrimination principle, by forcing cultural

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[234] Mark Wu 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' (2008) 33(1) *Yale Journal of International Law*, Article 6, 215-251 (224).

[235] UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 21, Right of Everyone to Take Part in Cultural Life (Art 15, Para 1a of the Covenant on Economic, Social and Cultural Rights)* 21 December 2009, E/C.12/GC/21.

goods to compete with cheaper generic goods, does not lead to the creation of barriers to the right of access to cultural goods. Collectively removing the State-sanctioned WTO barriers to such access under the 'public morals' provision of Article XX(a), again may protect the human right of access to cultural goods. Again, it would do so, by recognising the UNESCO CDCE as a set of provisions that allows States to uphold the fundamental right to participate in cultural life, or in other words, a system of national or domestic policies that remove hindrances to their populations' access to cultural goods.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 15(1)(a), which protects the right to take part in cultural life, in turn arguably forms part of a system of public morals under GATT Article XX(a). Article 15(1)(a) incorporates paragraph 6 of General Comment 21. Under General Comment 21, access to cultural goods forms part of the human right to take part in cultural life—a human right that must be guaranteed by both the non-interference and the positive action of States. Such non-interference and positive action can be guaranteed by compliance with UNESCO CDCE provisions.

If social moral codes do not permit a disruption of national or indigenous culture, then protecting the expressions of those cultures (including cultural goods, within our understanding through the UNESCO CDCE) falls under the GATT exception of Article XX(a). Shi writes:

> "GATT Article XX(a) [allows]…members to take measures 'necessary to protect public morals', subject to compliance with the chapeau. The term 'public morals' is not defined, but *US–Gambling* provides some guidance. In this case, a WTO panel recognizes the potential relevance of cultural concerns to this exception….
>
> In one way or another, though, WTO tribunals would have to interpret this exception broadly enough to cover cultural measures. They may be reluctant to do so because of the risk of

> abusing the exception, not only in relation to cultural products, but also in other unanticipated areas. In consideration of this risk, it is advised that international human rights law fill the gap and furnish a valuable basis for understanding [the notion of public morals]…[C]ulture is an essential component of human rights. Although there is no consensus that the UDHR [*Universal Declaration of Human Rights*] and the ICESR reflect customary international law, these human rights instruments do indicate that cultural rights represent a fundamental interest of society. In the same vein, the UN High Commissioner for Human Rights has contended that, although 'human rights should not be used as disguised barriers to trade', 'any judgement of the trade-restrictiveness of a measure should take into account States' obligations under human rights law'. This includes the obligation to full realisation of cultural rights…' Public morals'… are precisely the type of concept that are evolutionary by definition."[236]

Article XX(a) has been used several times. For instance, Saudi Arabia's accession protocol invoked the public morals clause to justify banning imports of alcoholic beverages, stating that alcoholic preparations were not to

> "be used for non-medical purposes except as a solvent for concentrated flavors and perfumes …[and] for *moral reasons* not to be used to produce or make alcoholic beverages."[237]

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[236] Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Hart 2013), 140-142.

[237] WTO, *Working Party on the Accession of the Kingdom of Saudi Arabia* WT/ACC/SAU/6 30 September 1996, 12, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/ACC/SAU6.pdf, Accessed 17 December 2022. Emphasis added.

Saudi Arabia's accession protocol also invoked the public morals clause of GATT Article XX(a) to prohibit:

> "-Tools and machines designed for gambling excluding those for innocent amusement....
>
> -Three-dimensional pictures which contradict Shariah and *public morality* imported for the purpose of sale in commercial quantities. …
>
> - Articles designed for floor covering or for wearing bearing the wording of Allah or Quranic verses or prophet's sayings.
>
> - Cross[es] and commodities bearing the cross and any pictures, inscriptions, drawings, quotations or expressions or publications of books and other printed matters, films and tapes violating the Islamic Shariah or Islamic *morality*[238] or the printed matter regulation."[239]

The *US–Gambling* and *EC–Seal Products* cases both interpreted the concept of 'public morals'.

US–Gambling

Although the *US–Gambling* case revolved around the use of the phrase in Article XIV(a) of the GATS, its interpretation may illuminate GATT Article XX(a): the words are identical, and the Appellate Body notes the equivalence of the phrase in the two agreements. Paragraph 296 of the Appellate Body Report (upholding the Panel's conclusion), notes:

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[238] ibid 8 Emphasis added.

[239] In other words, 'regulations on printed matter'.

> "In its analysis under Article XIV(a), the Panel found that 'the term "public morals" denotes standards of right and wrong conduct maintained by or on behalf of a community or nation'."[240]

Observing again that the 'Appellate Body…left the Panel's reasoning intact', the WTO Analytical Index on the GATS states:

> "The Panel in *US — Gambling*, noting that jurisprudence under Article XX of the GATT 1994 was applicable to the interpretation of this provision, stated that the meaning of 'public morals'…varied depending on a range of factors, and that a Member had the right to determine the appropriate level of protection:
>
> 'We are well aware that there may be sensitivities associated with the interpretation of the [term] "public morals" … in the context of Article XIV. In the Panel's view, *the content of [this concept] for Members can vary* in time and space, depending upon a range of factors, including prevailing social, *cultural*, ethical and religious values. Further, the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, *have the right to determine the level of protection that they consider appropriate.* Although these Appellate Body statements were made in the context of Article XX of the GATT 1994, it is our view that such statements are also valid with respect to the protection of public morals…under Article XVI of the GATS. More particularly, Members should be given some scope to define and apply for themselves the [concept] of "public mor-

[240] WTO *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Report of the Appellate Body* (7 April 2005) WT/DS285/AB/R [296].

> als"…in their respective territories, according to their own systems and scales of values.'"[241]

The inclusion of culture in this list is significant, and may form the basis for further exploration. Additionally, Members have the right to determine the level of protection they may consider necessary. Both of these considerations are very relevant to the central theme of this work, as can be seen below. However, before turning to that, the next section will look at the remaining relevant case law on public morals.

EC–Seal Products

The Appellate Body Report in the case *EC–Seal Products* cited the *US–Gambling* case to draw its own conclusions about the use of 'public morals' as an exception under GATT Article XX(a). It upheld the Panel's decision on this question. Paragraph 5.199 of the Appellate Body Report in *EC–Seal Products* repeats the definition of *US–Gambling*:

> "The Panel accepted the definition of 'public morals' developed by the panel in *US– Gambling*, according to which 'the term "public morals" denotes "standards of right and wrong conduct maintained by or on behalf of a community or nation"'. The Panel also referred to the reasoning developed by the panel in *US–Gambling* that the content of public morals can be characterized by a degree of variation, and that, for this reason, Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values.[242]

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[241] *WTO Analytical Index: General Agreement on Trade in Services*, XVII(B)(3) [82-83]. Emphasis added.

[242] WTO *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products* (22 May 2014) WT/DS400/AB/R [5.199].

Conclusions on Interpreting 'Public Morals'

As noted above, General Comment 21 to ICESCR Article 15(1)(a) identifies access to cultural goods as a component of the right to participate in cultural life. Human rights, including the rights guaranteed under ICESCR, arguably form part of a system of public morals. Public morals constitute an acceptable exception to GATT under its Article XX(a).

Thus, under General Comment 21, the UNESCO CDCE may allow States to protect access to cultural goods, in both a positive action and by non-interference, in accordance with the right to participate in cultural life that Article 15(1)(a) ICESCR guarantees. This would place the exercise of rights under the UNESCO CDCE within the scope of protections that GATT Article XX offers.

A first precept that *US–Gambling* upholds is that *'culture' forms an aspect of public morals*. Second, the Appellate Body recognises in several decisions referring to Article XX exceptions that Members may determine the level of protection that they deem appropriate. Third, *EC–Seal Products* provides the understanding that Members may "define and apply for themselves the concept of public morals according to their own systems and scales of values". Accepting the foregoing reasoning, Members could invoke the 'public morals' provision in GATT Article XX(a) to justify using the UNESCO CDCE as a system or scale of values that provides them with moral guidance in matters of culture, and as a treaty that they have determined to express the level of protection that they deem appropriate.

In tandem, Article XX(d) (which permits chapeau-conforming measures that are 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement') could justify implementing the UNESCO CDCE via domestic legislation, such as ratified instruments. Voon argues:

> "[R]ules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements

> that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system."[243]

The exception in GATT Article XX(a), in conjunction with Article XX(d), strongly seems to provide the necessary space for States to invoke the UNESCO CDCE, thereby restricting trade flows that affect cultural goods in a WTO-consistent manner.

3.3.1.2 National Treasures

The GATT permits procedures that limit trade but are "imposed for the protection of national treasures of artistic, historic or archaeological value". According to the Oxford Dictionary definition, 'National Treasure' is defined as "An artefact, institution, or public figure regarded as being emblematic of a nation's cultural heritage or identity".[244]

Hence, the artistic and historical characteristics of certain cultural goods, such as traditional handicrafts, may permit their classification as 'national treasures' under the GATT. Such characterisation could take the form of domestic legislation to recognise cultural goods as national treasures.

If such domestic legislation were consistent with the provisions of the UNESCO CDCE, this protection would be further justified under Article XX(f). This provision sets forth rules of allowing the adoption of measures that are inconsistent with the WTO Agreement, if the object of the challenged restriction on trade is to protect national treasures. Such consistency could be achieved either if the term 'national treasures' were interpreted broadly to include any goods linked to expressions of national culture. The invocation of GATT Article XX(e) could allow

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[243] Tania Voon, 'UNESCO and the WTO, a Clash of Cultures?' (2006) 55(3), *International and Comparative Law Quarterly*, 635-631.

[244] <https://www.lexico.com/en/definition/national_treasure>. Accessed on 17 December 2022.

WTO Members to discriminate or otherwise restrict trade if it is doing so 'for the protection of national treasures'.

As noted earlier, there are other means to deal with any such inconsistency. In particular, using harmonization through hard law (see Chapter 4), terms such as 'national treasures' or 'public morals' could be amended to include precise definitions that included cultural aspects, to enhance coherence with the corresponding UNESCO provisions. Additionally, interpreting these terms and corresponding provisions of the UNESCO CDCE in a manner ensuring mutual supportiveness through soft law (an approach that Chapter 5 will explain) between the UNESCO CDCE and WTO Agreement could accomplish the same purpose. The conclusion to this chapter, and Chapters 4 and 5, address these alternate means of enhancing coherence.

3.3.2 Interpretations of UNESCO CDCE Terminology

3.3.2.1 'Protect' and 'Protection'

As this chapter has already shown, the drafters of the UNESCO CDCE explicitly intended to create an instrument that would provide a counter balance to the WTO Agreement, adding to the exceptions already listed in GATT Article XX. Their inclusion of the words 'protect' and 'protection' do not formally conflict with any WTO provision, but they do *prima facie* counter the spirit of the Treaty—where 'protectionism' is perhaps the most serious accusation that one Member may direct against another. Efforts at interpreting the two treaties to enhance coherence should attempt to bridge this divide.

An interpreter of these words in the Convention might regard the terms as equivalent to the word 'protect' in GATT Article XX(a) and (b). Taken together with the chapeau, this use apparently permits 'protecting' both the categories of public morals (potentially including the UNESCO CDCE, as shown above), and human, animal, or plant life and

health, as 'restrictions on international trade', but with the caveat that such a restriction is 'necessary'.

Thus, the UNESCO CDCE's use of the words 'protect' and 'protection' might result in an interpretation that the cultural values and content that cultural expressions (including cultural goods) contain, constitute 'necessary restrictions on international trade' in the sense of GATT Article XX.

3.3.2.2 Sustainable Development

Article 2(6) of the UNESCO CDCE provides the principle of 'sustainable development', stating that "the protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations". In parallel, Recital 1 of the Preamble to the *Marrakesh Agreement Establishing the World Trade Organization* (Marrakesh Agreement) specifies an objective of the WTO Agreement as

> "sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.
>
> A mutually supportive interpretation of UNESCO CDCE Article 2(6) could seek to establish 'sustainable development' as a 'shared objective' (using the language of the ILC) in both treaties. While the Convention is not overtly directed at the protection of only the environment (in contrast with the Marrakesh Agreement), its usage of 'sustainable development' might constitute terminology that corresponds in a mutually supportive fashion with the 'needs and concerns at different levels of economic development' of WTO Members.

> In this regard, UNESCO CDCE Article 14(a)(II), (III), and (IV) state the Convention's objectives on sustainable development, particularly as it concerns developing countries:
>
> Parties shall endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the *specific needs of developing countries*, in order to foster the emergence of a *dynamic cultural sector* by, inter alia, the following means…
>
> (II) facilitating *wider access to the global market* and international distribution networks for their cultural activities, goods and services;
>
> (III) enabling the emergence of viable local and regional markets;
>
> (IV) adopting, where possible, appropriate measures in developed countries with a view to facilitating access to their territory for the cultural activities, goods and services of developing countries."[245]

Similarly, Recital 2 of the Preamble to the Marrakesh Agreement describes a perspective on development that includes

> "[the] need for positive efforts designed to ensure that developing countries, and especially the least developed among them, *secure a share in the growth in international trade* commensurate with the needs of their economic development."[246]

Thus, the UNESCO CDCE shares with the WTO Agreement a notion of sustainable development that clearly wishes to increase trade, particularly between developed and developing countries. Article 14(a) of UNESCO CDCE's proposes a 'dynamic cultural sector', as a means of creating sustainable development in developed and developing coun-

[245] Emphasis added.

[246] Emphasis added.

tries. This proposal might be interpreted as a means of helping "developing countries…secure a share in the growth in international trade commensurate with the needs of their economic development" under the Marrakesh Agreement.

Such an example of mutually supportive interpretation may be bolstered significantly by UNESCO CDCE Article 20, subparagraphs (a) and (b), which stipulate that States Parties "shall foster mutual supportiveness between this Convention and the 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 this Convention".

Some scholars believe in the necessity of applying Article XX (a) and (f) of the GATT and Article XIV(a) of the GATS as "legitimate regulatory tools to protect and promote the diversity of cultural expressions within the WTO".[247] Morosini emphasises this when he writes:

> "Cultural diversity should be accepted as a new element of sustainable development. It would follow that the protection of culture through general exceptions in the WTO agreement would not only be legitimate interpretation of Article XIV (a) of the GATS or Article XX (a) and (f) of the GATT 9a negative defense), but that protection of cultural values is one relevant way of promoting the overall WTO objective of sustainable development (an affirmative defense)."[248]

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[247] Morosini, Fabio, 'Taking into account environmental, social and cultural concerns through the objective of sustainable development: Perspectives from the WTO jurisprudence on general exceptions' in Richieri Hanania, Lilian (ed), *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Routledge 2014), 65.

[248] Ibid.

The contention in Section 3.3.1that the Convention constitutes an acceptable restriction to trade under the public morals provision of GATT Article XX(a)would still allow this interpretation of 'sustainable development' in the UNESCO CDCE to be upheld under Article 2(2), which states that "[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties [for instance, the WTO Agreement] to which they are Parties".

A mutually supportive interpretation, establishing that both the UNESCO CDCE and the WTO Agreement hold shared values, would provide the basis for further steps to enhance coherence in particular provisions between the two. Chapter 5 will clarify the concept of mutual supportiveness.

3.4 Conclusion: Interpretation and Its Relationship with Harmonization and Mutual Supportiveness

Interpretation is a route (an approach) with several pitfalls. Its primary weakness is that it relies heavily on subjective determinations, and thus the same procedure may yield different results, depending on who performs the interpretation. Nonetheless, interpretation is applicable at every step of enhancing coherence and also the application or implementation of norms: determining whether a conflict indeed exists; determining whether the conflict is narrow or broad; determining whether one treaty derogates from another; and these considerations determine whether creating coherence requires amending the treaty text.

Interpretation formally contains the notion of mutual supportiveness. However, this work elevates mutual supportiveness to the status of a principle in its own right. The ILC identifies harmonization as a general principle of international law. This study argues, on the basis of extant scholarship, that mutual supportiveness is also a general principle, and has equal status to harmonization. This is because it surpasses

the *Hormones* standard of an 'approach' and of a 'general principle'. It is thus separate from the notion of interpretation as this work uses it.

In some cases, mere re-interpretation of GATT exceptions, in light of the political obligations of law-appliers to abide by the 'preferences and expectations' of the community of States (which the ILC lists as a primary consideration during the exercise of interpretation), could protect cultural goods consistently with both the WTO and the UNESCO CDCE. With respect to cultural goods, the Appellate Body's interpretation of likeness thus far excludes cultural considerations as grounds to discriminate between products.

However, an evolutive or teleological interpretation of the 'public morals' and 'national treasures' exceptions under GATT Article XX could yield protection of cultural goods under the UNESCO CDCE, as 'not inconsistent' with the GATT. A mutually supportive interpretation of 'protect' and 'protection' in the UNESCO CDCE, and 'protect' in the GATT, could provide the foundation for coherence between the letter of the Convention and the spirit of the Treaty. Such an interpretation of the phrase 'sustainable development', used in both the UNESCO CDCE and the Marrakesh Treaty, could also provide significant grounds for coherence based on shared objectives.

Identifying whether 'narrow' or 'broad' perspectives on conflict apply, an interpretive step determines whether the route of harmonization or that of mutual supportiveness is most appropriate. UNESCO CDCE and WTO treaties can be considered instruments containing provisions that directly conflict with one another (if the broad definition of 'conflict' is accepted) or are mutually supportive of one another (if the narrow definition of conflict is accepted). Improving coherence between these two treaties suggests two approaches that correlate with each definition.

1. Based on a broad perspective of conflict, if the aim is to create perfect coherence between the two treaties, then it is possible to amend

one or both treaties. This would allow a State to fulfil the requirements of one treaty while remaining consistent with the other. Such a rationale for amending national legislation to ensure compliance with international treaties has emerged in a process known as 'harmonization'. Applications of this technique would exceed the use of the harmonization principle in interpretation and will use instruments and amendments flowing from the environment of hard law. Chapter 4 will investigate these concepts' analogous applicability between treaties, proposing an approach founded on a relationship between the concepts, and their effects for coherence between the WTO Agreement and UNESCO CDCE.

2. A narrow notion of conflict may favour interpretations of the terms of the two treaties based on the principle of mutual supportiveness in interpretation. For example, WTO Members that are also Parties to the UNESCO CDCE may wish to suggest interpretations of likeness according to the narrow definition of conflict, thus allowing a government to treat products that may appear to be physically alike, but which differ from the perspective of their cultural content (as interpreted under paragraph 18 of the UNESCO CDCE's Preamble), as 'unlike' products. If this is the case, interpretation might allow WTO Members more policy space to comply with the goals of the UNESCO CDCE, while at the same time acting consistently with WTO provisions. Also, Chapter 5will investigate this approach, and its effects for enhancing coherence between the two treaties by demonstrating the relationship between mutual supportiveness and instruments of soft law in most institutional cooperation and coordination between the WTO and UNESCO.[249]

[249] For instance, the exchange between China and the Appellate Body in China–Audiovisuals may have opened a possible path forward under this perspective Such instruments may include guidelines on how to interpret provisions.

CHAPTER 4

HARMONIZATION THROUGH HARD LAW

Route II

Harmonization through Hard Law

Chapter 3 presented the term Harmonization as a principle of interpretation. In this chapter, harmonization will be discussed as an approach to amend and modify the provisions increasing the coherency.

Recall that harmonization is one of the three fundamental routes, which this study argues, can be used to bring the trade and cultural regimes closer to one another. One could say, that Harmonization, would be best pursued through hard law, because of its capacity of amendment and modification. To 'harmonize through hard law' is to amend existing legal instruments so that they become consonant and binding with one another.

In this work, the instruments associated with hard law include written norms and institutional procedure. Both the provisions of the WTO and UNESCO treaties govern and affect trade in cultural goods: through written legal norms (the WTO Agreement and UNESCO CDCE); and through the day-to-day operations and procedures of these international organizations themselves. This chapter proposes that the technique of harmonization may lend itself well to enhancing coherence between international legal regimes.

Nele Matz-Lück's definition of 'legal fragmentation' (which Chapter 2 cites) states that this concept encompasses both incoherence between norms and the disharmonious allocation of institutional authority. By *a contrario* reasoning, this definition logically implies that enhancing coherence through harmonization entails the potential for both *normative* and *institutional* approaches to reduce fragmentation.

There are thus three possible combinations of these strategies: a solely normative approach (which this work calls the 'Amendment Approach'), a solely institutional approach (the 'Construction Approach'), and an approach combining features of the two (the Coordination Approach). This introduction defines each term briefly below.

Chapter 4 discusses harmonization through hard law as a strategy to reduce potential fragmentation, and thus enhance coherence, between the WTO's and UNESCO's legal regimes regarding trade in cultural goods. It tests the validity of the following overarching statement:

Harmonization through hard law is a feasible route to reduce fragmentation and enhance coherence between the WTO and UNESCO legal regimes regarding trade in cultural goods.

Determining this statement's validity requires assessing some of the hypotheses that can be derived from it. The test of each approach, —the Amendment Approach, the Construction Approach, and the Coordination Approach—is to enquire whether each is 'feasible'. Feasibility is measured by two values, contained in the statement above: utility and practicability. If an approach is not feasible, the statement that it is derived from is false.

A reduction of fragmentation must demonstrate both utility and practicability to enhance coherence. This chapter will try to show that, in the case of harmonization by way of hard law, there is an inverse relationship between the practicability and the utility of the possible strategies. In other words, the more completely a strategy may resolve legal frag-

mentation (greater utility), the more disruptive it would be—and thus, the less likely to garner approval (lesser practicability).

Similarly, the greater likelihood of implementing a strategy (greater practicability), the less completely it would resolve fragmentation (thus, lesser utility). This chapter's three approaches to harmonization are developed in order: beginning with most useful to resolve fragmentation (but least practicable), and ending with the most practicable to implement (but least useful to enhance coherence).

Section 4.1 defines the concepts of 'harmonization' and 'hard law', with reference to relevant legal and scholarly material. This section also examines the present potential for normative incoherence and institutional overlap between the WTO and UNESCO regimes, with reference to the relevant normative instruments.

Section 4.2 examines the question of discrimination and subsidies on cultural goods in hard law. It demonstrates that the WTO Agreement (in particular, its SCM Agreement) outlines strict limits on permissible subsidies; while the UNESCO CDCE explicitly recognises the right of Parties to adopt or maintain subsidies that contravene the SCM Agreement.

Section 4.3 evaluates the feasibility of harmonization by way of hard law by testing the following three hypotheses, corollary to the statement that begins this chapter.

Hypothesis 1 (the 'Amendment Approach'): It is feasible to harmonize the WTO and UNESCO legal regimes regarding trade in cultural goods, through *normative coherence*.

The Amendment Approach would amend the appropriate normative provisions addressing trade in cultural goods. Its goal is to prevent conflicts from occurring. The test of this hypothesis is to determine the extent to which fulfilling the conditions of existing amendment procedures is feasible under each regime.

Hypothesis 2 (the 'Construction Approach'): It is feasible to harmonize the WTO and UNESCO legal regimes regarding trade in cultural goods, by *constructing an external dispute settlement mechanism* between the two organizations which, by interpreting a specific dispute, will bring the two regimes closer to one another.

The Construction Approach requires that the WTO and UNESCO collaborate to construct a new dispute settlement mechanism regarding trade in cultural goods. Its goal is to resolve conflict once it has occurred. The test of this hypothesis is to determine the extent to which it is feasible to fulfill the conditions of establishing such an agreement.

Hypothesis 3 (the 'Coordination Approach'): It is feasible to harmonize the WTO and UNESCO legal regimes regarding trade in cultural goods, through *institutional coordination* to bring the evolving practices of both organisations closer to one another.

This approach requires establishing a joint institution of the WTO and UNESCO to administer matters arising from trade in cultural goods on a case-by-case basis whether to prevent, to resolve, or to mitigate conflict as it may potentially arise. The test of this hypothesis is to determine the extent to which it is feasible to fulfill the conditions of establishing such a new institution.

Section 4.4 draws conclusions about the practicability and utility of harmonization by way of hard law, as an approach to resolve fragmentation and enhance coherence between the WTO and UNESCO legal regimes regarding trade in cultural goods.

In summary, Chapter 4 investigates and assesses harmonization as a means to reduce normative incoherence and institutional overlap—the two characteristics that denote legal fragmentation between the two regimes. It evaluates the potential for conflict in the sphere of trade in cultural goods, emphasising the opposing provisions of the SCM Agreement and the UNESCO CDCE. Testing the feasibility of the three

hypotheses corollary to harmonization by way of hard law will reveal the practicability and utility of that approach.

4.1 Hard Law and Harmonization in the Trade of Cultural Goods

4.1.1 Definitions

4.1.1.1 What is a Hard Law?

The term 'hard law' most often describes the legislation of national legal systems, enforceable through sanctions that the State imposes. However, it may also describe readings of international legal instruments, enforceable by State consent to be bound by such an instrument.

As Abbott and other authors outline the conditions under which a norm qualifies as hard law:

> "Statutes or regulations in highly developed national legal systems are generally taken as prototypical of hard legalization. For example, a congressional statute…is (subject to any special exceptions) *legally binding* on U.S. residents…, *unambiguous in its requirements*…, and subject to *judicial interpretation and application* as well as *administrative elaboration and enforcement*…. But even domestic enactments vary widely in their degree of legalization, both across states…and across issue areas within states…. International legalization exhibits similar variation; on the whole, however, international institutions are less highly legalized than institutions in democratic rule-of-law states."[250]

For the purpose of this work, then, the term 'hard law' describes the type of instruments and norms that are *binding* on States and interna-

[250] Kenneth W Abbott (and others), 'The Concept of Legalization' 54 *International Organization* (2000), 401-419. Emphasis added.

tional institutions. These obligations are complete (or can be completed, by establishing comprehensive guidelines) and *enforceable*, while they *assign authority to adopt and interpret* the law (i.e. institutional authority). Enhancing coherence requires that the rules under discussion should be the same, or similar to one another in their scope. So, recognising this similarity requires that these rules themselves should be *clear and unambiguous.*

How do the two instruments measure up to these criteria? Parties to the UNESCO CDCE agree, as do WTO Members regarding the WTO covered agreements, to allow these instruments in governing their behaviour. The binding character of these instruments derived from the consent of the sovereign States to become Party to each international instrument. The WTO's provisions are *enforceable* through the possibility of trade retaliation. As this chapter shows later, the UNESCO CDCE's enforceability is limited in practice, which in turn carries with it the potential for difficulties in harmonization. Whereas the WTO agreements (in the broad sense of all WTO covered agreements) arguably contains *clear and unambiguous* provisions regarding States' rights and obligations, this chapter will show that the UNESCO CDCE contains at least one critical ambiguity. Each instrument *assigns authority* for interpretation: the WTO's DSU and the UNESCO CDCE's Article 25 on Settlement of Disputes play an equivalent role in this regard. However, the conditions under which to invoke one agreement or the other, where both might conceivably have jurisdiction, also remains to be clarified, as this chapter shows below.

So, it appears that where WTO law seemingly qualifies unequivocally as 'hard law' according to the criteria of Abbott and others, the UNESCO CDCE may not fully meet this standard. For the strategy of harmonization through hard law to function properly, the UNESCO CDCE must be strengthened in its clarity and its enforceability, which is

not desired by Parties when negotiating the CDCE. This study demonstrates this in detail below.

In theory, therefore, approaching trade in cultural goods through binding and enforceable hard law could ensure that the WTO Agreement and UNESCO CDCE should include strong and clear terms, definitions, rights, and obligations, along with effective mechanisms to resolve potential disharmony between the UNESCO and WTO legal regimes. This argument will be assessed later in this chapter.

4.1.1.2 What is Harmonization?

Just as the term 'hard law' most often describes the instruments of national legal systems, but may also define international legal instruments, the term 'harmonization' shares a similar origin and application. Boodman notes that

> "In the legal literature, the concept of harmonization of laws arises exclusively in comparative law and particularly in conjunction with inter-jurisdictional, private transactions. Harmonization is applied to specific and general areas of the laws of different countries or states within a federated country in order to facilitate transactions between their citizens or residents. The limitation of harmonization to laws of different jurisdictions is consistent with the concepts of law and law reform…. In fact, harmonization is redundant in any other legal context. Law as a system of concepts, rules, standards and methods for regulating human behaviour is predicated upon an ideal of inherent consistency and coherence or internal harmony."[251]

Mayeda, also presuming that 'harmonization' describes the process of bringing the norms of different national legal systems into conso-

[251] Martin Boodman, 'The Myth of Harmonization of Laws' 703 39(4) *American Journal of Comparative Law* (Autumn 1991), 699-724.

nance, defines the term as follows: "Harmonization can be broadly defined as the process of making different domestic laws, regulations, principles and government policies substantially or effectively the same or similar."[252] Schroder clarifies that

> "in Mayeda's words, …the phrase 'substantially the same' [is] emphasized because harmonization can be achieved either by the adoption of every element of the standard used as a basis of comparison or by the adoption of only its most important elements."[253]

Nonetheless, international law differs from that produced by national legislative structures in that it is ultimately dependent on States' sovereign consent. International organisations thus lack the more unitary lawmaking and law-enforcing powers that exist in national structures.[254] Consequently, although differences between national and international lawmaking structures are perhaps overstated, international law has a noticeable inclination to derive norms from multiple sources, which may diverge or conflict.[255]

While some authors view incompatibilities between treaties as a routine feature of international law-making, attempts to eliminate legal fragmentation seems necessary to others. (For instance, some advocate including compatibility clauses in treaty texts.[256]). Yet, compared with

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[252] G Mayeda, 'Developing Disharmony? The SPS And TBT Agreements And The Impact Of Harmonization On Developing Countries' (2004) 7, *Journal of International Economic Law* (737-764), 740.

[253] Humberto Zúñiga Schroder, *Harmonization, Equivalence and Mutual Recognition of Standards in WTO Law* (Kluwer: 2011), 22.

[254] Graeme B Dinwoodie. *A Neofederalist Vision of TRIPS* (OUP 2012), 50.

[255] McLachlan Campbell, 'The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54(2), *International & Comparative Law Quarterly*, 279, 282.

[256] W. Czapliński and G. Danilenko, 'Conflicts of Norms in International Law' (1990) 21, Netherlands Yearbook of International Law, 20-21.

harmonizing norms among national legal systems (as the literature, which this work cites, frames harmonization), disagreements that arise from disharmonious provisions among international treaties are relatively rare.

This is partly because of the presumption against conflicts in international law[257]—deriving from the premise that, when negotiating and finalising treaties, States are conscious of their rights and duties originating in previously existing treaties. Moreover, since States must comply with all treaty obligations simultaneously and cumulatively,[258] they prefer to read provisions of separate treaties in correspondence with one another, or to bring them into consonance.

The Report of the Study Group of the ILC on the fragmentation of international law affirms that "[w]hen two States have concluded two treaties on the same subject-matter, but have said nothing of their mutual relationship, it is usual to first try to read them as compatible (the Harmonization principle of Interpretation)".[259] Boisson de Chazournes and Mbengue clarify the ILC's perspective on harmonization's usefulness to the goal of coherence:

> "Here the subtle interaction between compatibility, 'harmonization' and the presumption against normative conflict appears.…

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[257] See ICJ Report, 'Right of Passage over Indian Territory' (1957), 142.

[258] According to Article 26 of the Vienna Convention, 'Every treaty in force is binding upon the Parties to it and must be performed by them in good faith'. This principle of *pacta sunt servanda* requires the Parties to the first treaty to interpret the second treaty in a fashion compatible with their obligation under the first treaty.

[259] International Law Commission *Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'* para 229. Finalized by Martti Koskeniemmi. 58th Session (1 May-9 June and 3 July-11 August 2006), Geneva, http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, Accessed 19 December 2022.

> In its Report on fragmentation, the ILC mentions no fewer than forty-four times the issue of 'compatibility' and only about twenty times the question of 'coherence', to conclude that 'coherence is, however, a formal and abstract virtue'. Moreover, compatibility is seen by the ILC essentially as a necessary corollary of the so-called principle of harmonization."[260]

Views on the value of harmonization are therefore, not unanimous. In 'The Myth of Harmonization of Laws', Boodman further opines that "harmonization of law is conceptually and methodologically indeterminate and, to a great degree, redundant in a legal context".[261] He states:

> "[H]armonization as described in the comparative law literature regarding inter-jurisdictional transactions is either redundant because it already exists, or meaningless because it describes any and every comparative legal analysis. As a model for law reform, *to the degree that the comparative law notion eschews diversity it cannot be harmonization*. The unavoidable conclusion is that in a legal context harmonization is merely synonymous with the process of problem solving and is as infinite in its configurations as are potential problems in law. Outside the context of a legal problem and without a prior justification, harmonization of law is unintelligible as an objective or basis for law reform despite its ostensible application to inter-jurisdictional transactions. Therefore, harmonization of law per se has no general meaning, is not

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[260] Laurence Boisson de Chazournes and Makane M Mbengue, 'A "Footnote as a Principle". Mutual Supportiveness and Its Relevance in an Era of Fragmentation' (7 October 2011) 2 *Coexistence, Cooperation and Solidarity - Liber Amicorum Rüdiger Wolfrum*, 1615-1638 (1622), Holger P Hestermeyer and others (eds.), <https://ssrn.com/abstract=2336979> Accessed 19 December 2022.

[261] Martin Boodman, 'The Myth of Harmonization of Laws' (Autumn, 1991), 708, 39(4), American Journal of Comparative Law (American Society of Comparative Law), 699-724.

> theoretically justifiable and evokes no particular methodology or model. Harmonization of law is at best a pragmatic or grounded concept in that it cannot be dissociated from its particular context or applied use."[262]

So, as discussed earlier, the notion of harmonization is useful when promoting coherence between two international institutions and their normative instruments. It constitutes the first of the two basic principles that this work discusses and applies to reconcile the regimes of trade and cultural goods (where mutual supportiveness is the second). However, most authorities recognise that the goal and the principle of harmonization have limitations.

These bounds include the fact that (at least according to Boodman) harmonization can only be applied within a specific context—otherwise, it requires such 'diversity' (or adaptability to a variety of particular circumstances) that the concept may lose its analytical value. Mindful of this consideration, this study restricts its scope to harmonization in the context of the hard law emanating from the WTO and UNESCO regarding trade in cultural goods. The meaning of harmonization is thus to produce coherence among the two regimes, through binding normative amendments and mandatory institutional approaches, as they address trade in cultural goods. This chapter will assess the practicability of this argument.

In theory, international law is achieved by the consent of States to be bound mostly by written treaties—which tend to unify and homogenise States' obligations within a given sphere of application. Thus, where harmonization efforts are successful, States also consent to be bound by the terms of harmonization and by the nature of hard law.

A final consideration is that, while this study sees harmonization as an approach best suited to hard-law instruments (and views the principle

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[262] ibid, emphasis added.

of mutual supportiveness as the best approach for soft law), other scholars view harmonization as a viable means of approaching fragmentation in soft law. Mistelis, for instance, notes that "statutory law is subject to interpretation by courts or administrative authorities often to the effect that law in action has little in common with law in books. Soft harmonization provides for a flexible and effective convergence of legal systems".[263] However, Mistelis appears to restrict his reading to the sphere of "commercial law, such as codification of customary law or trade usages".[264]

Therefore, within the limits of public international law, this work holds that the intrinsic relationship between hard law and harmonization retains its analytical value. However, as this chapter shows, these two concepts share the same limitations that lead Mistelis to discourage its use with soft law: implementing law in action may have little to do with law in books.

4.1.2 Concepts

This section contains two concepts: it explains harmonization in the WTO Agreement and UNESCO CDCE, and reviews the dispute settlement mechanisms of the two treaties. The concept of harmonization does not figure explicitly in the language of either text, but its status as a general principle of international law (under the ILC's definition) requires its use when dealing with normative conflict between the two. Understanding the dispute settlement mechanisms is important, since they describe the procedures that must apply in the case of a treaty violation that demonstrates the existence of normative incoherence.

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[263] Loukas A Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform–Some Fundamental Observations', (Fall 2000) 34(3), *The International Lawyer*, 1055-1069 (1060), Foreign Law Year in Review: 1999.

[264] Ibid.

4.1.2.1 Harmonization in the UNESCO CDCE

The UNESCO CDCE contains no provision or vocabulary that easily lends itself to harmonization. (Section 4.3 will address this limitation in full.) However, negotiations on Article 20 of the document, specifying its relationship to other treaties, resulted in this annotation from Mexico:

> The instrument of ratification contained the following reservation:
>
> "Reservation: The United Mexican States wishes to enter the following reservation to the application and interpretation of Article 20 of the Convention:
>
> (a) This Convention shall be *implemented in a manner that is in harmony and compatible* with other international treaties, especially the Marrakesh Agreement Establishing the World Trade Organization and other international trade treaties."[265]

The absence of language supporting harmonization between the UNESCO CDCE and the WTO Agreement could thus only have resulted from deliberate consideration. However, as Chapter 5 will show, Article 20 also includes language of 'mutual supportiveness' —an alternative route to harmonization.

4.1.2.2 Harmonization in WTO Law

Unlike its status within the UNESCO CDCE, harmonization is a familiar concept within WTO law. DSU Article 3.2 requires that laws subject to the WTO be constructed "in accordance with customary rules of interpretation of public international law".[266] The ILC Report details:

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[265] 'Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (UNESCO, 2016), http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html, Accessed 19 December 2022. Emphasis added.

[266] *Agreement Establishing the World Trade Organization*, Annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes).

> "Although… it has sometimes been suggested that the WTO covered treaties formed a closed system, this position has been rejected by the Appellate Body in terms that resemble the language of the European Court of Human Rights, noting that WTO agreement should not be read 'in clinical isolation from public international law'. Since then, the Appellate Body has frequently sought 'additional interpretative guidance, as appropriate, from the general principles of international law'.… There seems, thus, little reason of principle to depart from the view that general international law supplements WTO law unless it has been specifically excluded and that so do other treaties which should, preferably, be *read in harmony* with the WTO covered treaties."[267]

It is possible that Mexico's note on the UNESCO CDCE and the ILC's rendering of the Appellate Body's position both use the expressions 'implemented in harmony' and 'read in harmony' in a manner somewhat distinct from this study's concept of harmonization. Where 'implementation in harmony' seems closer to the concept of mutual supportiveness, 'reading in harmony' (as the ILC uses the term) appears closer to the notion of interpretation. The similar wording should not confuse the distinct practical meaning of the methods themselves. This study restricts its definition of 'harmonization' to the three approaches defined in the introduction.

Elsewhere in this work, the language of 'harmonization' in the SPS Agreement and TBT Agreement, has been explored at some length. SPS Agreement Article 3 and TBT Agreement Article 2.4-2.6 both describe

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[267] International Law Commission *Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'* para 165-168. Finalized by Martti Koskeniemmi. 58th Session (1 May-9 June and 3 July-11 August 2006) Geneva <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> Accessed 19 december 2022.

the concept of 'harmonization'. These WTO covered agreements use the concept to describe adherence of national legislation to international technical standards, as the other understanding of harmonization, rather than bringing international instruments into consonance. Nonetheless, the use of technical standards as an instrument to achieve harmonization may provide context for how the term might find application between international regimes.

4.1.2.3 Review of the Dispute Settlement Procedures of the UNESCO CDCE and the WTO Agreement Regarding Trade in Cultural Goods

An efficient dispute settlement mechanism is essential for the functioning of the WTO system.[268] As stated in DSU Article 3.2, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system".

The WTO dispute settlement mechanism contains distinctive characteristics. When a WTO Member requests consultations as technically the first stage in dispute settlement, with any other WTO Member concerning any issue under an agreement covered by the WTO Agreement (as defined in DSU Article 1), the dispute settlement mechanism of the WTO[269] is triggered. This is so even if the matter raises issues involving more sensitive questions such as health, environmental protection, public morals, or national security.[270]

The provisions of the WTO came into force on 1January 1995; while the Convention was ratified on 18 March 2007.Therefore, if a conflict

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[268] Tania Voon, 'UNESCO and the WTO: A Clash of Cultures?' (2006) 55(3), *International and Comparative Law Quarterly*, 635-651 (645).

[269] See Eric Canal-Forgues *Le règlement des différends à l'OMC* (1st edn, Bruylant 2008).

[270] Tania Voon, 'UNESCO and the WTO: A Clash of Cultures?' (2006) 55(3), *International and Comparative Law Quarterly*, 635-651 (647).

arises, both agreements are enforceable.[271] There is no international tribunal that can enforce both treaties in a cumulative and simultaneous manner. It is true that there is no real enforcement by the UNESCO Dispute Settlement Mechanism in the UNESCO CDCE, but, neither WTO Panels nor the Appellate Body can enforce the UNESCO *per se*.

UNESCO's dispute settlement mechanism is very different from that of the WTO. Only some provisions in the UNESCO CDCE, e.g. Articles 19, 20 and 25 are worded in an obligatory manner.[272] (One might wonder what disputes are likely to arise out of a UNESCO CDCE with so few obligations.) Even so, the mechanism exists, albeit at the price of an opt-out clause that allows any Party to deny its recognition. This is important with respect to how the Convention fits in with the rest of international law.[273]

The dispute settlement procedure reflects the mandatory aspects of the UNESCO CDCE. In comparison with the WTO's DSM , UNESCO's DSM is much weaker in practice. This can be concluded from three differences that exist between the two systems. First, while the Member States of the WTO are obliged to accept the WTO's DSM, the Members of the UNESCO CDCE are free to accept or refuse the dispute settlement procedures when ratifying the Convention. Additionally, the decisions of the WTO's DSB are binding on all Members; whereas the Convention can just propose its solution for resolving the dispute between the Parties. Finally, the The WTO's decisions are obligatory, binding, and can impose sanctions against any Member that does not implement

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[271] Jan Wouters and Bart De Meester *Cultural Diversity and The WTO: David Versus Goliath?* (1st edn, Leuven Centre for Global Governance Studies 2007) 10.

[272] UNESCO CDC Articles 19, 20 and 25.

[273] Nina Obuljen and Joost Smires *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making it Work* 'Chapter 4: The Convention as a response to the cultural challenges of economic globalization' (Institute for International relations 2006) 83.

the recommendations and rulings of the DSB upon adoption of the Panel and Appellate Body Reports.[274]

The WTO Dispute Settlement System

The DSU was established to regulate the dispute settlement mechanism of the WTO. The DSU is an interpretation and expansion of GATT Articles XXII and XXIII, which were not modified in the Uruguay Round. In particular, GATT Article XXII emphasises the importance as well as the mandatory nature of consultation, declaring that:

> "1. Each contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting Party with respect to any matter affecting the operation of this Agreement.
>
> 2. The Contracting Parties may, at the request of a contracting Party, consult with any contracting Party or Parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.
>
> These Articles were the source for dispute settlement in the GATT system. As all of the agreements attached to the Marrakesh Agreement depend on GATT Articles XXII and XXIII or similar provisions as sources for dispute settlement, they are also in the WTO system. Under Article XXII a WTO Member may request consultations with another Member concerning any issue that nullifies the benefits of an Agreement.
>
> Article XXIII provides for consultations and dispute settlement procedures where one Member considers that another Member is failing to carry out its obligations under the Agreement. There are four stages in WTO dispute settlement: consulta-

[274] ibid 602.

tions, the panel process, the appellate process, and surveillance of implementation."[275]

The UNESCO CDCE Dispute Settlement System

Under the UNESCO system, if one Party refuses to submit to conciliation or appeal to the ICJ, the case would face a deadlock[276]. It would be adjudicated in non-cultural international bodies. A conciliation mechanism avoids such an outcome for the dispute.[277]

Only eight out of the 28 conventions[278] adopted in UNESCO, since its foundation in 1945 till 2017, have addressed the issue of a dispute settlement procedure. They can be classified into three approaches. Firstly, if both Parties have accepted the ICJ Statute, they should refer the dispute to the Court, unless they have another agreed approach to dispute settlement. If one Party is not a Member of the Court, they would refer their case to an arbitral tribunal. Secondly, the Parties could refer their case to UNESCO's Director-General through a bilateral agreement. Thirdly, if settlement is not achievable by negotiation,[279] the

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[275] ibid.

[276] Conciliation has been defined as 'an intervention to resolve an international dispute by a body without political authority that has the trust the trust of the Parties involved and is responsible for examining all aspects of the dispute and proposing a solution that is not binding for the Parties'.

[277] Sabine von Schorlemer and Peter-Tobias Stoll, *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (first ed., Springer 2012), 607.

[278] UNESCO 'All Conventions' <http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html>, Accessed 19 December 2022.

[279] The Negotiation is defined as a 'search for a solution to something that is commonly found in many treaties'. Gerhard Von Glahn, *Law Among Nations* (1st ed. Macmillan, 1976), 485.

Parties can resort to the use of good offices or mediation by a third Party.[280]

The UNESCO CDCE follows the third approach and, in addition, it recognises conciliation procedures according to the content of the Annex of the Convention.[281] Article 25 of the UNESCO CDCE applies to negotiations, good offices, or mediation by third Parties, however, the last paragraph shows that Article 25 fails to provide binding legal commitments in the event of a dispute. It states:

> "1. In the event of a dispute between Parties to this Convention concerning the interpretation or the application of the Convention, the Parties shall seek a solution by negotiation.
>
> 2. If the Parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third Party.
>
> 3. If good offices or mediation are not undertaken or if there is no settlement by negotiation, good offices or mediation, a Party may have recourse to conciliation in accordance with the procedure laid down in the Annex of this Convention. The Parties

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[280] According to Article 25 para. 2, if the Parties could not reach to an agreement through negotiation "they may jointly seek the good offices of, or request mediation by a third party" which can be started by the voluntarily agreement of the relevant Parties. The good office is the preliminary stage for the start of the negotiations in which one party tries to persuade other Parties to enter the dispute settlement processes. It is specially practiced when the Parties have even broken off the diplomatic relations. But in mediation the third party goes one step forward, suggesting terms of the settlement. See Sabine von Schorlemer and Peter-Tobias Stoll, *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (first ed., Springer 2012), 610. See also Eric A. Schwartz, 'International Conciliation and the ICC' 16(2), *ICSID Foreign Investment Law Review* (2001)98-119 (111).

[281] *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, op. cit., 601.

shall consider in good faith the proposal made by the Conciliation Commission for the resolution of the dispute.

4. Each Party may, at the time of ratification, acceptance, approval or accession, declare that it does not recognize the conciliation procedure provided for above. Any Party having made such a declaration may, at any time, withdraw this declaration by notification to the Director-General of UNESCO.

Conciliation is a mechanism that would open a new window for cultural considerations and pave the way for resolving conflicts. But these non-compulsory mechanisms are weaker than the compulsory WTO dispute settlement mechanism.

The limited commitments imposed by UNESCO CDCE reduce the possibility of disputes between the Parties, providing for conflict settlement based on cultural considerations, rather than the economic aspect of the disputes. In other words, a necessary (but missing) part of the puzzle is for UNESCO to have a dispute settlement system benefiting from a clearer cultural interpretation and application of the UNESCO CDCE to settle the conflict regarding the limited commitments and the WTO provisions."[282]

Ideally, in the case of conflict potential between the substantive dispute settlement provisions of the UNESCO CDCE and the WTO Agreement, the problems should be solved by both the WTO and UNESCO CDCE legal regimes, using mutual supportiveness. But, the WTO DSB only takes into account its own agreements and the Vienna convention.

In line with Article 21 of UNESCO CDCE, not only do Parties agree to endorse the aims and values of the CDCE in alternative international platforms but in addition they shall "consult each other, as appropriate, bearing in mind these objectives and principles". The initial account of

[282] ibid 603, 604.

this Article in the Preliminary Draft Convention arranged that this consultation would occur within UNESCO.[283] During the talks, the allusion to UNESCO was eliminated, leaving it to the Parties to arrange consultations.

However, the CDCE also gives a mandate to the intergovernmental Committee to "establish procedures and other mechanisms for consultation aimed at promoting the objectives and principles of the Convention in other international forums".[284] Currently, it is difficult to say when and how these measures and instruments will be implemented. Article 21 was not among the provisions of the CDCE recognised by the Conference of Parties for priority consideration by the Intergovernmental Committee. One could say that this idea is not considered as requiring organisations as a priority.

4.1.3 Preliminary Conclusions on Harmonization

In the context of public international law, harmonization finds similarities between two potentially clashing normative instruments, producing a coherent normative framework for subsequent application and enforcement. Relating the method of harmonization to the context of hard law requires inquiry into the inherent limitations of each concept, thereby ensuring that harmonization is an applicable approach in this context.

Harmonization by way of hard law is an appealing strategy to enhance coherence between the legal regimes of international institutions, primarily because hard law is binding. Nonetheless, applying the understanding of legal scholars to the concept, it appears that its scope is, at least, limited.

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[283] Preliminary Draft Convention, Article 13.

[284] *Convention on the Diversity of Cultural Expressions*, Article 23(6)(e).

The UNESCO CDCE does not seem at present to contain provisions that would lend themselves to harmonization: indeed, negotiators considered, and excluded, a provision using the word 'harmony'.

Within WTO law, harmonization is an accepted principle, already forming part of at least two instruments: the SPS Agreement and the TBT Agreement. However, in these Agreements, the concept describes the harmonization of national legislation, not of international norms.

To investigate the practicability and utility of harmonization to enhance coherence between the WTO and UNESCO legal regimes as regards cultural goods, it is necessary to examine the norms that are presently in a state of fragmentation. This work now investigates the norms relevant to trade in cultural goods, examining several provisions in detail.

4.2 Normative Incoherence: Fragmentation of Norms between the UNESCO CDCE and the WTO's GATT and SCM Agreement as they Concern Trade in Cultural Goods

The WTO website states that:

> "Most of the WTO agreements are the result of the 1986–94 Uruguay Round negotiations, signed at the Marrakesh ministerial meeting in April 1994. There are about 60 agreements and decisions totaling 550 pages. Negotiations since then have produced additional legal texts such as the Information Technology Agreement, services and accession protocols."[285]

In matters relating to trade in cultural goods, the GATT describes NT and MFN aspects of the non-discrimination principle that Chapter 2 deals with. The SCM Agreement addresses subsidies and the conditions

[285] WTO *Legal Texts* <https://www.wto.org/english/docs_e/legal_e/legal_e.htm>, Accessed 19 December 2022.

under which they are permissible, actionable, or prohibited. Subsidies, as this section shows, are an intrinsic part of UNESCO CDCE's provisions whereby States can protect their cultural goods.

The UNESCO CDCE is specifically designed to define and protect 'cultural expressions' (which includes cultural goods, along with cultural services and cultural activities). In contrast, the GATT although distinguishing between categories of products such as 'goods' and 'services', does not permit discrimination between products based on status as cultural expressions.

The norms this study examines are those appearing most relevant to its subject matter. Other potentially problematic provisions may exist between the WTO Agreement and UNESCO CDCE. Methodologically, since the scope of this work is restricted to the category of 'cultural goods', it will examine the norms specific to that category first. This reverses the historical order in which the relevant norms were adopted: both the GATT and the SCM Agreement predate the UNESCO CDCE.

4.2.1 The UNESCO CDCE's Relationship to Other Conventions

4.2.1.1 UNESCO CDCE Article 20

This chapter has already noted that Article 20 was a point of significant discussions during negotiations, and the need to eliminate ambiguity within this provision and the UNESCO CDCE in general. This section examines that ambiguity. As one of the instrument's key provisions, Article 20 deals with the relationship between the UNESCO CDCE and other international instruments, such as the WTO Agreement. It states:

> "1-Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, *without subordinating this Convention to any other treaty*,

a) they shall foster mutual supportiveness[286] between this Convention and the other treaties to which they are parties; and

b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

2-*Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties* to which they are parties."[287]

The problem is as follows: due to ambiguity in multilateral negotiations and an unresolved dispute between advocates of culture and advocates of trade during negotiations, the text of this provision is vague and almost contradictory. For instance, Article 20(1) (sentence 1) of the UNESCO CDCE advocates adherence to current commitments under international law. Simultaneously, UNESCO CDCE Article 20(2) reads that "nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties subject to any other treaties to which they are Parties."

The *Vienna Convention on the Law of Treaties* (VCLT) Article 30(2) states that: "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." According to its own Article 20(2), then, the UNESCO CDCE would therefore seemingly be subordinate to treaties that predate it.

One way of looking at it would be to say that the UNESCO CDCE does not clearly define its sphere of dispute settlement, and thus implicitly provides for possible conflict with the WTO Agreement. Therefore,

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[286]As this work has already noted, the next chapter will assess the notion of 'mutual supportiveness'. Section 4.3 of this chapter further examines UNESCO CDC Article 20 in attempts to harmonize the treaty with the WTO Agreement.

[287] Emphasis added.

amending Article 20 to clarify these questions is one possible way to reach harmonization between the two.

However, Article 20(1) (sentence 2) of UNESCO's CDCE states, in plain language, that it is not subordinate to other treaties. For instance, recitals 10 and 11 of the Preamble to the *International Treaty on Plant Genetic Resources for Food and Agriculture* (ITPGR, signed in 2001) say:

Affirming that nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements;

Understanding that the above recital is not intended to create a hierarchy between this Treaty and other international agreements …

Also, the Preamble to the *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* reads, in part:

Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,

Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements.

If the application clause (Article 30) of the VCLT were ever invoked to resolve the question of a hierarchy between treaties, it would be difficult to determine whether the law of the WTO or UNESCO CDCE would predominate. The answer to this question would also depend on where the matter is debated—before a WTO judge or before a UNESCO mechanism.

In summary, it does not matter where the debate takes place, there is equality in the relationship, between the WTO and UNESCO CDCE. If the principle of mutual supportiveness is left aside, the manner of choosing between these forums would be similarly indeterminate.

4.2.1.2 Incorporating the UNESCO CDCE into the WTO's Covered Agreements

In tandem with such an amendment, incorporating the UNESCO CDCE into the WTO's system of covered agreements, would probably be an effective measure to protect the cultural aspect of the cultural goods in trade, in the same way as the commercial value is protected.

DSU Article 1 prescribes that its provisions should apply to disputes between WTO Members, pursuant to the dispute settlement provisions of the covered agreements listed in DSU Appendix 1.

Normatively speaking, a technical clause instructing Members to take note of the UNESCO CDCE when interpreting and employing WTO law, or in the context of trade talks, might bring the Convention under the covered agreements in the form of a Ministerial Decision. Wouters and Vidal extensively outline the context which would make this approach possible:

> "Apart from steering trade negotiations, it was hoped that the Convention [i.e. UNESCO CDCE] would succeed in introducing a 'cultural exception' from the outside into existing WTO law, which would have to be taken into account by the Organization's dispute settlement mechanism. Yet, the recent WTO panel report in the case of *European restrictions on biotechnological products* does not bode well for the potential of the Convention. In this case, a convention with a similar bearing, the *Convention on Biological Diversity*, was invoked by the European Communities. The Panel held that, since this Convention has not been ratified by the United States, it is thus not applicable to it. It continued: 'We have said that if a rule of international law is not applicable to one of the Parties to this dispute, it is not applicable in the relations between all WTO Members. Therefore, in view of the facts that the United States is not a party to the *Convention on Biological Diversity*, we do not agree with the European Communities

> that we are required to take into account the *Convention on Biological Diversity* in interpreting the multilateral WTO agreement at issue in this dispute. Furthermore, the Panel adopted a cautious approach about the customary status of the precautionary principle implicit in the *Convention on Biological Diversity*, and, referring to the ruling of the Appellate Body in the 1998 *Hormones* case, refrained from 'resolving this complex issue'. It has for this reason been suggested that an explicit link to the Convention be introduced in the law of the WTO by means of a procedural interface, possibly in the form of a Ministerial Decision adopted by the WTO Members. It remains to be seen whether this suggestion is realistic and whether it can really contribute to the strengthening of the importance of cultural diversity within the WTO."[288]

Thus, implementing a Ministerial Decision would be slightly more complex than it might initially appear. (Chapter 5 will take up this subject matter again, in the context of mutual supportiveness.) The WTO's Panels and Appellate Body must settle disputes on the basis of WTO covered agreements. The two bodies are prohibited by Article 3(2) DSU from adding to or diminishing the rights and obligations in these agreements, including the GATT.

Such integration would remedy the deficiencies of the CDCE. It would establish a legal system for cultural goods, detailing relevant implications, and offering viable solutions. Incorporating the UNESCO CDCE into the WTO's list of covered agreements would thus apply the WTO's highly effective enforcement mechanisms to provisions protecting culture.

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[288] Jan Wouters and Maarten Vidal, 'UNESCO and the Promotion of Cultural Exchange and Cultural Diversity', in Abdulqawi A. Yusuf (ed.), *Standard-Setting in UNESCO Volume I: Normative Action in Education, Science and Culture* (UNESCO/Nijhoff 2007), 166.

The UNESCO CDCE's dispute settlement provisions, however, lack binding enforcement against violations of the treaty. As this work observes elsewhere, its present weaknesses also include selective implementation by Parties in cases of conflict with other international regimes. The WTO DSU provides a much more effective regime for dispute resolution.

4.2.2 The WTO Agreement and Cultural Goods

Understanding the effects of WTO law on the status of cultural goods requires an examination of the WTO norms that govern trade in goods, and measures (such as subsidies) that States might use to protect cultural goods. Since the Uruguay Round of negotiation established the WTO's treaties as a 'single undertaking',[289] meaning that all covered agreements apply cumulatively and simultaneously, one treaty's provisions provide mandatory context for another treaty's provisions.

The GATT prescribes general trade principles, including trade in goods. The SCM Agreement defines and regulates subsidies (as this chapter shows later, subsidies are an important mechanism to protect cultural goods under the UNESCO CDCE). The GATS governs trade in services, and contains cultural exemptions that may be relevant for trade in goods. This study examines each treaty in this section.

Analysing GATT provisions is fundamental to understanding how the WTO governs trade in goods. GATT Article I deals with MFN treatment; Article III with NT; and Article XVI mentions that subsidies must be assessed to see whether they cause serious prejudice (a theme taken up in more detail under the SCM Agreement). Article XX deals with exceptions to the general rules.

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[289] Patrick Low, 'WTO Decision-Making for the Future' (Staff Working Paper ERSD-2011-05 2011), <https://www.wto.org/english/res_e/reser_e/ersd201105_e.pdf> Accessed 19 December 2022.

4.2.2.1 Non-Discrimination and General Exceptions under GATT

Non-discrimination encompasses two key concepts: MFN treatment and NT, which are included both in GATT and GATS. Since this work is concerned with cultural goods, and not services, it will address the relevant GATT provisions only.

Article I:1 of the GATT specifies the concept of MFN treatment as:

> "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the *like product*[290] originating in or destined for the territories of all other contracting parties."

For its part, GATT Article III:2 defines NT as:

> "The products of the territory of any contracting Party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to *like domestic products*."[291]

Thus, both of the key concepts of non-discrimination depend on whether the products (for the purposes of this research, goods) are considered 'like', as described in Chapter 2. The concepts differ in that MFN treatment applies to preferential treatment toward goods 'originating in or destined for' another country, while NT applies to goods once they have crossed into domestic territory and compete with domestic goods.

As Chapter 3 shows, UNESCO's terminology of *cultural* goods considers cultural goods to be distinctive from like products. The GATT sees these goods as 'like products' that must receive equal treatment

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[290] Emphasis added.

[291] Emphasis added.

without the protection of, for example, subsidies or tariffs, regardless of their national origin. According to precedent, to apply harmonization for the benefit of the protection of cultural goods through hard law, it is more convenient, to use GATT Articles I:1 and III:2.

As this work has shown, the primary existing way to cohere the UNESCO CDCE's protection mechanisms with the GATT's non-discrimination principle is to invoke GATT Article XX. Article XX contains the 'General Exceptions' clauses, indicating situations where WTO Members may discriminate between traded goods. The exception clauses provide an insight into the considerations that the drafters of the GATT considered rose above the GATT's strict trade-only interests.

Article XX's 'Chapeau' reads:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> In other words, for one of the exceptions in the Article XX list to apply, States would have to demonstrate that their measures fulfilled a cumulative list of preliminary conditions:
>
> 1) The measures should not be applied in a manner constituting arbitrary discrimination;
> 2) The measures should not be applied in a manner constituting unjustifiable discrimination;
> 3) This discrimination should not take place between countries where the same conditions prevail;
> 4) The measures should not constitute a disguised restriction on international trade."

Article XX contains several permissible exceptions. Chapter 3 has shown examples of how protecting cultural goods may meet the stand-

ard of Article XX. GATT Article XX(f) deals with protection of 'national treasures of artistic… value' and contains, in passing, particular relevance for the cultural provisions of the UNESCO CDCE. GATT Article XX(a) contains exceptions for 'public morals', of which the human right to participate in cultural life (under Article 15[1][a] of the ICESCR arguably forms an example). Chapter 3 demonstrates that paragraph 6 of General Comment 21 to Article 15 explicitly records 'access to cultural goods' as forming part of that right.

In summary, harmonizing the WTO Agreement and UNESCO CDCE with respect to cultural goods could include expanding Article XX's exceptions to explicitly include considerations relating to cultural goods, or, to recognise the human rights legal system as constituting a code of public morals.

4.2.2.2 The GATS Approach: A Successful Approach within WTO Law to Cultural Exemptions on Trade in Services

While services lie outside the scope of this work, GATS exceptions on trade in services might serve as a functional model for modifying existing regulations on trade in goods, allowing for cultural exceptions.

The GATS is briefly addressed and used as a kind of model, while examining GATS-related aspects and analysing its agreement could be used as an example to follow but not necessarily as "the perfect example".

Closely mirroring GATT provisions, GATS Article II defines MFN treatment, and GATS Article XVII:1 defines NT.[292] GATS Article XIV permits general exceptions in virtually identical language to that of GATT Article XX.

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[292] This work notes that the scope of non-discrimination principles (both NT and MFN) and market access is much more extensive in GATT than in GATS. This poses a problem for harmonization with the UNESCO CDC, which is to encounter NT and MFN obstacles under GATS.

Part III outlines 'Specific Commitments'. Article XVI:1 defines 'market access' within the limits of a Schedule of services that a Member may define. The NT provision, Article XVII:1, also specifically calls for application subject to a Schedule.

GATS Article XX defines Schedules (an approach that was considered innovative during the time of the Uruguay Round), which includes cultural services. The provision reads:

> "1-Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:
> 2-Terms, limitations and conditions on market access;
> (b)conditions and qualifications on national treatment;
> (c)undertakings relating to additional commitments;
> (d)where appropriate the time-frame for implementation of such commitments; …
> […]
> 3-Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof."

In contrast of GATS, decades-old conflicts while developing the GATT had not concluded whether to consider cultural subsidies as exceptions. Alternative concessions endure from these negotiations, subject to the laws of the WTO, such as the GATT rules as involving cinematographic films, as Article IV illustrates regarding the special provisions related to cinematograph films and payments for some subsidies.[293] GATT's 'negative list' approach to MFN (procedures inscribed

[293] Tania Voon, 'Substantive WTO Law and the Convention on the Diversity of Cultural Expressions', in Toshiyuki Kono, Steven Van Uytsel (eds.), *The UNESCO Convention on the Diversity of Cultural expressions: A Tale of Fragmentation in International Law* (Intersentia 2012), 277.

on a Member's list are discharged) also permits adaptability regarding culture.

Such cultural concerns also led to a unique structure for GATS. During the Uruguay Round, the European Commission objected to the progressive liberalisation of the audiovisual sector, favouring the cultural specificity clause in GATS Article XV (subsidies) and the Annex on Article II (MFN Exemptions).[294]

Furthermore, GATS Article II(2) was drafted to state: "A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions". This allows Members to grant some partners greater market access than the standard it sets for others, provided that they include such a provision in their Exemptions.

The cultural provisions in the GATS might serve as a model for similar considerations in the GATT, given the much larger volume of trade in services than in goods, and that services (such as the provision of film and music) embody the cultural market in ways that goods do not.

The GATS' 'positive list' approach does not resolve all problems regarding trade in services. Burri, for instance, notes that

> "On the eve of the Marrakesh talks, without striking any concrete deal, the EU and US basically agreed to disagree on addressing

[294] Toshiyuki Kono and Steven Van Uytsel, 'The Convention on the Diversity of Cultural Expressions' in Toshiyuki Kono and Steven Van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural expressions: A Tale of Fragmentation in International Law* (Intersentia 2012), 12. Also see S Cahn and D Schimmel, 'The Cultural Exception: Does it Exist in GATT and GATS Frameworks? How Does it Affect or is it Affected by the Agreement on TRIPS?' 15 *Cardozo Arts and Entertainment Law Journal* (1997), 294-5.

> cultural matters, and this is reflected in the design and substance of WTO law, in particular in the rules on trade in services."[295]

It is important to note that as early as 1998, the WTO's Council for Trade in Services stated its view that

> "[a]udiovisual services typically reflect the social and cultural characteristics of nations and their peoples, and are consequently regarded as being of great social and political importance. For these reasons, government regulations and public support programmes play a major role. The regulations on audiovisual services concern not only social and cultural issues, but also the promotion of domestic industry and foreign content restrictions. To accommodate rapid technological change and the new multimedia services, governments will, according to the OECD, need to modify their regulatory structures. The social and economic issues at stake, however, are both important and complex, and they were reflected in the discussions on this sector during the Uruguay Round."[296]

The Council's recognition of the tensions between these diverse interests allude to the need for a well-considered approach to international regulations governing cultural products, including both services and goods.

Considering the above, under GATS Article XX, a 'positive list' method governs market access and NT obligations: commitments exist to the degree that Members approve them. The EU and its Member States, along with Canada, Switzerland, and other Members of the WTO

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[295] Mira Burri, 'The Trade Versus Culture Discourse: Trading its Evolution in Global Law', in Valentina Vadi and Bruno de Witte (eds.), *Culture and International Economic Law* (Routledge 2015), 110.

[296] Mira Burri, 'The Trade Versus Culture Discourse: Trading its Evolution in Global Law', op. cit., 110.

that wish to retain legislative sovereignty in the sphere of culture, have refrained from GATS obligations on culture: audiovisual media, computer software, entertainment, museums, and education.

Thus, the GATS approach permits more flexibility. It includes measures to protect cultural services if a Member so chooses, provided that the Member makes its wishes clear prior to acceding to the WTO Agreement. Graber explains that

> "GATS schedules of specific commitments and MFN exemptions exemplify the flexible liberalization method provided by the WTO. Articles XVI and XVII GATS oblige Members to apply the principles of market access and national treatment to those subsectors and divisions of subsectors specifically included in their lists of commitments. If a certain subsector or division is covered, the Member must specify any limitation of the commitment in the list. The MFN principle, although a generally applicable obligation, also allows for flexibility under GATS: Article II(1) GATS obliges Members to conform to the principle. However, Article II(2) GATS allows Members to exempt certain measures from the obligation provided that at the moment of the entry into force of the WTO agreement this measure was specifically listed in the Member's list of exemptions."[297]

In summary, proposals to harmonize WTO law (especially GATT) with the UNESCO CDCE could look to the GATS positive list approach. Thus, with respect to cultural goods, the GATT general rules (specifically, NT and MFN provisions) could be amended to resemble GATS Article XX to accommodate, inter alia, cultural subsidies. However, the proposals to harmonize UNESCO CDCE with the GATT have

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[297] Christoph Beat Graber, 'The New UNESCO Convention On Cultural Diversity: A Counterbalance To The WTO?' (2006) 9, *Journal of International Economic Law*, 569.

not been agreed, which means that this solution is not feasible. The approach of allowing Members to create Schedules of goods they wish to exempt from GATT regulation would provide the space necessary to implement the cultural sovereignty that the UNESCO CDCE guarantees.

4.2.3 Subsidies

4.2.3.1 Subsidies in WTO Law

Since Article XX does not recognise cultural exceptions to the status of goods as like products, the WTO system as a whole does not presently recognise any legitimate means, including subsidies, to protect cultural goods. The above understanding of the GATT must take into account the SCM Agreement's definitions of 'prohibited' and 'actionable' subsidies: subsidies that are considered 'specific' under the latter agreement and thus may cause serious prejudice or adverse effects to other Members' interests.

Article 1 defines subsidies; Article 3 defines prohibited subsidies (or 'red-light subsidies'), and Articles 5-7 (Part III) define actionable subsidies ('amber-light subsidies'). (Articles 8 and 9, or Part IV, describe non-actionable subsidies, or 'green-light subsidies'. This category of Green subsidies expired on 31 December 1999.)[298]

Prohibited subsidies contain two categories. First, Article 3(1)(a) prohibits subsidies contingent in any way upon export performance. Second, Article 3(1)(b) prohibits subsidies contingent on using domestic over imported goods.

Actionable subsidies are those that cause 'adverse effects', as Article 5 states. Such adverse effects include 'injury' to the domestic industry of another Member, 'nullification or impairment of benefits' accruing to

[298] WTO agreement *on Subsidies and Countervailing Measures*, <https://www.wto.org/english/tratop_e/scm_e/subs_e.htm>, Accessed 19 december 2022.

other Members, or 'serious prejudice' to the interest of other Members. (Article 6 exhaustively defines 'serious prejudice'.).

Given that all WTO Agreements form a single undertaking, GATT Article XVI and SCM Agreement Articles 1 and 3 combine to regulate the respective national subsidies Member governments may adopt with relation to cultural goods.

4.2.3.2 Normative Incoherence between Subsidy Provisions of the SCM Agreement and the UNESCO CDCE

This study will now examine the categories of SCM Agreement subsidies that the UNESCO CDCE might allow. The provisions of Article 1.2 refer to conditions under which subsidies would be considered 'prohibited' or 'actionable'.

A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II [prohibited subsidies] or shall be subject to the provisions of Part III [actionable subsidies]… only if such a subsidy is specific in accordance with the provisions of Article 2.

Therefore, by *a contrario* reasoning, non-specific subsidies are not inconsistent with the SCM Agreement. According to Article 2.1(a), a specific subsidy 'explicitly limits access to a subsidy to certain enterprises'. Subparagraph (b) further notes:

> "Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to."

Thus, subsidies intended to promote and protect cultural goods under the UNESCO CDCE would have to be 'non-specific'—granted according to objective criteria and not limited to certain enterprises— to escape prohibition or action under the SCM Agreement. According to Van den

Bossche's work, *Free Trade and Culture: A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures*:

> The *SCM Agreement* distinguishes between four types of specificity:
>
> - *Enterprise-specificity*, i.e. a situation in which a government targets a particular company or companies for subsidisation (e.g. a specific publishing house);
> - *Industry-specificity,* i.e. a situation in which a government targets a particular sector or sectors of the economy for subsidisation (e.g. the national film industry);
> - *Regional specificity*, i.e. a situation in which a government targets producers in specified parts of its territory for subsidisation (e.g. subsidies to promote the culture of a specific region); and
> - *Prohibited subsidies*, i.e. a situation in which a government targets export goods or goods using domestic inputs for subsidisation.

For a subsidy to fall within the scope of application of the *SCM Agreement*, it has to be specific in one of these four ways. Often, a subsidy may not be specific, on its face, but, in fact, operates in a specific manner.[299]

States might thus attempt to protect cultural goods with subsidies that are *de jure* non-specific. It is debatable, however, whether such measures would survive analysis under subparagraph (c). It begins: "If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of

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[299] Peter Van den Bossche. *Free Trade and Culture: A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures* (Boekman Studies 2007), 78.

subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy."

Therefore, *de jure* non-specificity would not be enough. It is likely that subsidies protecting cultural goods would be used by a 'limited number of certain enterprises', or enjoy 'predominant use by certain enterprises', thus constituting *de facto* specificity. However, the subparagraph continues,

> "In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation."

States using subsidies to protect cultural goods might make use of this provision, in claiming that the cultural industry is a necessary diversification of the national economy, or that of the region at issue (if, for example, the subsidy were to protect indigenous or regional arts and crafts).

As this chapter observes below, the UNESCO CDCE clearly endorses subsidies as a primary mechanism to protect cultural goods. Not only do its Operational Guidelines use the exact word in its list of acceptable measures, but the drafting of Article 6(2)(d) fits the definition of a subsidy in SCM Agreement Article 1. However, not all subsidies run counter to the SCM Agreement.

These subsidies will be categorised below:

First, as mentioned above, subsidies that are not 'specific' under SCM Agreement Article 2 are permissible in the WTO system. 'Specificity', in essence, simply requires that subsidies should be granted according to objective criteria and not limited to certain enterprises. Thus, States that wish to subsidise cultural products under the UNESCO CDCE may do so within this limitation. Although the SCM Agreement considers *de facto* specificity to be equivalent to *de jure* specificity, if

necessary, a State could conceivably demonstrate that the subsidy programme was necessary for economic diversification, as foreseen in Article 2(1)(c).

Second, should a WTO Panel or Appellate Body find that subsidies to protect cultural goods were indeed specific, and that the UNESCO CDCE (which does not place limitations on the kind of subsidies) was l*ex specialis* legislation, such an instrument specifically conceived to protect cultural goods.

Finally, should a WTO Panel or Appellate Body find that subsidies to protect cultural goods were specific, and that the UNESCO CDCE was not *lex specialis*, UNESCO might modify its provisions to exclude specific subsidies within the meaning of the SCM Agreement. This possibility would harmonize the two treaties, but would run the risk of neutering the UNESCO CDCE. In this case, the SCM Agreement could be modified to permit cultural subsidies. It is worth mentioning that the issue of subsidies in the audiovisual sector, was the only sector discussed at the time of the adoption of the Convention and no agreement was reached.

Reviving the SCM Agreement's Green-Light Subsidy Category

Part IV of the SCM Agreement details the category of 'non-actionable' subsidies, also known as 'green-light' subsidies. This category expired on 31December 1999. Non-actionable subsidies included subsidies for areas such as industrial research -Article 8(2)(a)- and assistance to disadvantaged regions (Article 8[2][b]). Present-day discussions have focused on the utility of reviving green-light subsidies for matters such as environmental protection (covered under Article 8[2][c]).[300]

[300] Mark Wu 'Re-Examining "Green Light" Subsidies in the Wake of New Green Industrial Policies' *E15 Expert Group on Reinvigorating Manufacturing: New Industrial Policy and the Trade System* 8 <http://e15initiative.org/wp-content/uploads/2015/07/E15_Industrial-Policy_Wu_FINAL.pdf> Accessed 14 June 2017

Wu notes that the environmental provisions in Article 8(2)(c) were never invoked during their five-year existence, but that shifts in energy technology could provide a rationale for re-establishing the category. The need to protect cultural goods could provide a similar rationale.

The category of green-light subsidies could be revived, according to Wu, but this would face certain constraints. He writes:

> "First, at present, the WTO is highly unlikely to embrace any revival of non-actionable subsidies whose primary objective is to expand policy space for enactment of industrial policy, even if it has second-order benefits for the environment. Consequently, any options put forward must lead with environmental interests as its core objective. Therefore, proposals which put increased flexibility for industrial policy first appear to be off-the-table, especially if they contravene provisions found in other WTO agreement.
>
> Second, the divide between developed and developing countries which thwarted Article 8's renewal in 1999 remains. Most developing countries continue to view the revival of non-actionable subsidies as a move that would primarily benefit developed countries and a handful of large developing countries. Developed countries, on the other hand, are loathe to grant special and differential treatment to all developing countries, especially given the rise of China as an industrial power. China and other large developing countries have made it clear that they will not agree to be treated differently from other similarly situated developing countries. Thus, any viable proposal must either extend to all WTO Members, or alternatively, be limited only to a set of developing countries identified through pre-existing objective criteria."[301]

[301] ibid 10.

Reasoning by analogy, the need to protect cultural goods in trade could provide a similar justification as environmental considerations do for reviving the green-light subsidy. Such an amendment to the WTO Agreement would, nonetheless, encounter the same obstacles that Wu lists above. The process would then require a further amendment to include cultural subsidies. The need for this measure might be obviated if States chose to apply subsidies in a non-specific manner, as detailed above. Even if there are some obstacles according to Wu, this proposal still seems feasible.

In summary, there is no normative conflict between the UNESCO CDCE and the SCM Agreement, if Parties do not use specific subsidies while exercising their right to protect cultural goods. It is important to recall that if a State employs a non-specific subsidy based on nationality criteria while aiming to develop its cultural production, it may contradict the National Treatment obligation or the conditions for granting subsidies raised in *Canada–Periodicals*. This is the case even if there is no violation of SCM Agreement.

Amending the SCM Agreement, as long as the conditions for doing so under the Marrakesh Agreement had been complied with, might provide opportunities for States to provide subsidies that the UNESCO CDCE permits to protect cultural goods, while also remaining WTO-consistent. One such amendment might include explicit mention of excluding cultural subsidies as specific subsidies. A primary means to accomplish this would be to revive the 'green-light' subsidy and expand it to include cultural subsidies. These steps would normatively reduce the fragmentation regarding subsidies for cultural goods, and thus have high utility. However, such proposed amendments would more than likely meet with the WTO membership resistance, and would thus not be workable.

4.2.3.3 Enhancing Coherence Between the UNESCO CDCE's Subsidy Provisions and the SCM Agreement

The WTO system considers subsidies a primary mechanism by which Member States might discriminate between goods, or 'protect' them from competition. However, just as not all forms of discrimination are prohibited under the GATT by virtue of the Article XX exceptions, as mentioned above not all subsidies are inconsistent with the SCM Agreement.

The SCM Agreement defines the WTO's approach to subsidies, detailing the conditions under which a subsidy may be considered to fall under one of two categories: 'prohibited' or 'actionable'. (Section 4.3 will assess possibilities involving the expired category of 'non-actionable' subsidies.)

First, this section examines the SCM Agreement's conditions for determining whether a subsidy exists. Article 1 states, in part:

1(1) For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member …and

(b) a benefit is thereby conferred.

Simplifying this provision, the conditions establishing the existence of a subsidy are that there should be:

1) A financial contribution;
2) By a government or 'public body' within the territory of a Member; and
3) A benefit is conferred by this financial contribution

Article 6 of the UNESCO CDCE contains the 'Rights of parties at the national level'. Paragraph1 states that "each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory". Paragraph 2(d) states that "such measures may include… measures aimed at providing public financial assistance".

The plain language of UNESCO CDCE Article 6.2(d) seems to meet the SCM Agreement's first two conditions. Here, 'financial assistance' in the CDCE would almost certainly equal the first condition of 'a financial contribution'; and 'public' would similarly equal the second condition, 'by a government or public body'. In turn, the effect of this 'public financial assistance', expressly 'protecting and promoting' cultural expressions (as noted elsewhere, the UNESCO CDCE specifically identifies cultural goods as a vehicle of cultural expressions), would likely fulfill the third condition of 'conferring a benefit'. Article 6.2(d) of the UNESCO CDCE thus explicitly permits subsidies, as the SCM agreement defines them, to protect and promote cultural goods.

The UNESCO CDCE's Operational Guidelines bolster this reading. The 'Orientations and Measures' section, paragraph 6.4.2, lists acceptable measures to protect culture that include "subsidies, low-interest loans, guarantee funds, microcredit, technical assistance, tax benefits, etc.".

So, harmonization by way of hard law could involve amending WTO subsidy rules, to the effect that if subsidies to cultural goods cause adverse effects, such adverse effects can not be challenged in dispute. In other words, subsidies to cultural goods would become green subsidies, or 'non-actionable' subsidies, as the previous subsection discusses.

4.3 Harmonization by way of Hard Law between the WTO and UNESCO regarding Trade in Cultural Goods

Having identified some of the clashes and inconsistencies between WTO and UNESCO norms and regimes, this study now examines how these inconsistencies, differences and possible conflicts can be reduced and reconciled, technically. The three possible combinations of normative coherence and institutional coordination give rise to three categories of harmonization.

First, this section tests the feasibility of the 'Amendment Approach' regarding trade in cultural goods, between the WTO's GATT and SCM Agreement on one hand, and the UNESCO CDCE on the other, through detailed amendment to the treaties. This work explores the conditions on which this approach would depend, together with the probability of fulfilling these conditions. This work then turns to considerations that would be relevant, should this approach prove feasible.

Second, this section tests the feasibility of the 'Coordination Approach' between the two bodies. Such an approach would facilitate communication between organisations on a case-by-case basis—whether to prevent, to resolve, or to mitigate conflicts as they may arise. It explores the conditions under which this approach may be implemented, along with the likelihood of fulfilling them. It then deals with matters that would arise, should this approach prove feasible.

Finally, this section tests the feasibility of the 'Construction Approach', involving constructing a new mechanism for dispute settlement between the WTO and UNESCO. It defines the conditions on which this approach would depend, and the probability that these conditions would be fulfilled. This section then details factors that would become important, should this approach prove feasible.

These three approaches constitute alternative means of achieving harmonization by way of hard law. If one or more of these approaches should prove feasible, the strategy as a whole will be correspondingly practicable and useful. If none of them proves feasible, this chapter's approach of harmonization by way of hard law is correspondingly impracticable and would not prove useful as a way to enhance coherence between the WTO and UNESCO legal regimes as applicable to trade in cultural goods.

4.3.1 The Amendment Approach: Modifying Existing Rules by Amendment

The Amendment Approach holds that:

it is feasible to harmonize the WTO and UNESCO legal regimes regarding cultural goods, through normative amendments.

This approach requires amendments to the appropriate normative provisions addressing trade in cultural goods. The test of this hypothesis is to determine the extent to which fulfilling the conditions of existing amendment procedures is possible under each regime.

It bears noting at the outset that this section does not attempt to provide an exhaustive list of all possible normative amendments that could achieve harmonization of norms regulating trade in cultural goods. It presents a limited range of possibilities, covering those amendments that seem most obvious to me; other amendments might also accomplish the same objective.

This proposal could take one form among several variants. Adopting a technical standards agreement would redefine the status of cultural goods in the WTO. Precedent for using such instruments exists in the way that the TBT Agreement and the SPS Agreement operate within the WTO structure. Similarly, amending the WTO Exceptions, such as GATT Article XX, to include cultural subsidies would also be an effective approach. Amendments to the WTO General Rules themselves, particularly the MFN and NT principles, could accommodate cultural subsidies. Finally, amendments to the SCM Agreement could also accommodate cultural subsidies.

At first glance, it may seem inequitable that these proposals primarily concern amending provisions of the WTO Agreement, rather than those of UNESCO. Yet, the reality is that WTO trade rules are well entrenched, and the protection of culture weak by comparison. Consequently, if there is a real will to amend any instrument, it seems that efforts should directed at amending the UNESCO CDCE as it wields

less power than the WTO Agreement. In this discussion on the protection of the cultural goods in trade, this work intends to balance considerations of trade and culture equitably.

4.3.1.1 Testing the Feasibility of the Coherence Approach to Harmonization: UNESCO CDCE and WTO Agreement Amendment Procedures

UNESCO CDCE Amendment Procedure

Amending the UNESCO CDCE requires invoking the provisions of its Article 33. Article 33(1) stipulates that a Party to the Convention may propose an amendment to the Director-General, and binds the Director-General to circulate that communication to all Parties. The Article continues:

> "If, within six months from the date of dispatch of the communication, no less than one half of the Parties reply favourably to the request, the Director-General shall present such proposal to the next session of the Conference of Parties for discussion and possible adoption.
>
> Thus, the conditions for an amendment to reach the stage where the Conference of Parties may propose its adoption, are:
>
> 1) One half of the Parties must approve the request to discuss the amendment
> 2) They must make this favourable response within six months of its circulation.
>
> Additionally, the UNESCO Conference of Parties, like the WTO Ministerial Conference, takes place every two years."

Article 33(2) further stipulates that adopting amendments requires a two-thirds majority of 'Parties present and voting'. This condition is noticeably more lenient when compared with the similar condition in the Marrakesh Agreement, which appears to presume that all Parties are

present. UNESCO's adopting an amendment does not, however, make it binding on a Party.

Articles 33(3) and (4) provide that Parties may ratify, accept, approve, or accede to these amendments, and that these amendments take effect within three months of such an action. Like Article X:3 of the Marrakesh Agreement, the amendment is only binding on those Parties that have taken one of these positive actions. However, in all other aspects, this standard of adherence is significantly lower compared with amendments to the Marrakesh Agreement. Such adherence to an amendment still requires the decision of the State's legislative body.

In summary, under the UNESCO CDCE's amendment provisions, at least half of Parties must approve the discussion of an amendment; if the amendment is approved, it is only binding on those States that wish it to apply.

Procedure to Amend Annex 1A Agreements (including GATT and the SCM Agreement) under the Marrakesh Agreement

Amending treaties within the WTO system is a prolonged process. To begin, Article X:1 of the Marrakesh Agreement contains a complex formula for submitting amendments to WTO Members. Any Member may submit a proposal for an amendment to the Ministerial Conference. Once the proposal for amendment is tabled, the Ministerial Conference has 90 days to reach consensus on the proposal.

If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance.

Therefore, an amendment to recognise a GATT-compatible cultural standards agreement, as discussed in Section 4.1, would require either full consensus or the approval of two thirds of Members to reach the

stage of submitting it to a vote. Any such decision at the WTO level would also need to be followed by national ratification in each WTO Member's legislative structure. However, the WTO Ministerial Conference usually meets once every two years. Even given meetings of the General Council, which meets between these sessions, there is no guarantee of reaching consensus or a two-thirds majority in favour of deciding on the proposal once it has been discussed.

Article X:2 states that amendments to GATT Article I (MFN treatment) and Article II can only take effect after acceptance by all Members.[302]

Article X:3 states in part that

> "Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C…of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it.
>
> Here, therefore, the conditions for an amendment to take effect on a Member are:
>
> 1) The amendment must modify a provision of the Marrakesh Agreement, or an Agreement in Annex 1A or Annex 1C.
> 2) The amendment must alter the rights and obligations of the Members.
> 3) Two-thirds of Members must approve the amendment, and it is thereafter only binding on a Member that has approved it."

Both the GATT and the SCM Agreement fall under Annex 1A. Affirming the right to protect cultural goods, and the obligation to re-

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[302] While Article XXX of the GATT 1947 contains amendment procedures, the Marrakesh Agreement takes precedence as the *lex posteriori* and *lex specialis* on matters regarding amendment of the WTO Agreement.

spect that right among other Members would mean altering the rights and obligations of WTO Members. Thus, if an amendment to either of these provisions, permitting States to protect cultural goods, is to be binding on a Member, at least two thirds of States must have approved the amendment and that Member itself must have been one of them. In practice, such procedures only take place by consensus.

The bar for amending Annex 1A Agreements, including the GATT and the SCM Agreement, is extremely high. In practice, it is not a viable procedure, as achieving this threshold of consent would take a long time, if it is possible at all. Under the Marrakesh Agreement's amendment provisions, each of these domestic approval procedures, which would vary according to the ratification procedures of each country, would have to take place after consultation with the domestic legislatures of each Member State. This process, in addition to the possible two-year wait for a Ministerial Conference, would also likely require several years. The UNESCO CDCE negotiation history and previous experiences in the "culture and trade" debates, shows that the decision to develop those proposals are infeasible.

The Amendment Approach to Harmonization is not Feasible

In conclusion, while the UNESCO CDCE contains a more relaxed amendment procedure than that of the WTO Agreement, it still requires a waiting period of up to two years and adherence to the amendment by the States' legislative bodies: again, a time-consuming process. UNESCO's approving the amendment by vote does not make it binding on Parties; they must do this individually. So, amending the UNESCO CDCE is possible, but time-consuming.

Similarly, the amendment procedures to the Marrakesh Agreement indicate the procedural conditions under which such amendments would technically be possible. However, there is a lengthy process involved (including a waiting period of up to two years to simply submit the proposal for amendment). There is a high threshold of consensus or two-

thirds agreement among approximately 164 WTO Members to both formally consider a proposal for amendment and to approve the amendment. Considered together with the vagaries of a ratification process for each State, these factors render such an approach impractical.

Given the time factor, and the high threshold of agreement required under the Marrakesh Agreement and GATT, the Amendment Approach is not feasible as a way to achieve harmonization through hard law between the WTO and UNESCO regimes regarding trade in cultural goods.

Nonetheless, given the formal -although remote- possibility of attaining such a high threshold of State approval, this work will now turn to examining possible amendments —which could enhance normative coherence, and thus attain harmonization by way of hard law— that this study has not yet discussed.

4.3.1.2 Other Proposals to Amend the GATT

This book, and this chapter in particular, have observed that the GATT's MFN and NT provisions pose significant obstacles to protecting cultural goods. Normative coherence could take the form of directly modifying GATT's MFN and NT provisions to exempt cultural goods. In addition to the many procedural hurdles to surmount in this modification, directly modifying these fundamental principles seems unnecessarily grandiose.

Alternatively, such normative coherence could also be achieved by adding 'culture' or 'cultural goods' to GATT Article XX's list of permissible exemptions to the MFN and NT principles.

Failing any direct modification of the GATT's text, the successful example of accommodation within the GATS of exceptions regarding trade in cultural services raises the possibility that a similar approach might be used in respect of the GATT and cultural goods. WTO Members might be permitted to submit national Schedules of exempted goods, following the highly flexible GATS model.

Alternatively, the WTO might adopt an Annex to the GATT, of goods exempted on cultural grounds from the treaty's provisions. Such an Annex would ideally copy, or be based on, the UNESCO Framework for Cultural Statistics' list of cultural goods to be included with the digital products too.

4.3.1.3 Other Proposals to Amend the UNESCO CDCE

This section will enumerate several shortcomings of the UNESCO CDCE, and propose corresponding measures to strengthen the agreement. Each of these limitations impedes its harmonization, as a tool of hard law in its own right, with the WTO Agreement. This study identifies key problems with the Convention and propose measures to resolve them.

Amendments to Clarify Which Treaty Would Prevail in a VCLT Reading

Section 4.1 noted that UNESCO CDCE Article 20, defining its relationship with other treaties, is potentially contradictory, and makes it difficult to determine whether the Convention should rank equal with the WTO Agreement. Accordingly, efforts to harmonize the two should eliminate this ambiguity, establishing UNESCO CDCE provisions as possible exceptions to obligations under other treaties. Article 20 could simply state that it is either not subordinate to other treaties, thus only preserving the language of subparagraph (1) and eliminating that of subparagraph (2). Or, it could simply state that the Convention does not modify Parties' rights and obligations under any other treaty, thus only preserving the language of subparagraph (2) and eliminating that of subparagraph (1). In the latter case, applying VCLT Article 30.2 would result in it being subordinate to the WTO Agreement.

Amendments to Create Precise Definitions of 'Culture', 'Rights', 'Obligations', and 'Protection'

Another barrier to harmonization is that many applicable phrases and notions of the UNESCO CDCE require interpretation. As this Conven-

tion lacks a dispute resolution body, able to create case law that interprets and defines these phrases and concepts, only broad and theoretical interpretations will emerge. This Convention, "even if it were justiciable, is therefore not sufficiently operational from the legal perspective, at least in a way that would be comparable to the effect of most trade treaties, in particular the WTO agreement".[303]

The UNESCO CDCE does not define 'culture' clearly, rather it begins by defining 'cultural diversity' under Article 4.1. Article 4 defines 'cultural diversity' as "the manifold ways in which the cultures of groups and societies find expression". Through "characterizing culture in relation to its expression, taking into account the modalities of its production, dissemination, distribution, and enjoyment, the CCD permits one to analyse culture in terms of the markets where it is represented".[304]

The UNESCO CDCE's key Chapter IV on the "rights and obligations of Parties" is also ambiguous. Chapter IV is constructed on three pillars. Articles 5 and 6 constitute its first pillar. Parties have the sovereign right to formulate and implement their own cultural policies. A non-exhaustive list enumerates eight categories of regulatory, institutional, and financial measures each party may choose to adopt. The second pillar (Articles 7to 11) encourages Parties to promote cultural expressions in their territory. However, these provisions consist of incentives rather than binding obligations. The third pillar (Articles 12to 19) relates to the international level, addressing the cooperation of the Parties with a view to creating favourable conditions for the promotion of cultural diversity.[305]

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[303] Christophe Germann 'Towards a Global Cultural Contract to Counter Trade Related Cultural Discrimination', in Nina Obuljen and Joost Smires (eds.) *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Institute for International Relations 2006), 4.

[304] ibid.

[305] ibid.

According to the concept of harmonization that the rules under consideration should be clear and unambiguous, definitions of these terms should be more precise. It must be clear exactly which goods are, and are not, subject to treatment as cultural goods. Similarly, it must be clear what Parties to UNESCO CDCE are, and are not, bound to do, although it is true that there are not many obligations in the Convention.

Amendment to Prohibit Disguised Protectionism

The UNESCO CDCE is further susceptible to allegations that it is vulnerable to abuse, as States may use it to mask financial protectionism. Its language does not preclude such protectionist processes, and does not outline the procedures to address them. The instrument grants high discretion to determine which policy procedures are suitable to safeguard cultural diversity.

As with other shortcomings of the UNESCO CDCE, adding language similar to that of GATT Article XX—prohibiting "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", and "disguised restrictions on international trade"—would make harmonization with the WTO Agreement far more likely, and reduce concerns that it might allow States to engage in covert protectionism, although, the WTO case law has shown how hard it is to comply with the chapeau of Article XX.

Amendments to Create Enforcement Mechanisms

This work observes repeatedly that States may forgo their rights under the UNESCO CDCE if by doing this they gain an advantages in bilateral trade agreements. As Germann puts it, "nobody can realistically oblige a State to exercise its rights and comply with its 'shall endeavour' [see UNESCO CDCE Article 7] obligations to protect and promote cultural diversity under the UNESCO Convention if such [a] State is not

willing to do so for one reason or the other. Therefore, the UNESCO Convention is arguably not justiciable in practice".[306]

Graber notes that many provisions of "the three pillars of the rights and obligations chapter are good-faith or best-effort engagements, rather than binding and enforceable obligations".[307] The exception to this, is Article 9(a)[308] of the CDCE, which obliges Parties to account for processes taken at the domestic and international planes every four years. Article 16 declares that developed States shall grant "preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries". The weak normative influence of UNESCO CDCE is perceived as a key shortcoming.

Proposals to develop the normative impact of UNESCO CDCE include a proportionality test analysing the Members' procedures and rules.[309] Graber states that an administrative cultural policy procedure should address two requirements in this case:

> "First, it should be effectively aimed at protecting and promoting one of the goals protected by the CCD. Secondly, it should be necessary for that purpose. According to one suggestion, under

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[306] Christophe Germann, 'Towards a Global Cultural Contract to Counter Trade Related Cultural Discrimination', in Nina Obuljen and Joost Smires (eds.) *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Institute for International Relations 2006), 282-283.

[307] Christophe Graber, 'Trade and Culture'. *The Max Planck Encyclopedia of Public International Law,* Rüdiger Wolfrum (ed.) (OUP, 25 August 2010), 195-198. Available at SSRN: <https://ssrn.com/abstract=1656980>, Accessed 19 December 2022.

[308] UNESCO CDC Article 9(a)'provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level'.

[309] Christophe Graber, 'Trade and Culture', op. cit., 195-198. Accessed 22 december 2022.

> such a test a government would have to show on the basis of empirical data that the cultural measure at issue is effectively aimed at protecting and promoting the alleged goals of the CCD and is necessary for that purpose. In the latter respect the availability of alternative, less trade-restrictive measures would have to be considered. Art. 25 CCD, providing for a conciliation mechanism, after negotiations and mediation have failed, is considered to be relevant in this respect."[310]

This mechanism would permit nuanced clarification between legal and illegal procedures concerning cultural policy, depending on the circumstances of each case. More importantly, however, it would facilitate harmonization of WTO law with the UNESCO CDCE, using means that closely resemble the 'necessity test' under the exception clauses of GATT Article XX.

Deliberate harmonization with the WTO Agreement would provide a context of clear instances where UNESCO CDCE provisions could be invoked as exceptions to MFN and NT provisions, without incurring trade penalties; and define the contexts in which measures would fall outside of this scope. This would function as a means of enforcement.

4.3.2 The Coordination Approach: Establishing a Joint 'Coordination Bureau' of the WTO and UNESCO to Administer Matters Arising from Trade in Cultural Goods

The Coordination Approach holds that

it is feasible to harmonize the WTO and UNESCO legal regimes regarding cultural goods, through institutional coordination.

This approach requires establishing a joint institution to facilitate communication between organisations regarding trade in cultural goods.

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[310] Ibid.

The test of this hypothesis is to determine the extent to which it is possible to fulfill the conditions of establishing such a new institution.

The world of the WTO Agreement and that of the UNESCO CDCE address different areas of international law. Where the WTO deals almost exclusively with matters of trade, UNESCO deals almost specifically with cultural concerns. Their diverging outlooks, and their present lack of relationship with one another, may even give the impression that they act to the detriment of one another. However, traded cultural goods have a dual nature that provides a common foundation for collaboration between the two organisations. As traded goods, they fall under the scope of the WTO; as cultural goods, they lie within UNESCO's mandate. A Coordination Bureau would place the personnel of the two organisations in contact with one another to deal with day-to-day matters arising from the administration of trade in cultural goods. Such a relationship would provide the foundation for precise and appropriate resolution of difficulties as they arose.

However, attempts to establish such a Bureau would encounter obstacles. Differences exist between the DS mechanisms of the WTO and the UNESCO CDCE: each concerns a different subject and has limited jurisdiction. To begin with, disputes arising from UNESCO/WTO conflicts, involving States Parties to both treaties, may be arbitrated either via the dispute resolution mechanism of the WTO Agreement or via the UNESCO CDCE, as the complaining State wishes.

In the case of UNESCO, a violation of the UNESCO CDCE triggers a dispute settlement procedure. In the case of the WTO DSU, a violation of the WTO Agreement calls the DSB into action. So, where disputes occur between States belonging to both the WTO and UNESCO CDCE, it remains unclear which treaty process should prevail.

A collaborative procedure dealing with matters arising over trade in cultural goods would present a highly effective way of achieving legal coherence between the two. A Coordination Bureau, established be-

tween the dispute settlement mechanisms of WTO and UNESCO, could facilitate taking decisions without any normative amendment to the WTO Agreement or the UNESCO CDCE.

4.3.2.1 Testing the Feasibility of the Coordination Approach to Harmonization

In Chapter 5 of her book on *Cultural Products and the World Trade Organization*, Tania Voon makes an analogous proposal to the one in this section. "From a 'pro-culture' perspective", she writes, "the best possibility for improving the current WTO rules in relation to cultural products may be to reach an agreement on trade and culture outside the WTO".[311] She points out several difficulties with the approach of constructing a new agreement.

First, WTO Members' delegations and UNESCO CDCE State Parties' delegations may present different views on such a proposal, even if they represent the same country. This situation might arise because "different government representatives, from different ministries, may be involved in these two contexts. Normally one would expect a representative from a ministry dealing with culture to attend UNESCO meetings and a representative from a ministry dealing with international trade to attend WTO meetings"[312].

Second, some Members favour other instruments dealing with culture. Voon lists three before the UNESCO CDCE. Canada's Department of Foreign Affairs and International Trade (now Global Affairs Canada) has proposed a draft 'International Agreement on Cultural Diversity'. She also mentions the International Network on Cultural Policy, another Canadian-based group that has developed a draft instrument to deal with trade and culture. A third Canadian organisation, the International Network for Cultural Diversity (INCD) also exists, and has also drafted

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[311] Tania Voon, *Cultural Products and the World Trade Organization* (first ed., Cambridge 2007), 174.

[312] ibid 192.

a convention. Voon particularly notes the number of WTO Members aligned with the INCD.[313] She also records the USA's steadfast objections to the formulation of the UNESCO CDCE, noting that it considered the CDCE to be 'deeply flawed'.

Such obstacles to an agreement external to the WTO also stand in the way of constructing a new body to coordinate the efforts of the WTO and UNESCO. Such a scenario is unlikely to come to fruition, given the lack of synchronisation between and within Member States, and the lack of support from powerful States such as the USA.

Even more fundamental than these considerations, perhaps the most compelling indication of probable resistance to the Coordination Approach is that establishing a new Coordination Bureau would require financial support from States belonging to both international organisations, to enable the day-to-day operation of the joint body. Such budgetary concerns are often difficult to negotiate.

Nonetheless, assuming that such impediments could be overcome, the following mechanisms would be necessary to implement this type of coordination body.

4.3.2.2 Implementing the Coordination Approach: Establishing a Dispute Settlement Coordination Bureau

Here, this work proposes the creation of a 'Coordination Bureau for Culture and Trade,' an expert organ operated in collaboration between the WTO and UNESCO. UNESCO is a well-renowned international organisation, primarily concerned with conceptualising, encouraging, and safeguarding cultural diversity and cultural products. Similarly, the WTO is a global organisation specialised in several fields of trade. With due consideration of both entities' goals and purposes, this Coordination Bureau should facilitate the relationship between international trade and the cultural aspects of traded goods. In this regard, it would be important

[313] ibid 193.

for Member States to delegate a measure of decision-making power to the Coordination Bureau, however, this would not be at all easy to achieve in practice.

This body should primarily address disputes regarding cultural goods and services in the WTO (which is both the stronger forum, and the one where disputes involving a conflict of trade and culture are more likely to arise), while considering the UNESCO CDCE's provisions. Such an approach would permit the two dispute settlement mechanisms, dealing with common subjects, to avert potential conflicts.

Some authors[314] have proposed the creation of an institution between the WTO and other international organisations, before the UNESCO CDCE even came into being, with the mission of overseeing cultural diversity on a level playing field with the WTO called the World Cultural Diversity Organization. They suggest that this kind of organisation be an independent international organisation. Perhaps it would be possible to establish an international organisation for the purpose of such coordination between trade and cultural diversity; however, the constraint of the States convince by this proposal and also because of financial sponsorship at the international level makes this proposal more difficult to take seriously.

This Coordination Bureau should work to establish coherent practices and regulations relating to culture and trade, through engaging personnel striving to be fluent in the concerns of both. It should also possess a mechanism for effective dispute resolution—emphasising the dispute settlement rules that both systems hold in common. (This means that, at minimum, UNESCO should also strengthen its dispute settlement procedures.) Specialised commissions or working groups of this

[314] Christophe Germann, 'Towards a Global Cultural Contract to Counter Trade Related Cultural Discrimination', in Nina Obuljen and Joost Smires. *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Institute for International Relations 2006), 307.

Bureau could determine conflict potential between provisions of the WTO and the UNESCO CDCE, study problems and solutions on regarding cultural goods, develop practices for resolving any conflicts that may arise.

Effectively implementing the Coordination Approach would mean altering the WTO's DSU to define the scope of the Bureau's authority to make decisions. For instance, the Bureau could become a mandatory stage of consultation before the existing panel or the Appellate Body's proceedings on disputes involving cultural goods, just as with the Dispute Settlement Mechanism under the previous proposal. Otherwise, a WTO judge receiving the decision of the Coordination Bureau would not be bound to consider the UNESCO CDCE's cultural articles, and the Bureau could only encourage both the WTO and UNESCO to consider its findings.

However, modifying the relevant dispute settlement provisions would encounter the familiar obstacle of Member States' and States Parties' approval. Furthermore, the WTO is unlikely to apply its rules subject to any agreement outside its covered agreements. Finally, WTO judges have full independence and the capacity to act with utmost discretion, characteristics essential to their role. The successful operation of a Coordination Bureau would require that it become a point of reference for judges to consult. The Coordination Bureau would have to find a middle way, capable of satisfying both organisations.

The Coordination Approach would not attempt to unduly disrupt the status quo; nonetheless, it would require amendments to dispute settlement provisions and a change in institutional culture. In terms of utility assessment, it ranks lowest of the three approaches that Chapter 4 proposes. However, as regards its practicability, it ranks highest: its prescriptions are the least likely among these approaches to encounter institutional resistance. Its primary concern is with convincing Member States and States Parties of its relevance to establishing harmonization,

and thereby resolving legal fragmentation in matters regarding trade in cultural goods. Nonetheless, given its low utility, this study concludes that its feasibility is also low.

4.3.3 The Construction Approach: A Dispute Settlement Mechanism between the WTO and UNESCO regarding Trade in Cultural Goods

The Construction Approach holds that

it is feasible to harmonize the WTO and UNESCO legal regimes regarding trade in cultural goods, through constructing a new dispute settlement mechanism.

This mechanism would be external to both bodies, primarily dealing with the fragmentation of institutional authority. The feasibility of this hypothesis depends on the extent to which it is possible to fulfill the conditions to establish such a mechanism.

The new mechanism would thus establish a platform designed both to avoid overlaps (and hence conflicts) and prescribe coherent measures for resolution in the case that conflict should arise. Institutionally speaking, harmonizing the dispute settlement procedures of the two treaties would be essential.

Article 25 of the UNESCO CDCE describes its dispute settlement procedure: first involving negotiation, then mediation, then conciliation. States Parties have the right to withdraw from the conciliation procedure. The Article does not specify the forum under which the procedures should take place.

WTO litigation, on the other hand, is governed by the Dispute Settlement Understanding (DSU) contained in Annex 2 of the WTO agree-

ment.[315] Its jurisdiction is limited to WTO-related disputes; decisions of the Panel and Appellate Body are binding. Article 23.1 reads:

> "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they *shall have recourse to, and abide by, the rules and procedures of this Understanding*."

4.3.3.1 Testing the Feasibility of the Construction Approach to Harmonization

Enhancing coherence between the two regimes requires a harmonized means of settling disputes regarding trade in cultural goods. Any attempt to construct a dispute settlement mechanism relating to trade in cultural goods would mean modifying DSU Article 23.1 that gives the WTO exclusive jurisdiction on any matter affecting multilateral trade.

The practicability of the Construction Approach depends on the scenarios in which Parties to a dispute might have recourse to the proposed dispute settlement mechanism. The utility of the proposals that can be derived from this Approach depends on the success of the mechanism in addressing the following scenarios.

Dispute Settlement and Different Scenarios according to State Status as WTO Member and/or Party to UNESCO CDCE

Is it necessary to amend the dispute settlement mechanisms of the WTO or the UNESCO CDCE? Since the two treaties do not deal with the same issues, the WTO and UNESCO CDCE dispute settlement mechanisms do not really overlap, and thus do not enter into conflict. Notwithstanding this, the WTO's DSU provides little guidance for those seeking solutions to issues of trade in cultural goods, and the UNESCO

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[315] See the 'Understanding on Rules and Procedures Governing the Settlement of Disputes' of the *Marrakesh Agreement Establishing the World Trade Organization.*

CDCE is unlikely to prove effective in altering the WTO's treatment of cultural goods.

Dispute settlement cannot solve the fact that the GATT is irreconcilable with UNESCO CDCE provisions. Coherence is only possible through an amendment of the current norms, or through an agreement that supersedes them. Certainly, 'negotiation', as seen in Article 25 of the UNESCO CDCE, might provide appropriate solutions for disputes involving overlapping allocation of institutional authority. However, under which system of rules would such negotiation proceed?

Three scenarios for States' interactions illustrate the problem of fragmentation within the international legal system. The first is the situation where both Parties are WTO Members, but only one is a Party to UNESCO CDCE. Second, both Parties may be Parties to the UNESCO CDCE but only one belongs to the WTO. Lastly, both Parties may be WTO Members and States Parties to the UNESCO CDCE.

Scenario 1: Both States are WTO Members, but only one is Party to the UNESCO CDCE

In the first scenario (where both Parties are WTO Members, but only one is Party to the UNESCO CDCE), it is important to determine whether WTO judges may use the CDCE to interpret the WTO Agreement during a dispute between WTO Members, and vice-versa. In this scenario, the answer would be no.

However, an arbitrator or judge dealing with a dispute regarding implementation of the UNESCO CDCE can adjudicates only according this Convention. Therefore, given a treaty violation of the UNESCO CDCE between a Party to the CDCE and another State which is not (for example, the United States), where both are WTO Members, WTO law would clearly be the only applicable law for settling such a dispute. In other words, UNESCO dispute settlement procedures would not be available.

The same is true when a dispute emerges between a WTO Member not Party to the UNESCO CDCE (such as the United States), and another WTO Member that breaks WTO rules by exercising a right granted under the UNESCO CDCE, the WTO DSB has jurisdiction.[316] Article 23.1 of the Dispute Settlement Understanding (DSU) states that:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

Scenario 2: Both States are Parties to the UNESCO CDCE, but only one has acceded to the WTO

The second scenario examines a dispute occurring between two Parties to the UNESCO CDCE in which only one is a WTO Member. If two UNESCO Members dispute whether one State has respected its UNESCO obligations, the question arises as to whether they may refer the dispute to the WTO.

Article 25 of the UNESCO CDCE indicates that the CDCE resolution procedure would take precedence. Article 25 prescribes compulsory negotiations and optional participation in mediation and conciliation sessions.

It is important to determine whether the offending State has violated the UNESCO CDCE or the WTO Agreement, as the same State can never violate both in the same dispute. This is only possible in the case of two parallel disputes, but these would usually be two very different disputes, based on stated treaty obligations.

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[316] Anke Dahrendrof, "Free Trade Meets Cultural Diversity: The Legal Relationship Between WTO Rules and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions", in Hildegard Schneider and Peter Van den Bossche (eds.), *Protection of Cultural Diversity from a European and International Perspective* (Intersentia 2006) 44, 48.

Scenario 3: Both States are Parties to the UNESCO CDCE, and both have acceded to the WTO

The final scenario, that of a dispute between two WTO Members who are both also Parties to the UNESCO CDCE, simultaneously brings forward two distinct legal dispute settlement regimes. These regimes come under the procedures of the UNESCO CDCE for claims filed in accordance with Article 25, while the WTO mechanism applies to dispute settlement based on its covered agreements.[317] As most WTO Members are also States Parties to UNESCO CDCE, this sort of dispute may occur more frequently than the previous two scenarios described above.[318]

It is an established legal principle that in case of conflict or incompatibility, a *lex specialis* supersedes a *lex generalis*. A special law deals with more specific, singular subject matter, while a general law deals with a broader category of issues. Extending this logic to matters of the protection and the promotion of cultural expressions, it would appear that where a dispute involves trade in cultural goods, the UNESCO CDCE (specific law) should prevail over the relevant WTO rules.[319] Yet in matters of trade between two contracting States, WTO rules supersede those of the UNESCO CDCE. In matters regarding *the trade of cultural goods* between Parties to both treaties, therefore, there are two mutually competing special laws.

It is also important to note that this hierarchy depends on the jurisdiction of the court, since "WTO adjudicating bodies can only apply and assess WTO law".[320]

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[317] ibid 44 footnote 49.

[318] ibid 44, 45.

[319] ibid 58.

[320] Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights', (2002) 13(4) *EJIL* (753-814), 757 [footnote 10].

The Construction Approach to Harmonization is not Feasible

Given the possibility of such a conflict between provisions of the UNESCO CDCE and the WTO, Diebold[321] lists three main options for trade dispute settlement regarding cultural goods. These comprise the WTO DSB, the UNESCO CDCE procedure, or improvements to the existing agreements.

Regarding the scenario of two dispute settlement mechanisms invoked simultaneously, as described above, Stoll believes that,

> "in principle, the two dispute settlement procedures might be invoked in parallel ... [a]lthough … there is barely any coordination between dispute settlement mechanisms and ongoing proceedings."[322]

Marceau writes:

> "In case of conflicts, WTO adjudicating bodies do not appear to have the competence either to reach any formal conclusion that a non-WTO norm has been violated, or to require any positive action pursuant to that treaty or any conclusion that would enforce a non-WTO norm over WTO provisions, as in doing so the WTO adjudicating bodies would effectively add to, diminish or amend the WTO 'covered agreements'. A distinction exists between the binding obligations of states (WTO Members) — for which

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[321] See Nicolas F Diebold, *Non-Discrimination and the Pillars of International Economic Law – Comparative Analysis and Building Coherency* (SIEL 30 June 30 2010), Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, 8-10 July 2010.

[322] Peter-Tobias Stoll, 'Article 20: Relationship to Other Treaties: Mutual Supportiveness, Complementarity and Non-Subordination', in Sabine von Schorlemer and Peter-Tobias Stoll (eds.), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (Springer 2012), 538.

> states are at all times responsible — and the 'applicable WTO law'."[323]

Since WTO adjudicating bodies do not have the competence to enforce a non-WTO norm over WTO provisions, where treaty dispute settlement mechanisms overlap in jurisdiction, it may be a matter for States to decide, rather than for the WTO adjudicating bodies.[324]Pertinent WTO provisions could be unchanged, but allowed to develop interpretation through dispute settlement by Panels and the Appellate Body.[325] These WTO bodies may recognise relationships between the alleged objectives of Members' cultural policies and multilateral agreements concerning the value of culture and cultural diversity.[326]

As Schorlemer and Stoll indicate, coordination between the WTO and UNESCO appears unlikely in practice. As Marceau states, WTO bodies do not have jurisdiction over non-WTO norms. Thus, because amendment is required under the Construction Approach, realistically it may have low practicability, although it would arguably rank higher than the Amendment Approach on this scale. However, its prescriptions would have even less utility than those of the Amendment Approach in enhancing coherence. The Construction Approach's low practicability and utility make it infeasible.

Assuming, however, that the successive hurdles of amending the DSU and of navigating the various configurations of adherence to the WTO Agreement and UNESCO CDCE have been successfully addressed, a dispute settlement mechanism (as the Construction Approach advocates) would have several models to base itself on.

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[323] Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002), 13, *European Journal of International Law* (756-814), 756.

[324] See ibid 802, 807, and 814.

[325] Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge 2007), 251.

[326] ibid 172.

4.3.3.2 Adoption of Cultural Standards within the WTO and UNESCO in the Trade of Cultural Goods

The adoption of external standards defining cultural goods within the treaties of UNESCO and the WTO could provide a platform for harmonization. The WTO and UNESCO could negotiate a Cultural Standards Agreement on Trade in Goods. Such a technical standard might define the extent to which WTO Members could deviate from the GATT and other agreements to protect cultural goods. It might also invoke the UNESCO *Framework for Cultural Statistics*, seen in Chapter 3, to define which goods qualified as 'cultural'. Implementing such an agreement would require written mechanisms.

This would bind each organisation to recognise that standard. This might involve adding provisions to relevant agreements, such as the GATT or the UNESCO CDCE, recognising the authority of the standard to administer questions relating to cultural goods.

As the foregoing chapter observed, precedent exists for such coordination: the WTO presently uses technical standards definitions under the TBT and SPS Agreements to harmonize national regulations. Derived from the model of SPS Agreement Article 3.2, the UNESCO CDCE might include an amendment that presumes consistency with the GATT if the standard is met, or the GATT itself might be modified to recognise the external cultural standard.

4.3.3.3 Potential Guidance to Construct a 'Dispute Settlement Agreement' between the WTO and UNESCO regarding Trade in Cultural Goods

There appears to be two potential means to establish a dispute settlement understanding or mechanism between the WTO and the UNESCO CDCE.

On one hand, a neutral platform for dispute settlement (the ICJ), or a new specialised court for trade in cultural goods that uses the ICJ as a model) would provide for a balanced understanding of both trade and culture issues. On the other hand, a provision like the Dispute Preven-

tion and Settlement clause under the Trade-Related Aspects of Intellectual Property Rights—TRIPS Agreement—(Part V, Articles 63 and 64) between the WTO and WIPO could also serve as a model for such an agreement between the WTO and UNESCO.

Both the ICJ and the Dispute Prevention and Settlement clause provide examples of dispute settlements. A study of these frameworks permits an assessment of the benefits and drawbacks of a prospective dispute settlement mechanism coordinating interactions between the WTO and UNESCO on trade in cultural goods.

Since the WTO is not a general court, some argue that the ICJ (the only court with general jurisdiction), should deal with all disputes involving more than one treaty. Schrijver, for instance, notes that

> "under Article V, Paragraph 12 [of UNESCO's Constitution], UNESCO may request advisory opinions from the International Court of Justice. UNESCO has so far used this right only one, when it appealed certain judgements of the Administrative Tribunal of the ILO concerning the renewal of fixed-term appointments for UNESCO officials."[327]

In theory, the ICJ can compare multiple treaties, and demarcate the applicability of each accordingly. Since the SCM Agreement limits permissible subsidies, whereas under the UNESCO CDCE, financial assistance to the cultural sector is a commitment of States (Article 14(d)(ii) and (iii)), the ICJ could read the two texts together to permit some leeway. The Court could then invite the WTO to consider its reading. This approach would require an amendment to the allocation of authority in DSU Article 23, as noted above.

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[327] Nico Schrijver, 'UNESCO's Role in the Development and Application of International Law: An Assessment', in Abdudqawi A. Yusuf (ed.), *Standard-setting in UNESCO Volume I: Normative Action in Education, Science and Culture* (UNESCO/Nijhoff 2007), 367.

Alternatively, since an international jurisdiction dealing with trade and culture does not exist, a new court that deals with both could be constructed. This court could examine options for balancing between the two dispute settlement mechanisms on a case-by-case basis, using a foundation of general principles and guidelines to inform its decisions. If the UNESCO instrument's structural shortcomings and lack of enforceability were to prove a barrier to creating a dispute settlement mechanism in this manner, such a court could equally create and impose a special set of dispute settlement regulations for all cases dealing with trade and culture.

Effective functioning of the mechanism would require modifying the DSU to ensure that such a dispute settlement procedure become a required first step—before a panel or Appellate Body proceeding—in cases involving cultural goods.

Another proposal is to apply the TRIPS Dispute Prevention and Settlement Clause as a model for a "WTO-UNESCO Dispute Settlement Mechanism" regarding trade in cultural goods. WTO DSU Article 23 could be modified, constructing new dispute settlement mechanism that could take inspiration from the construction of the TRIPS Dispute Prevention and Settlement articles. In the proposed agreement between the WTO and UNESCO, there is a clear structure for harmonization between two organisations, including an exception procedure, which resolves divergences in the dispute settlement procedure.

The proposed WTO-UNESCO dispute settlement mechanism could directly incorporate relevant provisions of the DSU, the UNESCO CDCE, and other pertinent agreements into its own operation to ensure a harmonized approach. It would necessarily be the only dispute-settlement mechanism relevant to trade in cultural goods: thus, superseding the DSU as the sole mechanism applicable regarding trade in cultural goods. It could also acknowledge the authority of the UNESCO CDCE in granting exceptions to the GATT and SCM Agreement.

The fact that TRIPS coordinates such dispute prevention and settlement procedures indicates that the Construction Approach to harmonization regarding trade in cultural goods is a practicable approach. While less useful to resolving fragmentation than the Coherence Approach, it nonetheless retains a great deal of power to adjudicate disputes where institutional authority overlaps.

However, creating a new mechanism may not be absolutely necessary. Graber suggests adding a cultural panelist to WTO proceedings having to do with cultural and non-economic concerns. He proposes the

> "amendment of the DSU by a procedural rule requiring that panels sitting on a trade and culture dispute must include one cultural expert. Although this suggestion would not constitute a direct channel for accommodating cultural concerns, it would nonetheless ensure the necessary expertise when analyzing complex conflicts between trade and culture."[328]

4.4 Conclusion

Chapter 4 has assessed the utility and practicability of harmonization by way of hard law, to reduce legal fragmentation and achieve coherence between the WTO and UNESCO legal regimes regarding trade in cultural goods. It has evaluated the question of subsidies on cultural goods that the UNESCO CDCE permits, identifying a relationship of fragmentation with the SCM Agreement. Chapter 4's evaluation has been based on testing the feasibility of three hypotheses corollary to its overall strategy of harmonization—derived from legal fragmentation's

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[328] Christophe Graber, 'Trade and Culture'. *The Max Planck Encyclopedia of Public International Law*, Rüdiger Wolfrum (ed.), (OUP 25 August 2010) 195-198, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656980>, Accessed 19 Decmber 2022.

normative dimensions, its institutional dimensions, and a combination of the two.

The Amendment Approach addressed the normative dimension of legal fragmentation, that of incoherent norms. It proposed amending provisions to create normative coherence regarding trade in cultural goods, with the goal of preventing conflicts from occurring. It thus had the highest utility of the three approaches to resolve legal fragmentation. However, the Marrakesh Agreement's lengthy bureaucratic procedure of State approval for amending WTO Agreements (such as the GATT and the SCM Agreement), combined with the UNESCO CDCE's amendment procedures, indicate low practicability. Therefore, the Amendment Approach is not feasible.

The Coordination Approach focused on the institutional dimensions of legal fragmentation, viewing them as matters arising from the administration of trade in cultural goods and focussing on the inter agencies process of collaboration. It proposed establishing a joint (formal or even informal) institution of the WTO and UNESCO to administer these day-to-day issues, with the goal of preventing, resolving, or mitigating potential conflict. However, the proposed Coordination Bureau would likely be a low political priority for States that favoured other forms of resolution or other instruments. Furthermore, even within States, the delegations dealing trade and culture might disagree on their preferred strategies. Finally, budgetary allocations would have to be approved by Member States. Thus, although the Coordination Approach enjoyed the practicability despite its low effectiveness in resolving fragmentation, it remains an option of low feasibility.

The Construction Approach dealt with the combined normative and institutional dimension of legal fragmentation, that of disharmonious allocation of authority. It proposed an external dispute settlement mechanism between the WTO and UNESCO, with the goal of resolving conflict once it had occurred. This approach appeared to have less practica-

bility than the Amendment Approach to resolve fragmentation and incoherence between WTO norms and UNESCO norms and in modifying such differences in these norms. States are even less likely to create a new DS mechanism than to amend their basic provisions. The practicability of this approach is thus even lower than that of the former two. Therefore, the Construction Approach is not feasible.

For each of the three approaches that this chapter proposed, the political will of —to amend the WTO Agreement and UNESCO CDCE, to construct a new dispute settlement mechanism, or to financially and institutionally support a Bureau to coordinate the administration of trade in cultural goods—remains the fundamental weakness. The low likelihood of achieving the necessary threshold of State consent renders each of the three approaches infeasible.

In theory, the binding and clear nature of hard law makes it more enforceable than soft law. Because of its intrinsic ability to engage the problem of fragmentation by way of hard law, harmonization is thus the strategy with the greatest utility and effectiveness to achieve coherence between the WTO and UNESCO regimes regarding trade in cultural goods. However, Chapter 4 showed that each of the three approaches derived from its initial statement in support of harmonization cannot be feasibly implemented. Thus, that overarching statement is also false.

Chapter 4 has demonstrated that harmonization by way of hard law has high utility, but low practicability, to reduce legal fragmentation and enhance coherence between the WTO and UNESCO regimes regarding trade in cultural goods.

CHAPTER 5

MUTUAL SUPPORTIVENESS THROUGH SOFT LAW

Route III

Mutual Supportiveness through Soft Law

Mutual supportiveness through soft law is the last of the three routes that this work examines for its ability to feasibly enhance coherence between the legal regimes of trade and culture. Interpretation, the route that Chapter 3 examined, has neither an intrinsic relationship with soft law, nor with hard law—it is neutral. Chapter 4 has shown that harmonization has a strong affinity for instruments of hard law, and is synonymous with the 'hard' technique of amendment. Mutual supportiveness, in contrast to harmonization, has an intrinsic relationship with soft law.

To favour "mutual supportiveness through soft law" is to create a flexible environment for interpretation and coherence, proceeding from the understanding that the instruments in question are rooted in a common fabric of values. In comparison, because harmonization functions through hard law and thus implies amendment; if political will is absent, amendments are impossible (as Chapter 4 explains in detail). This leaves a vacuum of normative conflicts that are unresolvable through harmonization. The solutions that mutual supportiveness provides can only be indicative, non-binding, and goal-oriented. Such an approach, therefore, belongs to soft law.

This study encourages WTO Members and UNESCO CDCE Parties to agree that interactions between the two treaties should be governed by the approach of mutual supportiveness. Accordingly, governments would resolve disputes in matters of trade and culture by considering the WTO Agreement and the UNESCO CDCE to be mutually supportive agreements; such an approach would also account for the specific circumstances of each case. However, even without States' political will, 'soft' collaboration between the WTO and UNESCO themselves could enhance coherence.

Chapter 4 has demonstrated that reconciling provisions of the WTO Agreement and the UNESCO CDCE using the route of harmonization through hard law is not realistic. The legal differences and even conflicts between the WTO and UNESCO are too significant, making amendments to these instruments politically impracticable. Therefore, harmonization through hard law is not a feasible method of enhancing coherence.

In light of the foregoing, Chapter 5 will test a new overarching statement:

Mutual supportiveness through soft law is a feasible route to reduce fragmentation and improve coherence between the WTO and UNESCO legal regimes regarding trade in cultural goods.

Following Nele Matz-Lück's concept of fragmentation (discussed in Chapters 2 and 4), as containing both normative and institutional aspects, Chapter 5 restates this study's premise: since legal fragmentation contains both normative and institutional aspects, any strategies to reduce fragmentation must incorporate normative and institutional dimensions.

Thus, there are three possible combinations of these dimensions: a solely normative approach, a solely institutional approach, and an approach that combines normative and institutional aspects. Within the route of mutual supportiveness through soft law, this work calls the

solely normative approach the 'Interpretation Approach'; the solely institutional approach the 'Guidance Approach'; and the approach combining normative and institutional features the 'Consultation Approach'.

The test of each—the Interactive Approach, the Guidance Approach, and the Consultation Approach—is to enquire whether each is 'feasible' to reduce fragmentation, improve coherence, and mitigate the potential for conflict between the WTO Agreement and the UNESCO CDCE regarding trade in cultural goods. Feasibility is measured by two values: 'utility' and 'practicability'. Chapter 5 will assess the practicability and utility of each of these three approaches.

Chapter 5 will therefore determine whether any of the three approaches derivable from 'mutual supportiveness through soft law' is flexible enough to make it more attractive to States than those derivable from 'harmonization through hard law'.

Section 5.1 defines the concepts of 'mutual supportiveness' and 'soft law', using existing scholarship on these subjects. It then establishes the relationship between the two concepts using case studies in international law.

Section 5.2 tests the feasibility of the route of mutual supportiveness through soft law by testing the three hypotheses corollary to Chapter 5's statement.

Hypothesis 1 (the Interactive Approach): It is feasible to establish mutual supportiveness between the WTO and UNESCO legal regimes regarding trade in cultural goods, through *a mutually supportive interaction* of relevant provisions.

The Interactive Approach draws heavily on the subject matter of Chapter 3, which describes the principle of interpretation, but applies it specifically in the context of soft law.

Hypothesis 2 (the Consultation Approach): It is feasible to establish mutual supportiveness between the WTO and UNESCO legal regimes regarding trade in cultural goods, through establishing an expert

consultation group between the secretariats of the WTO and UNESCO. Such a consultation group may offer non-obligatory consultative proposals to the relevant dispute settlement mechanism.

Under the Consultation Approach, experts and representatives of the WTO and UNESCO, and of departments within those organisations, would meet to facilitate communication and problem-solving on particular issues centred on dispute settlement. Each meeting would be a new consultation, tailored to the problem at hand.

Hypothesis 3 (the Guidance Approach): It is feasible to establish mutual supportiveness between the WTO and UNESCO legal regimes regarding trade in cultural goods, through providing flexible guidance to States.

The Guidance Approach relies on the WTO and UNESCO jointly providing meaningful guidance to State decision-makers. This primarily entails creating non-binding agreements, decisions, and declarations of intent—each drawing on a shared perspective toward implementing mutual goals.

Based on Section 5.2's evaluation of each hypothesis, Section 5.3 will conclude regarding the utility and practicability of mutual supportiveness by way of soft law, as an approach to resolve fragmentation and improve coherence between the WTO and UNESCO legal regimes regarding trade in cultural goods.

In summary, Chapter 5 will assess the feasibility of achieving coherence between the WTO Agreement and the UNESCO CDCE, through an agreed perspective of mutual supportiveness by way of soft law. It will begin by investigating each of the two concepts: soft law and mutual supportiveness. It will then apply them in the contexts of a normative approach, an institutional approach, and an approach combining normative and institutional approaches. It will then draw practical conclusions about this method of achieving coherence.

5.1 Soft Law and Mutual Supportiveness in the Trade in Cultural Goods

5.1.1 Definitions

5.1.1.1 What is Soft Law?

Analysing Criticism of Hard Law and Soft Law

'Hard law', as Chapter 4 showed, refers to legal instruments that are binding on States and international institutions. In contrast, 'soft law' indicates "normative provisions contained in non-binding texts".[329] As in Chapter 4, the context of WTO law's interactions with environmental law provides a predominant paradigm. French maintains that soft law

> "is an issue that raises many theoretical and practical problems. There is no standard definition of soft law; in fact, such documents vary incredibly in terms of their nature and form. However, those documents that are usually considered as falling within soft law include codes of practice, recommendations, resolutions, guidelines, and declarations of principles. There is also a question as to whether certain vague provisions of international treaties should also be seen as soft law."[330]
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> Fajardo defines soft law as

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[329] Patrick Low, 'Hard Law and "Soft Law": Options for Fostering International Cooperation', in *The E15 Initiative Strengthening the Global Trade and Investment System for Sustainable Development* (ICTSD and World Economic Forum 2015), <http://e15initiative.org/wp-content/uploads/2015/09/E15-Services-Low-Final.pdf/>, Accessed 19 December 2022.

[330] Duncan French, 'International Guidelines and Principles', in Gabriela Kütting (ed.), *Conventions, Treaties and Other Responses to Global Issues: Vol. I* (UNESCO/Encyclopedia of Life Support Systems, 2009), 77.

> "soft rules that are included in treaties, nonbinding or voluntary resolutions, recommendations, codes of conduct, and standards. A good definition of soft law is difficult to find since this term has been the subject of passionate debates between those denying the existence of such law and those who consider it as a new quasi source of international law, and those who study the concept frequently demand that authors embrace one position or the other."[331]

Despite Fajardo's qualifications, it is safe to say that if soft law is indeed deemed to exist (as this chapter shows), it consists of norms that are not binding, and thus not strictly enforceable. Nonetheless, they retain their character as law, because of their ability to influence and shape State behaviour within the international legal system. Fazio states:

> "The character of soft law is given essentially by its content and several elements present in soft law may help to identify its nature. One such element is that its content is relatively vague and does not establish precise rules of conduct. Soft law tends to establish programmes or patterns of conduct to be followed. Furthermore, soft law provisions are generally seen in the form of general principles or programmes envisaging goals to be achieved, instead of concrete rights and obligations…"
>
> However, Fazio continues,
>
> *"first,* soft norms may be viewed as an earlier stage of 'hard' law and may reflect the intention of the parties in dealing with their subject through legally binding instruments in the future; *secondly*, soft norms create an expectation for their participants, so– even if they do not contain any binding rights or obligations–they

[331]Teresa Fajardo, 'Soft Law', *International Law* (30 January 2014), <http://dx.doi.org/10.1093/obo/9780199796953-0040>, Accessed 19 December 2022.

> are intended to influence the behaviour of States, International Organizations, and individuals…"[332]

Jürgen clarified this matter further,

> "Non-binding instruments which are growing in the soft law environment, have two main purposes:
>
> 1. They help to create cross-cutting principles that acknowledge other organisations' instruments.
> 2. They are influential in their ability to affect the progression of norms and other organisations' adoption of them, and hence are useful in coordinating the standards and visions of a variety of organisations."[333]

A major difficulty with employing non-binding instruments is the "absence of an independent judiciary with supporting enforcement powers to conclude that all international law is soft—and is therefore only window dressing".[334] Moreover, from a normative viewpoint, Prosper Weil contends that growing use of soft law "might destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose".[335]

It can also be argued that international actors usually select soft law as a more effective legal tool because they believe it is built to anchor hard law. Soft law delivers many of the rewards of hard law, and avoids

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[332] Silvia Fazio, *The Harmonization of International Commercial Law* (Kluwer 2007), 20.

[333] Jürgen Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer, 2013), 218.

[334] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (Summer 2000), 54(3) *International Organization* (421-456), 422.

[335] Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77, *American Journal of International Law*, 423.

some of its expenses.[336] Soft law, in contrast to hard law, also permits more operative ways of managing uncertainty, in particular when it introduces procedures that allow players to study the effect of agreements over time.[337]

According to Low, within a comprehensive understanding of non-binding instruments,

> "a typology of approaches to cooperation is developed. It is organised on the basis of an ordinal ranking designed roughly around the degree of explicit non-justiciable engagement involved. In this way, under the rubric of soft law, we can consider any formalized arrangement falling short of hard law, including vaguely worded formulations in hard-law agreements; non-justiciable normative provisions; best-practice texts; review mechanisms; and the exchange of information."[338]

Low identifies soft law as a "second-best alternative to hard law", while noting that hard law and soft law can be "alternatives, complements, or antagonists".[339] In turn, D'Amato caustically cites Besson as

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[336] Charles Lipson, 'Why are Some International Agreements Informal?' (1991) 45, *International Organization*, 495-538.

[337] Barbara Koremenos, 'Constructing International Agreements in the Face of Uncertainty', Unpublished manuscript, (UCLA 1998).

[338] Patrick Low, 'Hard Law and "Soft Law": Options for Fostering International Cooperation', in *The E15 Initiative Strengthening the Global Trade and Investment System for Sustainable Development* (ICTSD and World Economic Forum 2015), <http://e15initiative.org/wp-content/uploads/2015/09/E15-Services-Low-Final.pdf/>, Accessed 19 December 2022.

[339] Patrick Low, 'Hard Law and "Soft Law": Options for Fostering International Cooperation', in *The E15 Initiative Strengthening the Global Trade and Investment System for Sustainable Development* (ICTSD and World Economic Forum 2015), <http://e15initiative.org/wp-content/uploads/2015/09/E15-Services-Low-Final.pdf/>, Accessed 19 December 2022.

stating that there is no hierarchy between soft- and hard-law norms. According to D'Amato, Besson

> "regards soft law as the norms that arise from, and then apply to, individuals, organizations, and states….Besson does not claim that when a norm of soft law conflicts with a norm of hard law, soft law trumps hard law. Rather, both sets of norms co-exist. In any event, we learn that the instrumental relation between soft and hard law is less important than the great difference in their goals. The goals, Besson assures us, involve facilitating a new world order based on co-operation, coexistence, democracy, morality, and justice. Goals such as these tend to make a putative critic of soft law feel like the Grinch who stole Christmas."[340]

Nonetheless, D'Amato continues,

> "If Samantha Besson were our tour guide, we would see only norms that call for peace, justice, morality, co-existence, cooperation, multilateralism, pluralism, and democracy. If such norms [i.e., norms that facilitate these stated goals, or 'facilitative norms'] were to take over or pre-empt any area presently governed by traditional international law, then that area would perforce be improved.
>
> Although Besson does not indicate the mechanism by which norms of soft law can come down and preempt norms of hard law, she is entitled to claim that to the extent of any such preemption it happens for the best.
>
> But the flaw in her theory is her selectivity as a tour guide. The noösphere [i.e. the sphere of human cognition] is not just

[340] Anthony D'Amato, 'International Soft Law, Hard Law, and Coherence', (1 March 2008), *Northwestern Public Law Research Paper No. 08-01*, <https://ssrn.com/abstract=1103915>, Accessed 19 December 2022.

> filled with facilitative norms; it also contains norms that oppose the facilitative norms….
>
> Suppose, however, that a filter could be devised that would allow the norms approved by Besson to pass through while blocking the contrary norms. The resulting shower of purely facilitative norms upon the Earth could only lead to legal improvements and legal reform. As we have seen, Besson does not provide a filter; she trusts that soft law will co-exist with hard law by filling in unoccupied areas and gaps in the traditional legal system. But coexistence is hardly a solution when the contrary norms are mixed in with the facilitative ones."[341]

D'Amato's somewhat acerbic style has resulted in a lengthy text that might obscure the very crucial problem he raises. Nonetheless, the question deserves a response: when a hard-law norm conflicts with a soft-law norm, which takes precedence? How should incoherence between these forms of law be resolved? To answer these questions, this work holds that although nothing prevents soft-law norms from being physically modified it is not appropriate to apply harmonization to soft law. This is true for two reasons.

First, soft law is non-binding, and can therefore never truly force conflicting obligations on a State. Modifying a 'soft' provision does not make it more binding, unless the amendment process actually transforms it into a 'hard' provision. In this case, amendment would harmonize two norms by making them both binding and thus both 'hard', but it will not have genuinely harmonized a hard provision with a soft one. Such a 'soft-hard' harmonization is thus, by definition, impossible—precisely because it is unnecessary.

Second, this work has noted that while the WTO Agreement is clearly an instrument of hard law, the UNESCO CDCE is 'a sheep in a wolf's

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[341] Ibid.

clothing'—an instrument that uses the form of hard law, while its content is composed of soft words. The UNESCO CDCE's drafters purposely chose a softer construction to make it more compatible with the WTO Agreement. Applying the logic of the foregoing discussion, it is possible to amend the Convention's soft wording and enforcement mechanisms to make them 'harder', but (beyond concerns of practicability) this technique may increase, rather than decrease, the potential for conflict in ways unforeseen to the amenders. Instead, this study proposes that a mutually supportive perspective on their relationship may be more useful to reconcile the two instruments.

Chapter 4 has shown that, in efforts to reconcile conflicts between the WTO and UNESCO legal systems, harmonization through hard law does not produce practicable results. Therefore, this study turns to an examination of soft law to see whether it may prove more useful in enhancing coherence.

Analysing Criticism of Hard Law and Soft Law: Usage of Soft Law in the European Union

According to Friedrich,[342] while non-binding devices are convenient to initiate amendments and research into recently developed fields of study, States usually favour binding regulations. This is generally true, as long as these States perceive such a binding approach to be politically practicable. However, just as Fazio does, Snyder relevantly defines soft law as "rules of conduct, which in principle have no legally binding force but which nevertheless may have practical effects".[343]

In recent years, there has been growing interest in soft law in the European Union (EU). Although, as previously noted, some scholars be-

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[342] Jürgen Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013), 184.

[343] Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools, and Techniques', (1993) 56 *Modern Law Review*, 19-56.

lieve soft law to be a 'second-best alternative' to hard law, and despite Friedrich's statement that "the most relevant contribution of non-binding instruments to the development of international law is their role as precursors of treaty law",[344] some European appraisals of the issues include criticisms of hard law. The work of Trubek, Cottrell, and Nance consolidates several opinions from the EU.

The European scholars analyse and find that:

- Hard law tends toward uniformity of treatment, while many current issues demand tolerance for significant diversity among Member States.
- Hard law presupposes a fixed condition based on prior knowledge, while situations of uncertainty may demand constant experimentation and adjustment.
- Hard law is difficult to change, yet in many cases frequent changes to norms may be essential to achieve optimal results.
- If actors do not internalise the norms of hard law, enforcement may be difficult; if they do, it may be unnecessary.[345]
- The same authors observe EU-based criticisms of soft law with respect to hard law. Objections to the use of soft law in the EU include:
- It lacks the clarity and precision needed to provide predictability and a reliable framework for action;
- The EU treaties include hard provisions that enshrine market principles and these can only be offset if equally hard provisions are added to promote social objectives;

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[344] Jürgen Friedrich *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013) 214.

[345] David M. Trubek, Patrick Cottrell, and Mark Nance '"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity' 3 < https://papers.ssrn.com/sol3/results.cfm > Accessed 19 December 2022.

- Soft law cannot forestall races to the bottom in social policy within the EU;
- Soft law cannot really have any effect but it is a covert tactic to enlarge the Union's legislative hard law competence;
- Soft law is a device that is used to have an effect but it by-passes normal systems of accountability;
- Soft law undermines EU legitimacy because it creates expectations but cannot bring about change.[346]

The foregoing serves as an example of the difficulties with both hard and soft law. This criticism is correct to point out that hard law's problems include inflexibility, difficult amendment processes, and difficulties of enforcement. Despite the foregoing criticisms of soft law, however, the latter's strength lies precisely in its flexibility, the fact that its non-binding nature, often influences State behaviour without coercion. Criticism of soft law is valid, but it fails to see the potential and capacities of the alternative legal form. Soft law often fits precisely into the niches where hard law fails.

Soft Law: Examples from the WTO

Soft law is present in the accession procedure to the WTO, as founded on GATT 1947 practice. In 1995, the Secretariat of the WTO delivered a practical report on the succession procedure, which it re-examined in 2004. Its purpose was to provide a platform for operational direction in order to help the Members in "the organization and pursuit of accession negotiations" by active Members. This document is not binding. The operational report for accession to the WTO applies in conjunction with two alternative GATT 1947 mechanisms ('Complementary Procedures on Accession Negotiations' and the 'Chairman's Note on the Management of Accession Negotiations'), also not binding. These unofficial norms of soft law, which lay the groundwork for the

[346] ibid 2.

transition from the GATT to the WTO, provide Member States with significant adaptability and an understanding of intentions when it comes to specific State successions.

The GATT 1947, which the WTO replaced, was mostly concerned with tariff reductions. It functioned, in the words of Alvarez, as a 'linkage machine'. Its rules and respective policies of States often link trade with other issues: including intellectual property protection, government procurement, and aspects of investment law or environmental protection.

Currently, the WTO is increasingly engaged in the creation of guidelines. One could say that, the Organization recognises the International Organization for Standardization through the WTO, TBT Agreement, and the *Codex Alimentarius* Commission through the SPS Agreement. Because the WTO applies these standards, they have a certain legitimacy that they otherwise would not have. Therefore, the WTO indirectly promotes the development and the use of such international norms, whether legally binding or not.

5.1.1.2 Mutual Supportiveness: Principle Versus Approach

Chapter 3's conclusion has demonstrated that mutual supportiveness is a general principle of international law which must be used and 'taken into account' pursuant to Article 31.3(c) VCLT. Consequently, mutually supportive interpretations of similar terminology and concepts in the two treaties are genuinely possible. For instance, the shared value of 'sustainable development', and the terms 'protect' and 'protection' (common between the two treaties), give rise to mutually supportive interpretations that would yield the result of coherence between the two in many respects. Other, similar, mutually supportive interpretations are equally possible.

The ILC's Report on fragmentation (which Chapter 4 also cites) identifies a close relationship between the route of interpretation, (as Chapter 3 has elaborated), and what it describes as the 'technique' of

mutual supportiveness. Indeed, the ILC identifies mutual supportiveness as a category of interpretation. Its Report states:

> "[C]ontrary to what is sometimes suggested, conflict-resolution and interpretation cannot be distinguished from each other. Whether there is a conflict and what can be done with prima facie conflicts depends on the way the relevant rules are interpreted. Interpretation does not intervene only once it has already been ascertained that there is a conflict. Rules appear to be compatible or in conflict *as a result of interpretation*. Sometimes it may be useful to stress the conflicting nature of two rules or sets of rules so as to point to the need for legislative intervention. Often, however, it seems more appropriate to play down that sense of conflict and to read the relevant materials from the perspective of their contribution to some generally shared – 'systemic'– objective. Of this, the technique of 'mutual supportiveness' provided an example."[347]

According to the ILC Report, mutual supportiveness is a "category of interpretation" and this study developed reasoning based on this quotation that considers it as a treaty interpretation principle. However, Boisson de Chazournes and Mbengue, criticise the ILC's presentation of the concept.

The treatment of the principle or concept of mutual supportiveness in the *Report of the International Law Commission (ILC) on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* is an (un)conscious attempt at re-

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[347] International Law Commission, *Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'* para 412. Finalized by Martti Koskeniemmi. 58th Session (1 May - 9 June and 3 July-11 August 2006), Geneva, <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf>, Accessed 19 December 2022.

ducing mutual supportiveness to a 'footnote to history'. The ILC Report mentions mutual supportiveness only in two instances, and then only briefly.[348]

Boisson de Chazournes and Mbengue write:

> "While in the 'PIC trend', mutual supportiveness is only considered in its 'complementarity' aspect or outside any specific reference frame for harmony and integration between international agreements as evidenced by the POP Convention, mutual supportiveness is legally empowered in the Cartagena Protocol.
>
> Yet the Cartagena Protocol sits well at the crossroads of the PIC Convention and the POP Convention. It is based on the principle of mutual support, thereby approaching the spirit of the POP Convention, and adopts the same incentive approach as the Rotterdam Convention. The pursuit of sustainable development is not seen as a legal achievement but as an objective to be achieved. Mutual supportiveness thus emerges - at least on reading the Preamble to the Protocol - as an interpretive principle. Its function is to promote a harmonious interpretation of international trade agreements and MEAs in the direction of sustainable development. In addition, it aims to exclude any rationality of conflict between these different systems of international agreements. It is also emerging as a guiding principle which aims to guide and orient the parties in the direction of a harmonious implemen-

[348] Laurence Boisson de Chazournes and Makane M Mbengue, 'A "Footnote as a Principle". Mutual Supportiveness and Its Relevance in an Era of Fragmentation' (7 October 2011), *2 Coexistence, Cooperation and Solidarity - Liber Amicorum Rüdiger Wolfrum* 1615-1638 (1615), Holger P Hestermeyer and others (eds.), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336979>, Accessed 19 Decmber 2022.

> tation of their respective rights and obligations under international trade agreements and MEAs. "[349]

Citing a 'spirit of mutual supportiveness' that is identifiable in reports of WTO dispute-settlement bodies (such as the Appellate Body decision in *Brazil–Tyres*),[350] Boisson de Chazournes and Mbengue iden-

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[349] Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'A propos du principe du soutien mutuel–les relations entre le Protocole de Cartagena et les Accords de l'OMC (2007), *Revue générale de droit international public* (829-862), 833-834. Tandis que dans la « tendance PIC », le soutien mutuel n'est envisagé que dans son versant « complémentarité » ou en dehors de tout référentiel spécifique à l'harmonie et à l'intégration entre accords internationaux ainsi qu'en témoigne la Convention POP, le soutien mutuel est juridiquement autonomisé dans le Protocole de Cartagena. Pourtant, le Protocole de Cartagena se situe bien au carrefour de la Convention PIC et de la Convention POP. Il prend appui sur le principe du soutien mutuel se rapprochant par là de l'esprit de la Convention POP, et adopte la même démarche incitative que la Convention de Rotterdam. La poursuite du développement durable n'y est pas vue comme un acquis juridique mais comme un objectif à réaliser. Le soutien mutuel se profile de ce fait–du moins à la lecture du Préambule du Protocole–comme un principe interprétatif. Il a pour fonction de promouvoir une interprétation harmonieuse des accords du commerce international et des AEM dans le sens d'un développement durable. En outre, il a pour vocation d'exclure toute rationalité de conflit entre ces différents systèmes d'accords internationaux. Il se profile également comme un principe directeur qui a pour vocation de guider et d'orienter les parties dans le sens d'une mise en œuvre harmonieuse de leurs droits et obligations respectifs en vertu des accords internationaux de commerce et des AEM.

[350] 'Think, for example, of the decision of the Appellate Body in the *Brazil–Tyres* case in which the Appellate Body clearly recognised that "certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions–for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce

tify mutual supportiveness as a 'fundamental principle' that has a better legal foundation than that of harmonization, because of its deeper basis in relating instruments through shared common values. This identifies mutual supportiveness as a perspective is more useful in resolving fragmentation.

From the perspective of the UNESCO CDCE, Singh states that

> "Article 20 establishes the relationship to other international treaties: 'mutual supportiveness' is mentioned as the underlying principle, but the convention cannot be subordinated to other treaties. In other words, if there was to be a trade versus cultural protection [dispute in] the future, it would have to be resolved in the spirit of mutual supportiveness without subordinating the UNESCO Convention."[351]

This study now turns to the rationale for using mutual supportiveness as a fundamental principle in the present study. Article 20 of UNESCO CDCE's is an important provision that clearly invites collaboration with other treaties through mutual supportiveness. The objective of this work is to investigate productive interaction between the UNESCO CDCE and the WTO Agreement. This chapter examines the roots of mutual supportiveness and its usage in international law. It also presents the

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the incidence of diseases that may manifest themselves only after a certain period of time–can only be evaluated with the benefit of time." This acknowledgment of environmental complexity could play a vital role in building bridges between environment treaties and trade agreements. Perhaps the future of mutual supportiveness lies in a sort of informal integration of that principle, but with a formal purpose, which is to strengthen the ties between environment treaties and trade agreements. This informal integration can be channeled through treaty interpretation.' ibid 1633.

[351] JP Singh, *Globalized Arts: The Entertainment Economy and Cultural Identity* (Columbia 2011), 82.

implications of mutual supportiveness 'explicitly' in the UNESCO CDCE and 'implicitly' in the WTO Agreement.

Also of note is that several relatively recent agreements have used the mutual supportiveness approach, including the 2001 *International Treaty on Plant Genetic Resources for Food and Agriculture*, the 2000 *Cartagena Protocol on Biosafety*, and the 1998 *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (PIC).

In turn, intense discussions concerning the relationship between the UNESCO CDCE and the WTO Agreement resulted in the adoption of UNESCO CDCE Article 20: "Relationship to other Treaties: Mutual Supportiveness, Complementarity and Non-Subordination". UNESCO CDCE Article 20(1)(a), in particular, prescribes 'mutual supportiveness' regarding that treaty's relationship with other instruments. This provision is worth citing in full:

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

The explicit mention of mutual supportiveness here is, of course, noteworthy. The UNESCO CDCE is a rare treaty, in that it uses this

term within its text. As mentioned above, a small number of other treaties use the term as well, but its meaning is presently disputable depending on the context of each text. It is unambiguous that UNESCO CDCE uses the words 'mutual supportiveness' prescribing the use of soft law—such as guidelines, declarations, and other non-binding instruments—to enhance coherence between itself and the WTO Agreement.

5.1.2 Concepts

The term "mutual supportiveness" makes an appearance in several treaties. For instance, Recitals 9–11 of the Preamble to the *International Treaty on Plant Genetic Resources for Food and Agriculture* (ITPGR, signed in 2001) read:

Recognizing that this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to sustainable agriculture and food security;

Affirming that nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements;

Understanding that the above recital is not intended to create a hierarchy between this Treaty and other international agreements …

This formula of 1) mutual supportiveness, 2) no change to rights or obligations under other treaties (or complementarity), and 3) non-subordination, is becoming more common, as this section shows. It reaches its apex in the UNESCO CDCE, where the formula moves from the usual position of preambular language into the binding provisions of the Convention.

Mutual supportiveness is of particular importance to this work because one of the two instruments that constitute the basis of the present discussion explicitly prescribes it. Article 20(1)(a) reads: "Parties…shall foster mutual supportiveness between this Convention and the other treaties to which they are Parties".

The drafters included the concept by name, making it part of the legally binding provisions of the document. This decision indicates that the principle of mutual supportiveness not only had an established existence prior to the Convention's preparation in 2005, but that the drafters understood its practical application and effects, at least to a certain degree.

Furthermore, the historical rationale for the UNESCO CDCE's existence, as a response to the perceived overreach of the WTO's non-discrimination provisions provides context for the decision to choose this principle. When approving the UNESCO CDCE, both Mexico and Australia expressed detailed reservations[352] regarding Article 20(1), intended to ensure that it would not weaken obligations under the WTO Agreement. Additionally, the drafters evidently intended during the UNESCO CDCE negotiations—under pressure by the United States of America and its allies—that the very 'soft' language of the instrument would facilitate coherence with the WTO Agreement.

Thus, the explicit decision to prescribe 'mutual supportiveness' as a route to establishing coherent relationships with other treaties must be taken seriously. The following sections will detail the concept's development in international law, the background of its presence (at least in spirit) in WTO case law, and its practical consequences when applied in these cases. This historical perspective will illuminate the role of mutual supportiveness, applied together with soft law, in facilitating the relationship between the WTO Agreement and the UNESCO CDCE regarding trade in cultural goods.

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[352] These reservations were respectively made on 18 September 2009 (Australia) and 5 July 2006 (Mexico) upon ratification of the UNESCO CDC by the two countries. <https://www.unesco.org/en/legal-affairs/convention-protection-and-promotion-diversity-cultural-expressions?hub=66535#item-3>, Accessed 19 December 2022.

5.1.2.1 Precedent for Mutual Supportiveness in International Law: Critical Perspectives

This section demonstrates the increasingly widespread use of mutual supportiveness in treaties ratified by a significant number of States. Each of the examples cited below illuminates a different perspective on the concept. Boisson de Chazournes and Mbengue show that the use and understanding of 'mutual supportiveness', by the drafters of four relatively recent treaties, has progressed in a way that clarifies its meaning and increases its utility in reducing fragmentation. The section concludes with a discussion of the strong case for a mutually supportiveness of the relationship between trade and some of human rights regimes, and demonstrates that the UNESCO CDCE forms part of the regime of human rights.

Mutual Supportiveness and the 'PIC Tendency'

Boisson de Chazournes and Mbengue list four tendencies for the use of mutual supportiveness in international law. They name the first the 'PIC Tendency'—after the *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (the PIC or Rotterdam Convention)—which confuses mutual supportiveness with complementarity. They also note that the PIC Tendency influenced the *Stockholm Convention on Persistent Organic Pollutants* (Stockholm Convention on POPs).

To begin, the PIC (drafted in 1998) came into force on 24 February 2004. It is intended to regulate the "potential risks posed by hazardous chemicals and pesticides"[353] in the trade and environmental arenas. The English text of the Preamble to the *Convention on the Prior Informed*

[353] Secretariat of the Rotterdam Convention–UNEP 'History of the Negotiations of the Rotterdam Convention', *Rotterdam Convention*, http://www.pic.int/TheConvention/Overview/History/Overview/tabid/1360/language/en-US/Default.aspx, Accessed 19 Decmber 2022.

Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade reads, in part:

Recognizing that trade and environmental policies should be mutually supportive with a view to achieving sustainable development,

Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,

Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements

The strong similarity between the PIC Preamble's language and that of UNESCO CDCE Article 20 simultaneously prescribing mutual supportiveness, no alteration to rights or obligations under other treaties ('complementarity'), and non-subordination—indicates that the PIC's preamble is a predecessor to CDCE Article 20.

Boisson de Chazournes and Mbengue note that the PIC Preamble's expression "trade and environmental policies should be mutually supportive", in the English text, becomes "*les politiques commerciales et environnementales devraient être complémentaires*" in the French. The interpretation prescribed under VCLT Article 33(1) (mandating the equality of all authenticated linguistic versions of the text), and Article 33(3) (where the "terms of the treaty are presumed to have the same meaning in each authentic text"), poses a problem. The linguistic conflation of 'mutually supportive' with '*complémentaire*', according to Boisson de Chazournes and Mbengue, indicates a flawed conceptual foundation to the PIC drafters' perspective on mutual supportiveness. For disambiguation, Boisson de Chazournes and Mbengue refer to mutual supportiveness as '*soutien mutuel*' in French which was used in the same manner in UNESCO CDCE language.

The first trend of mutual supportiveness may be dubbed the 'PIC trend' after the name of the Rotterdam Convention on the Prior In-

formed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (hereafter 'PIC Convention'). The Preamble to this Convention emphasizes that "trade and environmental policies should be complementary in order to ensure the advent of sustainable development". Although this clause of the Preamble of the PIC Convention constitutes a base for a symbiotic reading of trade agreements and MEAs [multilateral environmental agreements or MEAs], mutual supportiveness is only seen as a factor of complementarity. However, mutual supportiveness transcends complementarity. All mutual supportiveness brings complementarity but all complementarity does not bring mutual supportiveness. Complementarity aims at active neutrality that should allow each body of standards, environmental and commercial, to contribute to a similar objective such as sustainable development, but without there being any legal interpenetration between the different regimes. [354]

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[354] Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'A propos du principe du soutien mutuel–les relations entre le Protocole de Cartagena et les Accords de l'OMC (2007), *Revue générale de droit international public* (829-862), 832.

La première tendance de soutien mutuel peut être baptisée « tendance PIC » du nom de la Convention de Rotterdam sur la procédure de consentement préalable en connaissance de cause applicable à certains produits chimiques et pesticides dangereux qui font l'objet d'un commerce international (ci-après « Convention PIC »). Le Préambule de cette Convention souligne que « les politiques commerciales et environnementales devraient être complémentaires afin d'assurer l'avènement d'un développement durable ». Bien que cette clause du Préambule de la Convention PIC constitue un socle pour une lecture symbiotique des accords commerciaux et des AEM [accords environnementaux multilatéraux, i.e. multilateral environmental agreements or MEAs], le soutien mutuel n'y est perçu qu'en tant que facteur de complémentarité. Or, le soutien mutuel transcende la complémentarité. Tout soutien mutuel est porteur de complémentarité mais toute complémentarité n'est pas porteuse de soutien mutuel. La complémentarité vise une neutralité active devant permettre à chacun des corps de normes, environnementales et commerciales, de concourir à un objectif similaire tel le dévelop-

According to Boisson de Chazournes and Mbengue, then, the 'PIC Tendency' views mutual supportiveness as just an aspect of complementarity between treaties. Complementarity sees that treaties coexist in a neutral state, but does not mean that their content dynamically interpenetrates according to a comprehensive understanding of the phrase 'mutual supportiveness'.

Therefore, the scholars argue, mutual supportiveness actually 'transcends' complementarity because, while mutual supportiveness always guarantees complementarity, complementarity does not always deliver a mutually supportive relationship. These scholars thus do not accept the PIC perspective on the principle of mutual supportiveness, and the present work shares their view.

Mutual Supportiveness and the 'Cartagena Tendency'

Boisson de Chazournes and Mbengue name the second tendency of mutual supportiveness the 'Cartagena Tendency', after the *Cartagena Protocol on Biosafety to the Convention on Biodiversity.* This tendency grants mutual supportiveness 'legal autonomy', as evidenced by the fact that the Cartagena Tendency refers to the principle by its own name (in French, "*les accords sur le commerce et l'environnement devraient se soutenir mutuellement*"), rather than conflating it with another concept. Thus, the Cartagena Tendency avoids the error of the PIC Tendency.

The Cartagena Protocol was adopted in January 2000 after five years of negotiation; and entered into force in September 2003. Academics observe that this is the first time a multilateral agreement mentioned the principle.[355]

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pement durable mais sans qu'il n'y ait d'interpénétration juridique entre les différents régimes.

[355] ibid 837.

The relevant part of the Preamble to the Cartagena Protocol (Recitals 9–11) reads in full, in English:

> "*Recognizing* that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,
>
> *Emphasizing* that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,
>
> *Understanding* that the above recital is not intended to subordinate this Protocol to other international agreements"

Again, the same elements—mutual supportiveness, no alteration to rights or obligations under other treaties (complementarity), and non-subordination—appear together in the Cartagena Protocol's Preamble.[356]

Thus, according to Boisson de Chazournes and Mbengue, the Cartagena Tendency frees the principle of mutual supportiveness from conflation with other concepts, and establishes it as both an interpretive and guiding principle, in its own right. As an '*interpretive* principle', it promotes a harmonious *interpretation* of trade treaties and MEAs, eliminating rational conflicts between them, on the basis of a shared value of sustainable development. As a '*guiding* principle', mutual supportiveness advocates a harmonious *implementation* of rights and obligations between trade and environment agreements.

Boisson de Chazournes and Mbengue continue:

> "The principle of mutual support as defined by the Cartagena Protocol is not limited to producing the objective effect mentioned above. A subjective effect derives from it. It consists in recognizing the granting of certain rights to States concerned

[356] Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'A propos du principe du soutien mutuel–les relations entre le Protocole de Cartagena et les Accords de l'OMC' (2007), op. cit. (829-862), 833-834.

> with international trade in biotechnological products. The content of these rights in turn reinforces the principle of mutual support between the Cartagena Protocol and the WTO Agreements. It is firstly the right of a State to determine the appropriate level of environmental or health protection and secondly the balancing of environmental and health considerations with considerations of another type, in particular of an economic nature."[357]

The Cartagena Tendency on mutual supportiveness, then, also includes subjective notions of the right of States to *determine the level of protection appropriate* to them, while *balancing* health and environmental concerns with those of trade. This work note with approval the Cartagena Tendency and its implications, and continues with its examination of the mutual supportiveness.

Mutual Supportiveness, the 'WTO Tendency', and Multilateral Environmental Agreements

Like the Cartagena Tendency, Boisson de Chazournes' and Mbengue's 'WTO Tendency' deals with the relationship between MEAs and the WTO agreement. The WTO web page 'Trade and Environment' states:

> "Sustainable development and protection and preservation of the environment are fundamental goals of the WTO. They are en-

[357] ibid 857.

Le principe du soutien mutuel tel que défini par le Protocole de Cartagena ne se limite pas à produire l'effet objectif susmentionné. Un effet subjectif en dérive. Il consiste à reconnaître l'octroi de certains droits aux Etats concernés par le commerce international de produits biotechnologiques. Le contenu de ces droits conforte à leur tour le principe du soutien mutuel entre le Protocole de Cartagena et les Accords de l'OMC. Il s'agit primo du droit d'un Etat à déterminer le niveau de protection environnementale ou sanitaire approprié et secundo de la mise en balance de considérations environnementales et sanitaires avec des considérations d'un autre type, notamment de nature économique.

> shrined in the Marrakesh Agreement, which established the WTO, and *complement the WTO's objective to reduce trade barriers and eliminate discriminatory treatment* in international trade relations. While there is no specific agreement dealing with the environment, under WTO rules members can adopt trade-related measures aimed at protecting the environment provided a number of conditions to avoid the misuse of such measures for protectionist ends are fulfilled."[358]

This work holds that mutual supportiveness in the environmental context may provide a template for future initiatives to bridge the legal regimes of trade and cultural diversity. The Preamble to the WTO's 1994 'Ministerial Decision on Trade and Environment' notes the "aim of making international trade and environmental policies mutually supportive". As regards the relationship between legal regimes of the WTO and environmental agreements, Boisson de Chazournes and Mbengue hold that

> "there is no *a priori* conflict between MEAs[359] and WTO law. The rationale for conflict is to be put aside and priority is to be given…to principles and criteria of coexistence and coherence between MEAs and WTO law. These principles of coexistence

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[358] WTO 'Trade and Environment', <http://www.wto.org/english/tratop_e/envir_e/envir_e.htm>, Accessed 19 December 2022. Emphasis added.

[359] WTO 'The Doha Mandate on Multilateral Environmental Agreements', <http://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm>, Accessed 19 December 2022. See also *Multilateral Environmental Agreement Negotiator's Handbook* (Environment Canada/UNEP/University of Joensuu 2007), <http://unfccc.int/resource/docs/publications/negotiators_handbook.pdf>, Accessed 19 December 2022. See furthermore Duncan Brack and Kevin Gray, *Multilateral Environmental Agreements and the WTO* (Royal Institute of International Affairs/International Institute for Sustainable Development 2003), <http://www.worldtradelaw.net/articles/graymeawto.pdf.download#page=1>, Accessed 19 December 2022.

> and coherence are contained principally in the generic principle of mutual supportiveness."[360]

Thus, the scholars argue from the perspective that mutual supportiveness is a general principle and criteria of coexistence and coherence as an approach of international law, and this therefore obliges States and international organisations to use it to resolve conflict between treaties.

The authors in the mentioned quotation while referring to "the generic principle of Mutual Supportiveness" conclude that there is a "general principle" of international law, as a criteria that creates an approach to achieve more coherence between the treaties. Further to this observation, Boisson de Chazournes and Mbengue identify a fourth tendency in their '*Protocole de Cartagena et les Accords de l'OMC*': the 'WTO Tendency'. They write:

> "The third trend relates to the 'WTO trend' of mutual support. The Doha Declaration of the WTO Ministerial Conference transposes the principle of mutual support in the framework of the negotiations at the WTO on the relationship between WTO rules and MEAs. Paragraph 31 of the Doha Declaration reads as follows: 'In order to strengthen the mutual support of trade and environment, we agree to negotiations, without prejudging their outcome, concerning: i) the relationship between the rules existing WTO and specific trade obligations set out in multilateral environmental agreements (MEAs). The scope of the negotiations will be limited to the applicability of those existing WTO rules between the parties to the MEA in question. The negotiations will be without prejudice to the WTO rights of any Member which is not a party to the MEA in question'. The Hong Kong

[360] Laurence Boisson de Chazournes and Makane M. Mbengue, 'Trade, Environment and Biotechnology: On Coexistence and Coherence', in Daniel Wuger and Thomas Cottier, *Genetic Engineering and the World Trade System* (Cambridge 2008), 207.

> Ministerial Declaration reiterates the principle of mutual support: 'We reaffirm the mandate set out in paragraph 31 of the Doha Ministerial Declaration, which aims to strengthen mutual support for trade and the environment, and we welcome the important work undertaken in the Committee on Trade and Environment (CTE) meeting in Special Session. We instruct Members to intensify negotiations, without prejudice to their outcome, on all parts of paragraph 31 in order to fulfill the mandate'."[361]

Thus, Boisson de Chazournes and Mbengue show that the WTO has begun to directly recognise mutual supportiveness in the sphere of trade-environment relations. Like the Cartagena Tendency before it, paragraph 31 of the 2001 Doha Ministerial Declaration shows that the WTO rec-

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[361] Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'A propos du principe du soutien mutuel–les relations entre le Protocole de Cartagena et les Accords de l'OMC' (2007) 4, *Revue générale de droit international public* 829-862 (834-835). La troisième tendance a trait à la « tendance OMC » du soutien mutuel. La Déclaration de Doha de la Conférence ministérielle de l'OMC transpose le principe du soutien mutuel dans le cadre des négociations à l'OMC sur la relation entre règles de l'OMC et AEM. Le paragraphe 31 de la Déclaration de Doha se lit en effet comme suit: « Afin de renforcer le *soutien mutuel du commerce et de l'environnement*, nous convenons de négociations, sans préjuger de leur résultat, concernant: i) la relation entre les règles de l'OMC existantes et les obligations commerciales spécifiques énoncées dans les accords environnementaux multilatéraux (AEM). La portée des négociations sera limitée à l'applicabilité de ces règles de l'OMC existantes entre les parties à l'AEM en question. Les négociations seront sans préjudice des droits dans le cadre de l'OMC de tout Membre qui n'est pas partie à l'AEM en question ». La Déclaration ministérielle de Hong Kong réitère le principe du soutien mutuel: « Nous réaffirmons le mandat énoncé au paragraphe 31 de la Déclaration ministérielle de Doha, qui vise à renforcer *le soutien mutuel du commerce et de l'environnement*, et nous félicitons des travaux importants entrepris au Comité du commerce et de l'environnement (CCE) réuni en Session extraordinaire. Nous donnons pour instruction aux Membres d'intensifier les négociations, sans préjuger de leur résultat, sur toutes les parties du paragraphe 31 afin de remplir le mandat ».

ognises mutual supportiveness between trade rules and MEAs. Similarly, the 2005 Hong Kong Ministerial Declaration explicitly reiterated the WTO's commitment to paragraph 31's mandate, again using the phrase 'mutual supportiveness'. In passing, this work also notes that this Non-binding Ministerial Declarations also forms a type of 'soft law', and will return to that theme in following section.

MEAs have relevance for the cultural diversity regime under the UNESCO CDCE. Dahrendorf notes that:

> "Such questions concerning the relationship between an international agreement and the *Marrakesh Agreement Establishing the World Trade Organization* (in the following 'WTO Agreement') including its multiple Annexes are not as new as they might seem. The same issues have already been discussed within the Committee on Trade and Environment (thereinafter CTE) in relation to Multilateral Environmental Agreements (thereinafter MEAs) for more than ten years under the auspices of the WTO. …Unfortunately, the CTE has not yet presented a common agreement of WTO Members on the question what the legal relationship between MEAs and the WTO agreement, including its Annexes, is. Nevertheless, the discussion in the area of environment *is simultaneously important for the area of culture as the questions to be answered are very similar*."[362]

[362] Anke Dahrendorf, 'Trade Meets Culture: The Legal Relationship between WTO Rules and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions', in Hildegard Schneider and Peter van den Bossche, *Protection of Cultural Diversity from a European and International and Perspective* (Intersentia 2008), 32-33; Emphasis added. Also see Anke Dahrendorf, *Trade Meets Culture: The Legal Relationship between WTO Rules and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Universiteit Maastricht 2011), 4, <https://cris.

The spheres of cultural diversity and the environment both contain similar overlap and the potential for conflict within the realm of trade, and both wish to defuse this potential for conflict. Boisson de Chazournes and Mbengue find that the WTO has begun investigating a solution to this issue by employing the principle of mutual supportiveness. The WTO describes the relationship between trade and environment as one of 'complementary objectives', alongside the explicit mention of mutual supportiveness in the Doha and Hong Kong Ministerial Declarations.

The WTO-MEA relationship has already produced a model for using mutual supportiveness to enhance coherence between WTO and non-WTO treaties. Thus, as Dahrendorf argues, if such a solution is so readily available in the sphere of environment-trade relationships, it may serve as a model for interactions between trade and culture. This study accepts that argument.

Mutual Supportiveness and the 'UNESCO Tendency'

The final tendency that Boisson de Chazournes and Mbengue identify is the 'UNESCO Tendency'. They write:

> "The fourth trend can be qualified as 'UNESCO trend' with reference to the UNESCO Convention on Cultural Diversity. This marks a new stage in mutual supportiveness. While all of the above-mentioned international agreements incorporate the principle of mutual supportiveness in their Preamble, the UNESCO Convention incorporates the principle of mutual supportiveness as a jus dispositivum. The reference to the principle is explicit there as in the context of the 'Cartagena' generation since the States Parties 'encourage mutual support between this Convention and the other treaties to which [they] are parties'. The

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maastrichtuniversity.nl/en/publications/trade-meets-culture-the-legal-relationship-between-wto-rules-and->, Accessed 19 December 2022.

> UNESCO Convention differentiates mutual support from simple 'complementarity' through the very interesting title of Article 20 of the UNESCO Convention: 'Relations with other instruments: mutual support, complementarity and non-subordination'. Better still, it clarifies the content of these concepts. It thus demonstrates that complementarity is aimed at ensuring that States fulfill 'in good faith their obligations under this Convention and all other treaties to which [they] are parties'. This explains the famous active neutrality referred to to clarify the meaning of the content of the concept of complementarity in the PIC Convention. Finally, the UNESCO Convention highlights the diptych on which the principle of mutual support is based, that is to say a principle of interpretation and a guiding principle by providing that 'when [they] interpret and apply others treaties to which [they] are parties or when [they] enter into other international obligations, [States] Parties shall take into account the relevant provisions of this Convention'."[363]

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[363] Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'A propos du principe du soutien mutuel–les relations entre le Protocole de Cartagena et les Accords de l'OMC' (2007), op. cit., 829-862 (835). La quatrième tendance peut être qualifiée de « tendance UNESCO » en référence à la Convention de l'UNESCO sur la diversité culturelle. Celle-ci marque une étape nouvelle en matière de soutien mutuel. Alors que tous les accords internationaux susmentionnés incorporent le principe du soutien mutuel dans leur Préambule, la Convention de l'UNESCO incorpore le principe du soutien mutuel à titre de *jus dispositivum*. La référence au principe y est explicite comme dans le cadre de la génération « Cartagena » puisque les Etats parties « encouragent le soutien mutuel entre cette Convention et les autres traités auxquels [ils] sont parties ». La Convention UNESCO différencie le soutien mutuel de la simple « complémentarité» par le biais de l'intitulé fort intéressant de l'Article 20 de la Convention UNESCO: « *Relations avec les autres instruments: soutien mutuel, complémentarité et non-subordination*». Mieux, elle clarifie le contenu de ces concepts. Elle démontre ainsi que la complémentarité vise à ce que les Etats rem-

Thus, the 'UNESCO Tendency' is to view mutual supportiveness in direct relationship with the notion of soft law, or '*jus dispositivum*' in the Latin phrase that Boisson de Chazournes and Mbengue employ here. It conceptually separates 'complementarity' from 'mutual supportiveness' in the text, linking complementarity with good faith in fulfilling obligations under both the UNESCO CDCE and all other treaties. The UNESCO CDCE moves the now-formulaic prescriptions of mutual supportiveness, complementarity, and non-subordination from the preamble, which can never bind its signatories (and where it is placed in the previous treaties), to the 'binding provisions' of the agreement.

The principle of mutual supportiveness within the UNESCO CDCE is best understood alongside the concepts of non-subordination and complementarity. Some scholars are of the view that 'non-subordination and mutual supportiveness' can better explain the interrelationship between different legal regimes by emphasising the principle of normative interaction rather than normative conflicts.

The UNESCO CDCE not only requires States Parties to perform treaty obligations in good faith, but also to fully respect all other treaty-based obligations, "without subordinating this Convention to any other treaty". Moreover, the Convention specifically urges State Parties to "foster mutual supportiveness between this Convention and the other treaties to which they are Parties". Article 20 of the UNESCO CDCE,

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plissent « de bonne foi leurs obligations en vertu de la présente Convention et de tous les autres traités auxquels [ils] sont parties ». Cela explique la fameuse neutralité active à laquelle l'on s'est référée pour expliciter le sens du contenu du concept de complémentarité dans la Convention PIC. La Convention UNESCO met enfin en exergue le diptyque sur lequel s'appuie le principe de soutien mutuel, c'est-à-dire un principe d'interprétation el un principe directeur en prévoyant que « lorsqu' [ils]*interprètent et appliquent* les autres traités auxquels [ils] sont parties ou lorsqu'[ils] souscrivent à d'autres obligations internationales, les [Etats] Parties prennent en compte les dispositions pertinentes de la présente Convention ».

specifically its clause 2, addresses conflict between treaties by declaring that "nothing in this Convention shall be interpreted as altering rights and obligations of the Parties subject to any other treaties to which they are Members". Throughout the negotiation, there was discussion of this provision and its relationship with other legal instruments, as suggested in the preliminary experts' draft of July 2004:

The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.

Nonetheless, the preamble and the relevant provisions of the UNESCO CDCE seem not to provide any 'hard', binding solution to the problem of institutional fragmentation between regimes of international trade and cultural diversity. Without the perspective of mutual supportiveness as a distinct principle, conceptually separate from complementarity and non-subordination, this would be a conundrum indeed. As Boisson de Chazournes and Mbengue wrote to describe the PIC Tendency, while mutual supportiveness guarantees complementarity, the latter however does not always deliver a mutually supportive relationship.

Where Boisson de Chazournes and Mbengue situate the relationship between mutual supportiveness and soft law within the specific context of the UNESCO CDCE, this study argues that this relationship is generally applicable. Just as harmonization has a natural affinity for hard-law instruments, the principle of mutual supportiveness lends itself well to use with non-binding instruments.

Mutual Supportiveness between Trade and Human Rights: Cultural Rights as Human Rights

As Chapter 3 of this book established, General Comment 21 to ICESCR Article 15(1)(a) states that the human right to participate in cultural life includes access to cultural goods. Parties to the ICESCR are

thus obliged to refrain from restricting access to cultural goods, and to take measures that facilitate access to cultural goods respecting their populations. To reiterate its significance for this study, this section will quote paragraph 6 of General Comment 21 again:

The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).

The Covenant is important for understanding General Comment 21. Article 15(1)(a) states: "The States Parties to the present Covenant recognise the right of everyone… to take part in cultural life". General Comment 21, from December 2009, states in part:

> "1. Cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world ….
> 3. The right of everyone to take part in cultural life is also recognized in article 27, paragraph 1, of the *Universal Declaration of Human Rights*, which states that 'everyone has the right freely to participate in the cultural life of the community'. Other international instruments refer to the right to equal participation in cultural activities[.]"[364]

This study notes Morijn's objection to arguments based on General Comment 21. Citing Srinivas as his authority, he writes:

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[364] The UNESCO CDC, which protects 'cultural activities' as a cultural expression equal to cultural goods and cultural services, is just such an instrument.

"Rights holders cannot be simultaneously individuals *and* the State…

[T]he adoption of the 2005 UNESCO Cultural Diversity Convention may have *weakened* the chances for effective articulation of this issue in terms of individual rights to continued access to a plurality of cultural sources. After all, States were brought up as the main rights holders….In particular, following an arguably implicit State/*one* culture conflation, the regulatory aim tends towards protecting States' majority culture(s). As a result, and notwithstanding the UNESCO initiatives various references to obligations to protect human rights, the cultural diversity concept favoured by them appears to 'lock in' cultural protective practice that many human rights norms seek *to break*. They represent an unlikely basis for making the human rights case for access to a continued plurality of cultural sources for all individuals on a territory.

Recently, the Committee on Economic, Social, and Cultural Rights adopted General Comment 21 on the right to take part in cultural life. This text has in no way clarified the situation. In fact, the key phrases from the viewpoint of our discussion of the GATT['s]… impact on cultural protection are directly based on the UNESCO texts just discussed–and therefore raise all the same questions…It can be concluded that as yet, there does not appear to be an explicit 'cultural' provision in UN human rights law and recent UNESCO initiatives that could serve as a legal basis to formulate the type of substantive human rights concerns supportive of the bottom-up cultural protection conception…The state of the law as laid down in Article 27 UDHR, Article 15(1)(a) ICESCR, the General Comment interpreting it, and the UNESCO Convention would hardly be helpful in strengthening the *human rights* case for ensuring continued access of individu-

> als and groups of individuals for ensuring continued access of individuals and groups of individuals (irrespective of whether they belong to the majority or minority in a given State) to a plurality of sources of cultural content…"[365]

Morijn's contention is thus that the UNESCO CDCE's reaffirmation of State sovereignty undermines the individual character of human rights, and may thus privilege majority groups over minorities within those States. This would defeat the purpose of human rights protections, which are conceived from the perspective of the individual. It is possible that Morijn could be technically correct. The practical application of the treaty might not adhere to its letter. Morijn does not, however, account for paragraph 6's of General Comment 21's clarification that Parties must *guarantee access* to cultural goods. If sovereign States' implementation of the UNESCO CDCE effectively *impedes access* to cultural goods to persons belonging to cultural minorities within those States, or impedes international consumers' access to cultural goods produced by those minorities within such States, this would directly violate the prescriptions of paragraph 6. States that upheld such practices would not be in conformity with the UNESCO CDCE's provisions, either: this Convention encourages the States to use their sovereignty to guarantee the right of individuals, minorities, and indigenous peoples to access cultural goods from elsewhere and to access their own cultural goods.

The Convention Preamble invites Parties to:

> "*Tak[e] into account* the importance of the vitality of cultures, including for *persons belonging to minorities and indigenous peoples*, as manifested in their freedom to create, disseminate and

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[365] John Morijn, *Reframing Human Rights and Trade: Potential and Limits of a Human Rights Perspective of WTO Law on Cultural and Educational Goods and Services* (Intersentia 2010), 148-149.

> distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development."[366]

UNESCO CDCE Article 2(3) states:

> "The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of *persons belonging to minorities and indigenous peoples*."[367]

The recital and this provision both address the concerns about the 'individual' foundation of human rights ('persons') as well as those about cultural minorities ('minorities and indigenous peoples').

UNESCO CDCE Article 7(1) even clarifies the status of 'individuals' and 'persons belonging to minorities and indigenous peoples' as those who are entitled to 'access'—the same language as paragraph 6 of General Comment 21—both to their own cultural expressions and those from abroad:

Parties shall endeavour to create in their territory an environment which encourages *individuals and social groups*:

a) to create, produce, disseminate, distribute and have *access* to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including *persons belonging to minorities and indigenous peoples*;

b) to have *access* to diverse cultural expressions from within their territory as well as from other countries of the world.

In short, States that used the re-affirmation of State sovereignty within the UNESCO CDCE to effectively deny access to individuals, minority groups, or indigenous peoples would directly violate its provisions. They would thereby violate paragraph 6's interpretation of ICESCR 15(1)(a) which binds States to *guarantee access* to cultural goods. Such

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[366] Emphasis added.

[367] Emphasis added.

violations of individual, minority group, and indigenous rights would violate the object and purpose of both the UNESCO CDCE and the ICESCR.

This work therefore rejects Morijn's and Srinivas's challenge concerning the effects of General Comment 21 and the UNESCO CDCE. They may be concerned about a bad-faith implementation of the rights that the UNESCO CDCE and ICESCR grant regarding the State's role in guaranteeing access to cultural goods; such concerns do not, however, find foundation in the wording (or any observable absence thereof) of the texts in question.

General Comment 21 and the Fundamental Value of Preserving Peace

Pinseschi records the history of General Comment 21.

> "The scant attention paid by the international community to the protection of cultural rights during the 20th century is well represented by the ICESCR. The first legally-binding instrument to explicitly mention cultural rights in its title contains only one provision directly referring to culture (Article 15). The right of everyone to take part in cultural life, the core of Article 15(1)(a), is a very general and vague assertion. Neither a literal interpretation of this provision nor the consultation of its *travaux préparatoires* are of much help in understanding the exact meaning of either 'cultural life' or 'to take part in cultural life'.
>
> The ESCR Committee organized a general discussion on the right to take part in cultural life under Article 15 of the ICESCR in December 1992…[I]t cannot be ignored that at this time, serious concern was growing in international fora about the increasing number of internal conflicts with ethnic or religious implications. This is evidenced, for instance, by *An Agenda for Peace*, submitted by the Secretary-General of the United Nations, Boutros Boutros-Ghali, to the General Assembly and the Security

> Council in June 1992, in which efforts to solve cultural problems were expressly identified as being instrumental in preventing the breakdown of international peace and security and in enhancing the construction of a peaceful environment on a durable foundation in the aftermath of an armed conflict….
>
> A General Comment on the right of everyone to take part in cultural life under Article 15(1)(a) of the ICESCR was adopted by the ESCR Committee seventeen years later, in November, 2009. …States are *inter alia* invited to '(i)ndicate the measures taken to protect cultural diversity…and create favourable conditions for them to preserve, develop, express, and disseminate their identity, history, culture, language, traditions, and customs'.
>
> The ESCR Committee's renewed attention for the protection of cultural rights can be explained by a number of factors. In particular, globalization, migration and terrorism–in many respects the cause and consequence of an emerging 'battle of cultures'–at the international level led to growing awareness of the importance of protecting cultural rights as an indispensable took for fostering tolerance and public safety."[368]

It is thus clear that the renewed interest in ICESCR Article 15(1)(a) had to do with the fundamental interest of preserving peace. However, the context of conflict had drastically changed between 1948 and 2009. Due in part to stabilising mechanisms such as the GATT and the human rights legal system, the era of international conflicts had largely drawn to a close. However, the process of globalisation had engendered cultural conflict—sometimes intra-nationally, and sometimes on a global scale—which States had difficulty grappling with.

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[368] Laura Pineschi, 'Cultural Diversity as a Human Right?' in Silvia Borelli and Federico Lenzerini, *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Nijhoff 2012), 31-32.

The context of General Comment 21 demonstrates why access to cultural goods constitutes a human right. As Chapter 2 explained, the trend of globalisation places pressures on many of the world's cultures. This can include the process by which their cultural expressions and products, including cultural goods, are squeezed out of the market due to inability to compete on a playing field that favours cheaper generic goods.

In this way, as Chapter 2 has argued, neoliberal globalisation threatens the existence of traditional and domestic cultural livelihoods, rather than allowing them to adapt to and flourish within the globalised economic system. This sense of perceived threat may engender culturally based conflicts, in the context of the 'battle of cultures' that Pineschi refers to. Thus, General Comment 21's definition of access to cultural goods, as an aspect of the human right to participate in cultural life, is intended to uphold the fundamental value of peace, on which the international legal order is based. This peace is now threatened on a cultural, rather than a State-centric, basis.

As Chapter 2 has noted, the WTO has an interest in maintaining social contentment and peace between nations by upholding public morals within societies: such values help to advance sustainable development and fair international trade, which are primary goals of the WTO. The UNESCO CDCE, as a document intended to ensure access to cultural goods based on General Comment 21, upholds the fundamental value of peace. It holds this value in common with the WTO Agreement.

General Comment 21 and the Fundamental Value of Sustainable Development

Similarly, the value of sustainable development is discernible in the wording of the 1966 ICESCR—significantly predating the 1987 Brundtland Report, which used the exact phrase for the first time. ICESCR Article 2(3) reads:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 6(2), on the right to work, states:

The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include… policies and techniques to achieve *steady economic, social and cultural development*… under conditions safeguarding fundamental political and economic freedoms to the individual.

The language of 'steady cultural development' is certainly one sense in which the phrase 'sustainable development' could be interpreted. Article 6(2)'s notion of 'steady development' incorporates culture as an aspect, to be taken into account in, but not yet as a pillar of development. Thus, steps taken by an ICESCR State Party to ensure the 'right to work' include policies that achieve steady cultural development. The UNESCO CDCE may constitute such a policy.

Similarly, the aforementioned Article 15(2), referring in part to the right to take part in cultural life, notes:

The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the *development and the diffusion of… culture*.

Perhaps most notably, Article 1 of the ICESCR reads, in part:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their *economic, social and cultural development*.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources *without prejudice to any obligations arising out of international economic co-operation,* based upon the principle of mutual benefit, and international law. *In no case may a people be deprived of its own means of subsistence*.

Article 1(1)'s wording of 'cultural development' may most certainly fall into the definition of 'sustainable development'. Particularly in the context of the above discussion regarding the role of cultural development and dissemination in preserving peace, 'development' that does not include a 'cultural' aspect cannot be considered 'sustainable'. In a similar vein, Shi notes:

> "When culture is identified as a fundamental resource–like ecological resources–human beings ought to use it wisely and sustainably, with a view to sustainable development….The idea of sustainability brings into question the way nature itself is conceived, and consequently, how the cultural values that condition a society's relationship to nature should be conceived and preserved.
>
> We have inherited a wealth of tangible and intangible cultural resources that embody the collective memory of communities and buttress their senses of identity in times of uncertainty. Held in trust for humankind, these resources are essentially non-renewable and merit careful preservation for the generations to come. In this sense, culture should be seen organically, as akin to the natural resources that should be preserved for the collective future good. As such, there is a crucial cultural aspect to sustainability that has long been underemphasized. Globalisation, however, brings the call for cultural sustainability front and centre….
>
> [I]t is not wise to treat sustainability as a development tool limited to the natural environment. Instead, the constitutive role of culture in promoting social development should be stressed, alongside the premise that cultural diversity is parallel to biodiversity."[369]

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[369] Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Hart 2013), 45-46.

Pursuant to what Shi argued, the essential role of culture is not only in the promotion of social development, but also in cultural diversity.

Article 1(2)'s statement that the exercise of cultural rights should not prejudice obligations arising from international economic cooperation need not worry those interested in coherence between the ICESCR's rights and the WTO's trade rules. It seems that there is a kind of subordination relationship between the ICESCR and the WTO, but fortunately trade obligations in the WTO allow a certain openness.

As Chapter 3 noted, the WTO's protection of 'public morals' acknowledges one of the limits to the WTO agreement's scope under GATT Article XX(a). Pineschi writes:

> "In principle, States have shown themselves to be very sensitive to certain commercial implications of the protection of cultural diversity, as the rapid negotiation and entry into force of the UNESCO Cultural Diversity Convention [i.e. the UNESCO CDCE] shows….It should be mentioned that the effective enjoyment of cultural rights is an essential prerequisite for the effective enjoyment of civil and political rights…"[370]

Thus, by promoting access to cultural goods, the UNESCO CDCE protects the human right to participate in cultural life, by virtue of paragraph 6 of General Comment 21 on ICESCR Article 15(1)(a). In protecting cultural rights, the Convention upholds the fundamental value of sustainable development. Given Chapter 3's argument that the UNESCO CDCE is admissible as a code of public morals under GATT Article XX(a), it does not prejudice obligations arising out of international economic cooperation. The UNESCO CDCE upholds the fundamental value of sustainable development, and it holds this value in common

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[370] Laura Pineschi, 'Cultural Diversity as a Human Right?' in Silvia Borelli and Federico Lenzerini*Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Nijhoff 2012), 52.

with the WTO Agreement (as stated in the Preamble to the Marrakesh Agreement).

Human Rights and Trade Are Mutually Supportive

Former WTO Director-General Pascal Lamy has stated that "human rights and trade are mutually supportive"[371], given that "[h]uman rights are essential to the good functioning of the multilateral trading system, and trade and WTO rules contribute to the realization of human rights".[372] Paragraph 6 of General Comment 21 to Article 15(1)(a) of the ICESCR demonstrates that the UNESCO CDCE contributes both to the realisation of human rights and to the good functioning of the multilateral trading system. As Pineschi recorded, the reason that General Comment 21 was integrated into the framework of human rights legislation was partly due to the anxieties provoked by globalisation.

To clarify the potential relationship between human rights and trade legislation, Marceau writes,

> "The WTO adjudicating bodies are not courts of general jurisdiction and they cannot interpret and apply all treaties involving WTO Members, as states. Otherwise, WTO adjudicating bodies would end up 'interpreting' human rights treaties. (Note that *under the general exceptions, panels may look at other treaties*, other reports of international bodies… as factual matters, *to assess compliance with the exception provisions*.) The covered agreements are explicitly listed, and it cannot be presumed that members wanted to provide the WTO remedial system to enforce obligations and rights other than those listed in the WTO agree-

[371] WTO 'Lamy Calls for Mindset Change to Align Trade and Human Rights', <www.wto.org/english/news_e/sppl_e/sppl146_e.htm>, Accessed 19 December 2022.

[372] R Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' (2010) 21, *European Journal of International Law*, 650.

> ment. WTO adjudicating bodies cannot give direct effect to human rights in any way that would set aside or amend a WTO provision…. Fortunately, such situations of conflict will occur very rarely, and, through good faith interpretation, the WTO law and human rights law can generally be applied harmoniously and effectively."[373]

The WTO Agreement and the UNESCO CDCE hold both the fundamental values of preserving peace, and promoting sustainable development, that underlie the stable functioning of the international legal system. Paragraph 6 of General Comment 21 to Article 15(1)(a) ICESCR links the regimes of trade and culture, with respect for cultural goods, under human rights legislation.

The UNESCO CDCE thus upholds the ICESCR's human right to participate in cultural life, by providing a means for States to protect access to cultural goods. It may thereby constitute an aspect of 'public morals'. GATT Article XX(a) prescribes public morals as acceptable grounds for exceptions to the non-discrimination provisions—and may be applied harmoniously and effectively with the human right to access cultural goods that ICESCR Article 15(1)(a) contains, by virtue of paragraph 6 of General Comment 21. The UNESCO CDCE seems to be an instrument that has tried to bear the modalities of such a guarantee of access, under the rubric of State sovereignty.

To conclude regarding the relationship between trade and human rights as regards access to cultural goods, the former WTO Director-General has asserted that the two spheres are mutually supportive. This is a sentiment that Marceau has echoed, with reference to 'good faith interpretation', and to the fact that non-WTO treaties may be relevant to WTO decisions under the WTO exception provisions. Thus, this work holds that the WTO Agreement and the UNESCO CDCE are mutually

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[373] Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13(4) *EJIL* (753-814), 777-778.

supportive, given their linkage through GATT Article XX(a), and their shared mutual values of peace and sustainable development. In conclusion, mutual supportiveness promotes peace and sustainable development through enhancing coherence between trade and human rights.

5.1.2.2 Preliminary Conclusions on Mutual Supportiveness and Soft Law in the WTO Agreement and the UNESCO CDCE

To summarise the premises established in the foregoing argument, this study concludes that the mutual supportiveness is deemed to be a general principle and an approach of international law, and as such, being used to interpret apparently conflicting treaty provisions under VCLT Article 31(3)(c), and, similarly, as an approach to create non-binding instruments within the context of coexistence and coherence between the treaties, all as natural means to clarify such a mutually supportive relationship.

Transnational organisations depend heavily on non-binding instruments for "inter-institutional cooperation and cross-sectoral norm setting".[374] For instance, when looking at cultural courses of action, the EU and other States first attained the implementation of non-binding declarations in the Council of Europe and UNESCO. In 2005, they signed the UNESCO CDCE, which embraced hard-law features. However, the dispute-settlement provisions of UNESCO CDCE are still weaker (allowing simply for voluntary conciliation) than those of the WTO, so the UNESCO CDCE language remains mostly soft.[375]

In any case, however, States Parties to the UNESCO CDCE are bound to use the principle of mutual supportiveness in determining its relationship to other treaties under its Article 20. As this chapter demon-

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[374] Jürgen Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013), 218.

[375] Tania Voon, 'UNESCO and the WTO: A Clash of Cultures?' (2006) 55, *International and Comparative Law Quarterly*, 636.

strated in earlier sections, such a requirement to use mutual supportiveness implies the use of soft law, or non-binding instruments, to specify such relationships.

It is widely understood that WTO dispute settlement mechanism is rather effective. Punitive measures for non-compliance are

> "largely limited to trade retaliation and the withdrawal of equivalent concessions. The argument here is that state consent is a key ingredient for the effectiveness of the global trade organization, even in its own hard-law terms. To the extent that state consent is influenced by the effectiveness of communication and understanding among parties to the WTO agreement, then soft law has a complementary role to play not only in facilitating negotiations but also in contributing to rule observance and dispute resolution."[376]

When an organisation implements a non-binding instrument, it becomes a source that other organisations can cite as grounds for enacting their own guidelines. This leads to validation in the area that the 'source institution' addresses.[377] These relationships between establishments usually positively affect the efficacy of the instrument implemented, in addition to the activities of the source institutions.[378]

Non-binding instruments contribute to collaborations between institutions, and their procedures. Frequently, however, no instruments have

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[376] Patrick Low, 'Hard Law and "Soft Law": Options for Fostering International Cooperation', in *The E15 Initiative Strengthening the Global Trade and Investment System for Sustainable Development* (ICTSD and World Economic Forum 2015), <http://e15initiative.org/wp-content/uploads/2015/09/E15-Services-Low-Final.pdf/>, Accessed 19 December 2022.

[377] Jürgen Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013), 222.

[378] ibid 223.

been adopted in a particular area, or the existing instruments do not have wide acceptance. Non-binding instruments supported unanimously or with large majorities by States are well suited as both arguments and as a basis on which further activities can legitimately be built.[379]

An institution and its laws may include incentive structures, costs and the diffusion of ideas. Incentive structures and costs play a role for compliance of actors with a rational and utilitarian disposition.[380] The World Bank's financing policies, for instance, directly influence cost-benefit calculations and can therefore be expected to be a strong compliance-inducing factor. Fear of reputational and actual costs attached to non-compliance with binding WTO rules, possibly enforced through dispute settlement, serves as a strong incentive to comply with a non-binding instrument that the WTO endorses or promulgates.

At the same time, these instruments provide a set of best practices, which can be easily adapted. States are more likely to adapt a broad list of policies and measures and to engage in applying discourse when the relevant arrangements are non-binding.

5.2 Mutual Supportiveness through Soft Law between the WTO and UNESCO regarding Trade in Cultural Goods

Having defined and explored the essential concepts of soft law and mutual supportiveness, this work now examines how inconsistencies, differences and possible conflicts between the WTO Agreement and UNESCO CDCE regarding trade in cultural goods may be reduced using the route of mutual supportiveness through soft law. These technical, but non-binding, strategies forgo the 'hard' political commitment of States, in favour of cooperation that delivers faster results with less

[379] ibid 243.

[380] Ibid.

difficulty. The three possible combinations of normative coherence and institutional cooperation give rise to three approaches to mutual supportiveness through soft law.

First, this section tests the feasibility of the 'Interactive Approach', a strategy to enhance coherence between the WTO Agreement and the UNESCO CDCE regarding trade in cultural goods. It then explores the propositions on which this approach would depend, together with the probability of fulfilling the conditions.

Second, this study tests the feasibility of the 'Consultation Approach' between the two bodies. Such a purely institutional approach would facilitate communication between organisations on a case-by-case basis—whether to prevent, to resolve, or to mitigate conflict as it may potentially arise. This work then explores the conditions under which this approach may be implemented, along with the likelihood of fulfilling them.

Finally, this study tests the feasibility of the 'Guidance Approach'. Combining features of the normative and institutional strategies, this approach advances soft law instruments to enhance cooperation between the WTO and UNESCO regimes. Again, this work explores the propositions on which this approach would depend, together with the probability of fulfilling these conditions.

The three mentioned approaches constitute alternative means of achieving mutual supportiveness through soft law. If one or more of these approaches should prove practicable and useful, the strategy as a whole will be correspondingly feasible. In this case, this chapter's approach of mutual supportiveness by way of soft law is correspondingly practicable and useful to guarantee coherence between the WTO and UNESCO legal regimes regarding trade in cultural goods.

5.2.1 The Interactive Approach

This study proposes the 'Interactive Approach' to encourage the WTO and UNESCO to positively interact regarding the trade in cultural goods. Here, this chapter tests the statement that:

it is feasible to encourage mutual supportiveness between the WTO and UNESCO legal regimes regarding trade in cultural goods, through a mutually supportive interaction.

The route of mutual supportiveness works to reduce fragmentation by encouraging the relevant organisations to interact by appealing to the core values and other principles that underlie the respective conventions. Given that all treaties are simultaneously binding; the provisions are not purposefully intended to contradict one another. Rather, they are intended to pursue different paths toward these underlying principles and values.

For instance, the non-discrimination provisions of the WTO Agreement and the measures for protection of cultural goods in the UNESCO CDCE do *prima facie* contradict one another; yet they both exist to promote the principles of preserving peace and advancing sustainable development. Such a mutually supportive reading shows that neither provision 'dominates' the other; rather, they complement each other.

Similarly, the concept of mutual supportiveness enjoys widespread written recognition in several treaties, ratified by most countries of the world. This includes the particular case of the UNESCO CDCE, which prescribes mutual supportiveness in its provisions rather than in its Preamble.

The Interactive Approach may be implemented by all WTO Members and Parties to the UNESCO CDCE, by the WTO and UNESCO organisations themselves, the bodies and authorities of both international organisations, and by experts or scholars inside or even outside of these institutions. There is no limit regarding what kinds of interaction are

possible, and which could be effective in the encouragement of creating coherence. These interactions would result in a sort of 'soft law' corresponding with the principle of mutual supportiveness.

Thus, the Interactive Approach is both highly practicable, in that any entity may produce this kind of work with relatively little effort; and it is highly useful, in that such interactions will genuinely provide a foundation for coherence between treaties that States could quite easily implement. Therefore, the interactive Approach is a feasible method to reduce fragmentation and enhance coherence regarding trade in cultural goods between the UNESCO CDCE and the WTO Agreement.

5.2.2 The Consultation Approach

This section tests the statement that

it is feasible to establish mutual supportiveness between the WTO and UNESCO legal regimes regarding trade in cultural goods, through non-binding consultative forums or groups between these organisations.

Such a structure would be loosely constituted and relatively informal, intended to study possibilities for mutual supportiveness in the non-binding framework of soft law.

This section examines three possibilities:

- a 'Consultation Forum', or a broadly based conference to regularly discuss matters regarding trade in cultural goods;
- a closed 'General Consultation Group' to discuss both these trade matters and the dispute settlement functions that arise from them;
- and the 'Consultation Group Concerning Dispute Settlement', a closed group which would solely discuss dispute settlement matters.

This section will appraise coherence between provisions of the WTO and UNESCO in an institutional framework.

Article V of the Marrakesh Agreement prescribes:

> "1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.
> 2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."[381]

As this work notes previously, UNESCO CDCE Article 20 defines the treaty's relationship to other instruments. Article 21 mandates that States Parties should

> "undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles."

Both the WTO Agreement and the UNESCO CDCE thus provide normative space to establish the informal institutional arrangements that this section will detail.

5.2.2.1 A 'Consultation Forum' between the WTO and UNESCO regarding Trade in Cultural Goods

This section proposes the creation of a 'Consultation Forum for Culture and Trade', a series of specialist meetings in cooperation between the WTO and UNESCO. This would not be a permanent or fixed body. UNESCO is a well-renowned international organisation, concerned with conceptualising, encouraging, and safeguarding cultural diversity and cultural products. Similarly, the WTO is a global organisation specialising in trade. Taking into account the aims of both bodies, this Consulta-

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[381] WTO, *Marrakesh Agreement Establishing the World Trade Organization*, <https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleV>, Accessed 15 June 2017

tion Forum should govern the relationship between international trade and the cultural aspects of traded goods. Such cooperation would pave the way for the protection and promotion of cultural diversity expressions, through discourse and a common understanding.

A Consultation Forum, in contrast with the Coordination Bureau proposed in the previous chapter based on hard law, would involve soft law and a soft mechanism of exchange between experts of both organisations. This Consultation Forum should be allowed to function via the principle of mutual supportiveness, forming legal coherence among procedures and protocols relating to culture and trade. The cooperation between these organisations through their secretariats would thus fall under the category of mutual supportiveness by way of soft law.

The agenda of this proposed consultation group or consultation forum would include issues of relevance to either organisation and respond to the specific needs (general or specific) of the time —including the settlement of disputes or disagreements or conflicts between the two organisations. Special commissions or working groups would review issues causing concern and resolutions concerning cultural goods, and provide verdicts for the resolution of conflicts.

The practical creation of such a Forum could give UNESCO a voice to answer questions when the WTO Panels seek information on the CDCE. Equally, the conflict clause in the UNESCO CDCE could then be assumed to include such a consultative body to ask for an opinion from the WTO when the practical application of UNESCO CDCE appears to deal with a trade issue.

This Forum has high utility under the Consultation Approach. It draws from the widest pool of expert opinion and discussion. However, it would appear to be a quasi-decisive body, and may require additional funding if meetings took place in person. It thus may be less practicable than other options.

5.2.2.2 A 'General Consultation Group' between the WTO and UNESCO regarding Trade in Cultural Goods

However, based on the preceding idea of a more efficient interaction between culture and trade, and considering the real limitation in providing financial sponsorship, it may be more practical to set up a virtual coordination mechanism, such as a website or online forum, along with meetings to be held over online video chat. In this case, this work proposes the creation of a 'Consultation Group Balancing Culture and Trade'.

This consultation group or mechanism should be operated through collaboration between the WTO and UNESCO CDCE. However, first they have to agree to create a consultation group. This could be achieved through negotiations between the WTO and UNESCO, which at the same time also take account of both entities' goals.

It would also be necessary to set up a channel to address concerns respecting both international trade and the specifically 'cultural' aspects of cultural goods. These initiatives could take shape through informal commissions or working groups to study the problem and provide solutions and could also decide how to handle conflicts.

This 'Consultation Group' could be an informal, but expert, meeting to regulate the trade-culture relationship, facilitating dialogue and the exchange of views with due consideration of the protection and promotion of cultural diversity expressions. In addition, this Consultation Group should be empowered to develop mutually supportive interpretations between norms that have any conflict potential, and hence provide appropriate means for competent mechanisms for the settlement of disputes.

This General Consultation Group has higher practicability than the previous Consultation Forum, since it would be composed of a narrower group of people, would be virtually constituted, and would require no further financial obligation. It would simply be an additional task for the WTO and UNESCO secretariats. It is of lesser utility than the Consulta-

tion Forum, since it draws on a smaller pool of expertise. However, both treaties provide the normative space necessary to establish such a forum. The Consultation Approach is feasible.

5.2.2.3 An Informal 'Consultation Group Concerning Dispute Settlement' between the WTO and UNESCO regarding Trade in Cultural Goods

One means of achieving such an informal Consultation Group Concerning Dispute Settlement would be to build on the already existing bodies of the WTO and UNESCO CDCE. That is, the Conference of Parties and the Intergovernmental Committee, and to ensue beginning of addressing the issues that have already been recognised by these institutions for consultation. For instance, providing privileged treatment to developing States as is illustrated in Article 16, or incorporating culture into the value of sustainable development, could be matters for discussion.

Prior to proceeding with the consultation in this way, it may be necessary to consolidate related material to act as a starting point for the consultations between the Parties. Once a voluntary settlement has been achieved regarding how to adopt the relevant provision, the Parties could offer their opinion on this particular matter in alternative international platforms.

Such platforms could involve, for instance, organisations such as the United Nations Conference on Trade and Development, the United Nations Development Program, the Organization for Economic Cooperation and Development, the WTO, and regional organisations such as the Council of Europe.

The understanding attained, could improve the processes and mechanisms and investigate alternative matters that could apply either to the adoption of the CDCE or to improvements that occur in alternative platforms, incorporating the WTO, regional agreements and bilateral trade deals. Hence, authentic mutual supportiveness could be advanced in a

tangible manner between the CDCE and the other treaties, in the true fashion of cooperation. Indeed, this method considers singular proposals by the Parties who could at all times demand that the question of consultation as envisioned in Article 21 be inserted onto the plan of either the Conference of Parties or the Intergovernmental Committee. It could be in the interest of each State to endorse coherence when acting at the international level, which evidently requires such coordination between different Parties.

Thus, the Consultation Approach has high utility, but relatively lower practicability, than the other two approaches that this chapter proposes. It is a less feasible strategy for achieving coherence between the WTO Agreement and UNESCO CDCE regimes governing trade in cultural goods, but is not completely infeasible.

5.2.3 The Guidance Approach

This work now turns to the possibilities for enhancing coherence between the WTO Agreement and the UNESCO CDCE under the Guidance Approach. Here, this chapter tests the statement that

it is feasible to establish mutual supportiveness between the WTO and UNESCO legal regimes regarding trade in cultural goods, through providing flexible guidance to States.

This approach would retain its utility, even if mutual supportiveness were not a general principle of international law under VCLT Article 31(3)(c). States could agree to use the principle of mutual supportiveness to avoid conflict and to reconcile provisions of the WTO Agreement and the UNESCO CDCE.

Friedrich describes several such non-binding forms of guidance in the environmental context; this work incorporates some of them as the 'normative and institutional' form of reducing fragmentation thereby enhancing coherence between the two treaties. Each of these instruments

are analogous to the relationship between the regimes of trade the WTO and UNESCO. This section outlines them below, contributing a sixth form of guidance: 'Guidelines and Protection Policies'.

5.2.3.1 Memoranda of Understanding

A Memorandum of Understanding (MOU) is an arrangement between two or more Parties outlining the basic principles and intentions guiding each Party. Although MOUs *may* be legally binding under the WTO system, they are not necessarily *always* binding. Whether binding or not, however, MOUs carry a degree of respect and gravity. They are often negotiated and adopted bilaterally by two or more actors to clarify issues and to set out agreements on cooperation. This study recommends their use as non-binding instruments.

Friedrich writes:

> "One can distinguish between Memoranda of Understanding between institutions and between states. With respect to the first group, Memoranda of Understanding are commonly used by international institutions to formalise and enhance their cooperation. Memoranda of Understanding are in this manner commonly employed between treaty bodies, between organs of international organisations and between international institutions and treaty bodies. They are important instruments for addressing conflicts of norms and avoiding overlap of activities through horizontal coordination and cooperation. Memoranda of Understanding are also commonly used as a basis for environmental cooperation between states or between states and organizations."[382]

MOUs also provide a foundation for drafting treaties between States, for instance, in the sphere of environmental cooperation. Friedrich men-

[382] Jürgen Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013), 16-17.

tions several instances of use of this form of guidance between treaty bodies and treaty secretariats, including *inter alia*:

> "[T]he Memorandum of Understanding between the secretariat of the Convention on Biological Diversity and the Bureau of the Convention on Wetlands of International Importance, especially as Waterfowl Habitat…the Memorandum of Understanding between the secretariat of the Convention on Biological Diversity and the secretariat of the Convention on International Trade in Endangered Species…"[383]
>
> and "the Memorandum of Understanding between the secretariat of the Convention on International Trade in Endangered Species and the Food and Agriculture Organisation".[384]

An MOU between the WTO and UNESCO regarding traded cultural goods could propose that the two institutions work together in the spirit of mutual supportiveness to develop solutions to normative fragmentation regarding trade in cultural goods.

5.2.3.2 Action Plans and International Programmes

As for action plans and international programs, Friedrich writes:

> "International programmes, often also called action plans, are here referred to as those documents that outline future activities of international institutions and states. Oftentimes these instruments additionally contain a number of recommendations, as described in the next section. These programmes often shape institutional policies but also general international environmental policy and legal development."[385]

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[383] ibid 16 (Footnote 5).
[384] ibid 17 (Footnote 7).
[385] ibid 18.

He goes on to list several examples: the Programme for the Development and Periodic Review of Environmental Law (the Montevideo Programme), the Action Plan for the Human Environment, and the Bali Action Plan (which "served as a guiding framework for negotiations for a successor agreement to the Kyoto Protocol").[386]

Similarly, the Action Plan on Cultural Policies for Development (1998) laid the groundwork for the UNESCO CDCE.[387]

5.2.3.3 Declarations of Principles and Action Plans Adopted at International Conferences

Friedrich again notes regarding declarations of principles:

"Nonbinding declarations refer to documents containing norms in the form of principles and more concrete rules that are adopted at international conferences. In contrast to international recommendations discussed in the next section, these instruments are not adopted by the body or organ of an international institution but are in principle one-time decisions. International conferences not only adopt declarations of principles, but also often supplement these with a more concrete action plan. These prescribe measures to be taken at international, regional and national levels to reach a particular goal."[388] Multilateral trade agreements provide for such 'soft' measures, thus illustrating that "the use of a treaty form does not of itself ensure a hard obligation".[389]

In the WTO frame of reference, a diverse range of soft law includes the non-binding Ministerial Declarations, decisions, recommendations,

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[386] Ibid.

[387] Sabine von Schorlemer, 'Introduction' in Sabine von Schorlemer and Peter-Tobias Stoll (eds.), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* 3.

[388] ibid 19-22.

[389] CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38, *International and Comparative Law Quarterly* (850-866), 851.

guidelines, reports, statements, programmes of action endorsed by the Council Members. Furthermore, this may consist of informal provisions in the administrative sense as regards the WTO treaty system, for instance 'off the record' conferences, informal gatherings and 'non-papers' to be debated between the Members.

Many of these soft-law instruments relate to the WTO's performance regarding the process of WTO membership, occasionally dependent on a combination of a set of rules distinct to the WTO, and practice which extends as far back as the GATT 1947 era. These may be employed for a range of different reasons: strengthening a Member's obligations, reinforcing a unified appreciation of essential WTO treaty duties, laying groundwork for upcoming treaty language, or simply as strengthening Members' commitments to agreements before creating such norms.

While the WTO does not have such an action plan, its non-binding Ministerial Declarations fulfill a similar role. Similarly, the norms on special and differential treatment in various multilateral trade agreements are not generally understood to be obligatory. This is implied from the use of broad language, and the lack of binding enforcement, in such provisions.[390]

Importantly for this study, the final stages of the Uruguay Round implemented the Coherence Declaration, regarding international financial decision-making[391] to improve efficiency of trade, and to provide economic guidelines for financial obligations. It concludes with the words:

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[390] Daniel Thürer, 'Soft Law' in Rudolf Bernhardt (ed.) *Encyclopedia of Public International Law* (North Holland/Elsevier 2000) Vol 4 (452-460), 453-454.

[391] *Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking in the Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Cambridge/WTO 1999), 386-387.

> "Ministers further invite the Director-General of the WTO to review with the Managing Director of the International Monetary Fund and the President of the World Bank, the implications of the WTO's responsibilities for its cooperation with the Bretton Woods institutions, as well as the forms such cooperation might take, with a view to achieving greater coherence in global economic policymaking."[392]

The Doha Ministerial Declaration, a soft law fragment itself, requests Members to assess the rules "with a view to strengthening them and making them more precise, effective and operational".[393] The Declaration supports "the work program on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns."[394]

The Ministerial Declaration on Aid for Trade was set into motion at the Hong Kong Ministerial Conference in 2005.[395] Its purpose was to provide assistance to developing countries (and especially Less Developed Countries) to develop their reserve potential and the required foundation associated with trade in order to gain more advantage from the liberalisation of trade[396] and WTO settlements.[397]

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[392] WTO, 'Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking', <https://www.wto.org/english/docs_e/legal_e/32-dchor_e.htm>, Accessed 19 December 2022.

[393] WTO Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, Ministerial Declaration, WT/MIN (01)/DEC/1, 20 November 2001 [hereinafter Doha Ministerial Declaration] para 44.

[394] WTO, 'Implementation-Related Issues and Concerns, Decision of 14 November 2001' WT/MIN (01)17 (20 November 2001).

[395] WTO Ministerial Conference, Sixth Session, Hong Kong, China, 13-18 December 2005, Ministerial Declaration, WT/MIN(01)/DEC, 20 December 2005 [hereinafter Hong Kong Ministerial Declaration] para 57.

[396] Marc Auboin, 'Fulfilling the Marrakesh Mandate on Coherence: Ten Years of Cooperation between the WTO, IMF and World Bank', *WTO Discussion*

Yet another recent example is the Dubai Declaration on International Chemicals Management in 2006. "Together with the Overarching Policy Strategy and the more concrete Global Plan of Action, it forms the basis of the completely non-binding initiative of the Strategic Approach to International Chemicals Management (SAICM)".[398]

Such non-binding declarations are widespread, and are commonplace in the WTO system. The WTO might accept such a declaration to recognise the provisions of the UNESCO CDCE as a guideline for how to administer traded cultural goods. It is noteworthy that reaching such a declaration even as a non-binding instrument is almost the same as producing a binding instrument in practice.

5.2.3.4 International Recommendations issued by International Institutions

Regarding international recommendations issued by international institutions Friedrich writes,

> "International recommendations are nonbinding instruments adopted in decision making bodies of international institutions which prescribe norms for state and/or private actors….The term 'code of conduct' is most often used for instruments that contain norms addressed to non-state actors either exclusively or in addition to norms directed at states.
>
> International recommendations constitute one of the principal means of expression for most international institutions. One of

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Paper No. 13 (WTO 2007) (1-39) 31-32.

[397] WTO *Recommendations of the Task Force on Aid for Trade* WT/AFT/1 (27 July 2006), which were endorsed by the General Council at its meeting in October 2006. See 'Minutes of the Meeting of the General Council of 10 October 2006' WT/GC/M/104 (5 December 2006) para 36.

[398] Jürgen Friedrich *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013) 20.

> the reasons is that the constitutions or founding treaties only rarely authorise their organs and treaty bodies to adopt instruments that are directly binding for states."[399]

An excellent example of such international recommendations is the United Nations' Sustainable Development Goals, also known as Agenda 2030, which contribute to the definition of the principle of sustainable development. The UN website notes: "While the SDGs are not legally binding, governments are expected to take ownership and establish national frameworks for the achievement of the 17 Goals".[400]

For its part, UNESCO notes several 'non-binding legal instruments' on its website, as:[401]

> -1948: *Universal Declaration of Human Rights*
> *http://www.un.org/en/documents/udhr/*
> -1959: *Declaration on the Rights of the Child*
> *http://www.un.org/cyberschoolbus/humanrights/resources/child.asp*
> -1967: *Declaration on the Elimination of Discrimination against Women*
> *http://www.unhcr.org/refworld/docid/3b00f05938.html*
> -1993: *Vienna Declaration and Programme of Action*

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[399] Jürgen Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013), 22-23.

[400] UN 'Sustainable Development Goals: 17 Goals to Transform Our World' <http://www.un.org/sustainabledevelopment/development-agenda/>, Accessed 19 December 2022.

[401] Major international instruments in human rights, <https://www.unesco.org/en/legal-affairs/intl-instr-humanrights?TSPD_101_R0=080713870fab20005cb018ffc2b6b1d338bb227b98d1fc71e53f5fa6924a9b33411bce4a4de7b7c408fa379ac11430005e59fdc9504887e0ed91fb0571b873549b2632a2a2c7895b390cc032400c7e1052c3025f3c3336c986f12e4066ff2b74>; Accessed 19 December 2022.

http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF .157.23.En?OpenDocument
-2000: *United Nations Millennium Declaration*
http://www.un.org/millennium/declaration/ares552e.htm

Such international recommendations could form a model for a "Recommendation on the Status of Traded Cultural Goods", perhaps developed by the WTO, or perhaps jointly with UNESCO. Such a recommendation would advise States that are signatories to both the WTO Agreement and the UNESCO CDCE that they may use the Convention to uphold the human right of access to cultural goods.

5.2.3.5 Non-binding Ad hoc Standards

Technical regulations provide, for common and repetitive use, guidelines for products or production-related processes.[402] According to the definition in the Annex of the WTO TBT Agreement, technical regulations are not only standards that define the specific characteristics of a product, but also are norms prescribing requirements on how to handle, produce, transport, package, label, or deal in other specific ways with specific products. Standards are specific descriptions that define requirements or characteristics of products with high specificity and are not designed for general application. When applying the WTO TBT Agreement, an initial issue is "whether the challenged instrument should be classified as a technical regulation or as a standard".[403]

Institutions which develop and issue voluntary standards, therefore, indirectly take part in policy-making exercises that have crucial regulatory implications for States and even directly for private actors. Their

[402] Jürgen Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013), 57.

[403] Arwel Davies, 'Technical Regulations and Standards under the WTO agreement on Technical Barriers to Trade' (2014) 41(1), *Legal Issues of Economic Integration* (37-63), 37.

effect is reinforced when they are acknowledged in treaty law (as is the case for technical standards of the *Codex Alimentarius* Commission, and the International Organization for Standardization under the SPS Agreement and TBT Agreement, respectively.[404]

The WHO in cooperation with FAO established the *Codex Alimentarius* Commission in 1963 with a view to preparing and promoting food standards that protect the health of consumers and to facilitate international food trade.[405] Over 180 States are members of this Commission.

Once governments accept it, the standards are published in the *Codex Alimentarius*. It describes characteristics of products such as the maximum residue limits of pesticides or of drugs in foods or general standards for food additives, contaminants and toxins in foods. But the *Codex Alimentarius* also issues codes of practice that define the production, processing, transport and storage practices for food. In addition, it adopts principles that set out policies in key area including a risk of analysis of foods derived from modern biotechnology and guidelines for the interpretation of these principles and the general standard.[406]

However, it has been claimed—at least with respect to the international food-safety standards set by the *Codex Alimentarius*—that the *Codex* measures, while not legally binding on WTO Members in and of themselves,[407] have *de minimis* a benchmarking effect and are *de facto*,

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[404] Jürgen Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Springer 2013), 57-58.

[405] Jürgen Friedrich, International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law (Springer 2013), 58. See also Statutes of the Codex Alimentarius Commission Article 1(a). The Statutes are included in the Codex Alimentarius Commission Procedural Manual (18th ed. 2008).

[406] ibid.

[407] See Joost Pauwelyn, 'Non-Traditional Patterns of Global Regulation: Is the WTO "Missing the Boat"?' in Christian Joerges and Ernst-Ulrich Petersmann (eds.) *Constitutionalism, Multilevel Trade Governance and Social Regulation*

if not *de jure*, binding on Members in the context of the SPS Agreement and the TBT Agreement.[408] A voluntary standard on health for example can be invoked by a State in a dispute when it invokes GATT Article XX(b)—as evidence of health considerations.

Although it seems a difficult task especially considering digital products, such ad hoc standards could be drafted to demonstrate, for instance, that a country's standards on classifying cultural goods are both adequate and properly applied. Such standards would permit, for instance, UNESCO certification of these goods as 'cultural goods' under the definitions of its *Framework for Cultural Statistics*. This would then, possibly, permit the goods to be excepted from the non-discrimination principle under GATT Article XX(a)'s 'public morals' provision.

5.2.3.6 Guidelines (Operational Procedures and Protection Policies)

In this section, the work proposes an original soft-law instrument using the Guidance Approach which may also demonstrate the feasibility of the strategy. The WTO and UNESCO could jointly propose a 'guideline' to determine the ways in which the non-discrimination principle should be applied in cases involved traded cultural goods. The guideline would view the informal changes in a manner promoting a mutually supportive interpretation of the two treaties. The guidelines concern illustration of the operational procedures and protection policies.

Guidelines also could include informal changes, i.e. soft law changes, illustrate a noteworthy example of the production of soft law instruments. Instead of, or in addition to, interpretations, and rather than formal amendments (harmonization), informal modifications might have

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(Hart Publishing 2006) (199-227), 209.

[408] Created by the FAO and WHO in 1963 the Codex Alimentarius Commission develops food standards, guidelines, recommendations and related texts, such as codes of practice, under the Joint FAO/WHO Food Standards Programme. See Mariëlle D. Masson-Matthee, *The* Codex Alimentarius, *Commission and Its Standards* (Asser 2007).

some advantages. For instance, they do not need to be decided by the States or to be ratified domestically. In addition, most soft declarations and expressions, such as 'we will try to reconcile', 'we believe', 'we encourage', 'affirming', and 'emphasizing' fall under this category. That is to say, informal changes can be classified as soft laws that have no binding effect, but that nonetheless can be very useful.

One proposed guideline could include the following three main provisions:

> 1. Mutual supportiveness is a principle, which can enhance coherence between provisions of the WTO Agreement and the UNESCO CDCE.
> 2. Both the WTO and UNESCO will envisage measures for the protection of culture, which take into account WTO rules.
> 3. Informal consultation between international organisations and countries is advised though bilateral negotiations. In this step, discussions are assisted by an expert (e.g. from the bureau that is proposed in the next section). Each side (WTO and UNESCO) invites the other side's experts to comment on and explain the issues.

Examples of such soft instruments include decisions on waiver, on clarification, or guidelines that could be adopted in the WTO and in UNESCO. An existing example of such a decision is the creation of the WTO Committee on Trade and Environment (CTE) established by the General Council in 1995. A similar Committee on Trade and Culture could be established via identical means.

5.2.3.7 Preliminary Conclusions on the Guidance Approach

The widespread use of MOUs, international programmes and action plans, declarations of principles issued at international conferences, international recommendations provided by international institutions, and non-binding ad hoc standards, demonstrates the feasibility of these

nonbinding instruments for use in achieving coherence between treaties. Thus, using Friedrich's record of their use in the environmental sphere as an analogy, this study argues that the same instruments would be useful and practicable in enhancing coherence through 'normative and institutional' collaboration between the secretariats of the WTO and UNESCO. This work also proposes an original measure, the 'informal changes', which could propose mutually supportive means of applying the two treaties together in practice. It is equally useful and practicable.

Thus, the Guidance Approach draws on a broad range of existing practice to establish grounds for coherence between the WTO Agreement and the UNESCO CDCE in the trade of cultural goods. The existence of these examples in other spheres of WTO and UNESCO law, in particular, serves as a model for implementation in the regimes governing cultural goods. There are no visible barriers to State participation, and the instruments resulting from this approach could genuinely accomplish their goals. The Guidance Approach is both highly practicable and highly useful, and is therefore a feasible strategy to enhance coherence between the WTO and UNESCO legal regimes regarding traded cultural goods.

5.3 Conclusion

Chapter 5 has presented the concept of mutual supportiveness through soft law, as a strategy for achieving coherence between WTO and UNESCO regimes governing trade in cultural goods.

Section 5.1 outlined the definitions of both 'mutual supportiveness' and 'soft law', identifying some of the vagaries of each. Its strength comes from the notion that treaties adhere to an underlying logic of inter-State relationships that often supersedes apparent conflict.

Soft law, carries with it no tangible enforcement mechanisms, but in practice it has many advantages that hard law cannot offer. Principal among these is that States are far more likely to agree to and participate

in developing soft-law instruments, precisely because of the flexibility they offer with comparison to hard law. Section 5.2 evaluated the feasibility of strategies to achieve mutual supportiveness through the use of soft law processes. Since this work regards mutual supportiveness as a general principle of international law, under VCLT Article 31(3)(c) and ICJ Statute Article 38, States *must* use it to reduce fragmentation between treaties. However, even if it is only regarded as being a customary principle, it remains a viable option for enhancing coherence. Thus, Chapter 5 judged the Interactive Approach to be a practicable and useful means of enhancing coherence between the WTO Agreement and the UNESCO CDCE. The solely institutional technique, the Consultation Approach, proposed the creation of new informal and virtual consultation fora to discuss action over conflicts and disagreements between the WTO and UNESCO where there is overlap in matters of traded cultural goods. While the Consultation Approach would be quite useful in favouring coherence, it would be less practicable since it would involve higher operational costs than the previous two approaches, including a coordination of procedural rules that might meet institutional resistance. (These considerations might be softened by less formal methods of meeting, such as online video chat.) For these reasons, and since it involved access to a reduced pool of expertise, Chapter 5 judged this strategy to be less feasible than the Interactive Approach and Guidance Approach, though not completely infeasible.

The strategy combining normative and institutional techniques, the Guidance Approach, was shown to be pre-existing in several congruent cases. MOUs, action plans, declarations, recommendations, ad-hoc standards, and guidelines were among the principal examples demonstrating that several categories of soft-law instruments have the potential for highly effective use in bridging trade and cultural considerations between the WTO Agreement and UNESCO CDCE. States do indeed accord such instruments gravity, despite their non-binding nature, and

are highly likely to approve of and implement them. Chapter 5 therefore adjudged the Guidance Approach to also be a practicable and useful strategy to achieve coherence. In summary, the three approaches that Chapter 5 examined for achieving coherence between the WTO Agreement and UNESCO CDCE have each proven feasible. Thus, the overarching statement that opened this chapter is true: mutual supportiveness by way of soft law is a feasible route to reduce fragmentation and enhance coherence between the WTO and UNESCO legal regimes regarding trade in cultural goods.

CHAPTER 6

CONCLUSION

6.1 Summary of the findings and proposals

This work has argued that the treatment of cultural goods in the WTO should better accommodate sovereign cultural and economic aspirations on a global scale. Nonetheless, it also argues that non-discrimination and liberalism in trade should remain the context for protecting international and domestic cultural diversity expressions. Failure to make such accommodations for the smooth cooperation of the regimes of trade and culture expresses itself as legal fragmentation.

This research project has thus recognised the importance of the interactions between the provisions, institutions and practices of the WTO Agreement and UNESCO CDCE on trade in cultural goods. It examines potential conflicts between the two agreements governing traded cultural goods, including incoherence between dispute resolution mechanisms. It proposes three routes to enhance legal coherence between the rules of the WTO Agreement and the UNESCO CDCE.

The first route is to apply principles of interpretation for solving such conflicts, the subject matter of Chapter 3. Provisions and terminology may be interpreted in such a way as to resolve conflicts between the WTO Agreement and the UNESCO CDCE.

From the perspective of protecting culture, the least effective way is to read the 'soft' provisions of the UNESCO CDCE as permitting derogation from the WTO Agreement. Thus, States may choose not to protect cultural goods when their rights under the UNESCO CDCE conflict

with their obligations under the WTO Agreement. This yields the result that cultural goods may not often be protected, and this study finds that outcome unsatisfactory.

Interpretation might also require determining whether the WTO Agreement and UNESCO CDCE are two general laws, two special laws, or one general and one special law. It can be argued that the UNESCO CDCE is more specific (*lex specialis*) and has the status of a special law (governing trade in cultural goods in particular), while the WTO regulates trade generally. The result would be that the UNESCO CDCE's provisions would take precedence over those of the WTO Agreement in the particular cases of trade in cultural goods.

It can also be argued that even if the two treaties are seen as two general laws or two special laws—appropriate interpretation could reduce fragmentation through coherent readings of concepts and terminology. For instance, interpretations of the 'public morals' or 'national treasures' exceptions under GATT Article XX could be broadened to include traded cultural goods. This would permit the UNESCO CDCE to be invoked under Article XX as an applicable means of protecting such goods, similar to the way in which MEAs protect environmental concerns under the 'conservation of natural resources' provision of paragraph (g) of GATT Article XX. Similarly, shared terms between the treaties such as 'protection' and 'sustainable development' could be interpreted in a mutually supportive manner.

The second route suggested in this work was harmonization through hard law, which Chapter 4 explored. Harmonization through hard law might be accomplished through three approaches. The Amendment Approach would require physical alterations to the texts of one or both treaties to bring them into coherence. For example, the UNESCO CDCE provisions implicitly permitting subsidies to be provided to protect cultural goods would have to be recognised under the SCM Agreement, which would need to be amended. The Construction Approach would

implement solutions such as adopting common cultural standards, or a common dispute settlement mechanism between the WTO and UNESCO on matters regarding trade in cultural goods. Finally, the Co-ordination Approach would institutionalise a joint coordination bureau between the WTO and UNESCO to administer matters arising from trade in cultural goods.

The route of harmonization through hard law is not feasible. Each approach using this route would offer high utility in genuinely reducing fragmentation. However, none of the approaches is likely to engender the necessary political will, neither in terms of the lengthy process to negotiate and ratify these amendments, nor to pay for the new institutions that would have to be created.

The last and third route that this work examines is that of mutual supportiveness through soft law. Although mutual supportiveness is a form of interpretation, this study accepts Boisson de Chazournes' and Mbengue's conclusions that mutual supportiveness constitutes a principle of application for enhancing coherence on its own merits.

Mutual Supportiveness through soft law might be accomplished through three approaches. The Interactive Approach would read the WTO Agreement and UNESCO CDCE as holding common values, such as 'preserving peace' and 'promoting sustainable development'. This would yield readings of particular terminology and concepts that protect traded cultural goods as compatible with terminology and concepts that promote the interests of trade. The Guidance Approach would implement soft law, in the form of non-binding texts, to promote cooperation between the two organisations in matters concerning traded cultural goods. The Consultation Approach proposes informal, but effective, meetings of a 'General Consultation Group' or 'Dispute Settlement Consultation Group', composed of experts in culture and in trade, which could smooth over any difficulties of simultaneously applying the WTO Agreement and the UNESCO CDCE.

The route of mutual supportiveness through soft law seems to have relatively a lower utility impact than the harmonization approach for enhancing coherence. Nonetheless, it offers much higher level of practicability. For instance, the use of soft law would be extremely effective in attracting States' participation, since they could opt out of any soft law instrument that did not appear to serve their interests in a particular case. Similarly, the informal nature of the suggested bodies would require very low levels of financial and political commitment. As such, the route of mutual supportiveness through soft law is extremely feasible.

6.2 New Avenues for Research: Extensions of the Subjects of this Work

The foregoing has simply summed up the findings of this work from a schematic perspective. However, this study is also intended to provide a basis for further studies. On the foundation of its original contributions to scholarship in the fields of culture and trade, the foregoing work opens up several fruitful avenues for investigation.

For instance, this work has given a comprehensive explanation of the preliminary requirements to improve protection for traded cultural goods. The fundamental problem was to enhance coherence between the WTO Agreement and the UNESCO CDCE, covering two aspects of these goods and entailing the jurisdiction of two different bodies. A similar methodology as this study uses, with similar approaches to the subject matter, would apply in the case of traded cultural services.

However, future work would have to delimit the boundaries of similarity with the present study for cultural services. In addition, new work would need to examine in greater detail the particularities where treatment of the subject of traded cultural services should differ from investigation regarding the subject of traded cultural goods. It would have to factor in the level to which the GATS has genuinely resolved problems

related to culture, identify the problems not yet addressed, and note any GATS solutions that it finds unsatisfactory in practice.

This study also contains other possibilities for future work.

Coherence between the dispute settlement mechanisms of the WTO and UNESCO formed a minor, though essential part of this work. Specialists might be able to focus narrowly on the question of coherence between the two dispute settlement mechanisms to elaborate and deepen the questions that this work has opened.

Similarly, the intrinsic relationship between the principle of harmonization and hard law, or the principle of mutual supportiveness and soft law, would benefit from a more focused examination. In particular, examination of mutual supportiveness through soft law and its application in enhancing coherence between treaties would likely prove quite fruitful in other areas of international law. Chapter 5's 'Guidance Approach' notably contains a number of productive avenues for deeper study.

The broader themes of this work may also raise questions regarding the intellectual property aspects of cultural goods and services. For example, how can the international legal system protect traditional indigenous knowledge and ensure that revenues derived from use of this knowledge benefit the indigenous peoples who have produced it? Such a work would be able to draw on a wealth of international instruments. The WTO Agreement (in particular the TRIPS Agreement) would govern some commercial aspects of intellectual property, while the UNESCO system would regulate the cultural facets of this knowledge. In turn, the World Intellectual Property Organization (WIPO) would come into play as traditional indigenous knowledge became intellectual property in the context of trade. Such a situation of overlaps and possible fragmentation would provide ample material for future research.

Finally, the UN's Agenda 2030 addresses the cultural goods and services traded globally to achieve the sustainable development. UNESCO reports that

> "By analyzing data from a wide range of sources, we regularly track the ways in which cultural goods and services are traded globally. This analysis is used to help monitor progress towards Sustainable Development Goal 17 (SDG 17) and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which specifically calls for efforts to balance the flow of cultural goods and services, especially between developed and developing countries."[409]

Research into this initiative would provide the basis for a quantitative approach to the subjects of trade in cultural goods and trade in cultural services. As the UNESCO Institute for Statistics writes,

> "With the adoption of the 2030 agenda for sustainable development in 2015, culture is recognized globally as an enabler and contributor to sustainable development. This agenda presents the world with a challenge to measure more accurately the contribution of culture."[410]

In conclusion, the promotion of trade in cultural goods and services and the protection of cultural aspects of such trade can foster Sustainable Development Goals which could be studied as another topic in the future.

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6.3 Final Afterword

This work proceeds from the understanding that if international organisations such as the WTO and UNESCO do not deal with potential conflicts between norms and institutions, the current trends in globalisation will engender greater problems, rather than creating solutions, such as improved quality of life and reducing poverty. The values of preserving peace and promoting sustainable development are fundamental to the missions of both the WTO and UNESCO and must form the basis for efforts at enhancing coherence. Indeed, these values provide the reason to undertake such an effort.

The interests of the systems of global trade and cultural diversity may appear to conflict. Nonetheless, they hold in common the shared values of preserving peace and promoting sustainable development. In this respect, free trade and cultural diversity form two aspects of a single global system, based on the common value of 'sustainable development', and must be understood as such. The interdependent nature of interlocking systems, which the Bruntland Report notes, means that conflicts between systems can undermine the effectiveness and legitimacy of the international order as a whole.

This work's fundamental contribution to those efforts has been to go beyond simple examination of potential conflict between the WTO Agreement and the UNESCO CDCE. It examines the routes of interpretation, harmonization through hard law, and mutual supportiveness through soft law toward enhancing coherence in cases of *prima facie* conflict. This work evaluates these routes on the basis of their ability to contribute to the stability of the international order.

It is possible today to interpret what appears to be conflicting provisions of the WTO Agreement and the UNESCO CDCE to produce a harmonious reading. Some soft-law additions to these instruments would also greatly enhance normative and institutional coherence between the regimes of trade and cultural goods.

Harmonization is a general principle of international law, and the ILC has accepted it as such. This work argues, along with Boisson de Chazournes and Mbengue, that mutual supportiveness is also a fundamental principle of application of international law. These principles are complementary: where harmonization fails, mutual supportiveness is up to the task, because each relies on either hard law or soft law.

Mutual supportiveness through soft law imposes a lighter financial burden, and thus may be a more attractive and practicable option for States, thus laying the foundation for feasible State practice that may be evolve into hard law, at a later date. The mentioned routes of international law thus contribute to the overall stability and legitimacy of the international legal order, providing alternative avenues for recourse in the case that interpretation uncovers a genuine conflict between the WTO Agreement and the UNESCO CDCE.

Within the broad routes to coherence that it outlines, this work has found and illustrated several feasible solutions, with various levels of utility and practicability, for the problem of fragmentation between the WTO's rules for the international trading regimes, and specific UNESCO rules that States have adopted to enhance cultural diversity. Furthermore, by addressing this particular manifestation of fragmentation, as a problem of overall stability and legitimacy for the international system, this work has furthered the scholarly understanding of international law regarding trade in cultural goods.

While some may portray coherence as an abstract legal value, this work holds that it is also necessary to ensure respect for cultural diversity. Coherence thus carries also essential human values which are necessary to mitigate the negative effects of globalisation, and to authentically promote sustainable development.

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ANNEXES

Annex 1: UNESCO CDCE

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 3 to 21 October 2005 at its 33rd session,

Affirming that cultural diversity is a defining characteristic of humanity,

Conscious that cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all,

Being aware that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples and nations,

Recalling that cultural diversity, flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, is indispensable for peace and security at the local, national and international levels,

Celebrating the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments,

Emphasizing the need to incorporate culture as a strategic element in national and international development policies, as well as in international development cooperation, taking into account also the United

Nations Millennium Declaration (2000) with its special emphasis on poverty eradication,

Taking into account that culture takes diverse forms across time and space and that this diversity is embodied in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity,

Recognizing the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion,

Recognizing the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment,

Emphasizing the importance of culture for social cohesion in general, and in particular its potential for the enhancement of the status and role of women in society,

Being aware that cultural diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures,

Reaffirming that freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies,

Recognizing that the diversity of cultural expressions, including traditional cultural expressions, is an important factor that allows individuals and peoples to express and to share with others their ideas and values,

Recalling that linguistic diversity is a fundamental element of cultural diversity, and reaffirming the fundamental role that education plays in the protection and promotion of cultural expressions,

Taking into account the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development,

Emphasizing the vital role of cultural interaction and creativity, which nurture and renew cultural expressions and enhance the role played by those involved in the development of culture for the progress of society at large,

Recognizing the importance of intellectual property rights in sustaining those involved in cultural creativity,

Being convinced that cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value,

Noting that while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, they also represent a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries,

Being aware of UNESCO's specific mandate to ensure respect for the diversity of cultures and to recommend such international agreements as may be necessary to promote the free flow of ideas by word and image,

Referring to the provisions of the international instruments adopted by UNESCO relating to cultural diversity and the exercise of cultural

rights, and in particular the Universal Declaration on Cultural Diversity of 2001,

Adopts this Convention on 20 October 2005.

I. Objectives and guiding principles

Article 1 – Objectives

The objectives of this Convention are:

(a) to protect and promote the diversity of cultural expressions;

(b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner;

(c) 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;

(d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples;

(e) to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels;

(f) to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link;

(g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning;

(h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory;

(i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.

Article 2 – Guiding principles

1. Principle of respect for human rights and fundamental freedoms. Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

2. Principle of sovereignty. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory.

3. Principle of equal dignity of and respect for all cultures . The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.

4. Principle of international solidarity and cooperation. International cooperation and solidarity should be aimed at enabling countries, especially developing countries, to create and strengthen their means of cultural expression, including their cultural industries, whether nascent or established, at the local, national and international levels.

5. Principle of the complementarity of economic and cultural aspects of development. Since culture is one of the mainsprings of de-

velopment, the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and enjoy.

6. Principle of sustainable development. Cultural diversity is a rich asset for individuals and societies. The protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations.

7. Principle of equitable access. Equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding.

8. Principle of openness and balance. When States adopt measures to support the diversity of cultural expressions, they should seek to promote, in an appropriate manner, openness to other cultures of the world and to ensure that these measures are geared to the objectives pursued under the present Convention.

II. Scope of Application

Article 3 – Scope of application

This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions.

III. Definitions

Article 4 – Definitions

For the purposes of this Convention, it is understood that:

1. Cultural diversity. “Cultural diversity” refers to the manifold ways in which the cultures of groups and societies find expression.

These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.

2. Cultural content. "Cultural content" refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.

3. Cultural expressions. "Cultural expressions" are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.

4. Cultural activities, goods and services. "Cultural activities, goods and services" refers to those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services.

5. Cultural industries. "Cultural industries" refers to industries producing and distributing cultural goods or services as defined in paragraph 4 above.

6. Cultural policies and measures. "Cultural policies and measures" refers to those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.

7. Protection. “Protection” means the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions. “Protect” means to adopt such measures.

8. Interculturality. “Interculturality” refers to the existence and equitable interaction of diverse cultures and the possibility of generating shared cultural expressions through dialogue and mutual respect.

IV. Rights and Obligations of Parties

Article 5 – General rule regarding rights and obligations

1. The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.

2. When a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention.

Article 6 – Rights of parties at the national level

1. Within the framework of its cultural policies and measures as defined in Article 4.6 and taking into account its own particular circumstances and needs, each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.

2. Such measures may include the following:

(a) regulatory measures aimed at protecting and promoting diversity of cultural expressions;

(b) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services;

(c) 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 activities, goods and services;

(d) measures aimed at providing public financial assistance;

(e) measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities;

(f) measures aimed at establishing and supporting public institutions, as appropriate;

(g) measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions;

(h) measures aimed at enhancing diversity of the media, including through public service broadcasting.

Article 7 – Measures to promote cultural expressions

1. Parties shall endeavour to create in their territory an environment which encourages individuals and social groups:

(a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;

(b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.

2. Parties shall also endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions.

Article 8 – Measures to protect cultural expressions

1. Without prejudice to the provisions of Articles 5 and 6, a Party may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.

2. Parties may take all appropriate measures to protect and preserve cultural expressions in situations referred to in paragraph 1 in a manner consistent with the provisions of this Convention.

3. Parties shall report to the Intergovernmental Committee referred to in Article 23 all measures taken to meet the exigencies of the situation, and the Committee may make appropriate recommendations.

Article 9 – Information sharing and transparency

Parties shall:

(a) provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level;

(b) designate a point of contact responsible for information sharing in relation to this Convention;

(c) share and exchange information relating to the protection and promotion of the diversity of cultural expressions.

Article 10 – Education and public awareness

Parties shall:

(a) encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions, inter alia, through educational and greater public awareness programmes;

(b) cooperate with other Parties and international and regional organizations in achieving the purpose of this article;

(c) endeavour to encourage creativity and strengthen production capacities by setting up educational, training and exchange programmes in the field of cultural industries. These measures should be implemented in a manner which does not have a negative impact on traditional forms of production.

Article 11 – Participation of civil society

Parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention.

Article 12 – Promotion of international cooperation

Parties shall endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions, taking particular account of the situations referred to in Articles 8 and 17, notably in order to:

(a) facilitate dialogue among Parties on cultural policy;

(b) enhance public sector strategic and management capacities in cultural public sector institutions, through professional and international cultural exchanges and sharing of best practices;

(c) reinforce partnerships with and among civil society, non-governmental organizations and the private sector in fostering and promoting the diversity of cultural expressions;

(d) promote the use of new technologies, encourage partnerships to enhance information sharing and cultural understanding, and foster the diversity of cultural expressions;

(e) encourage the conclusion of co-production and co-distribution agreements.

Article 13 – Integration of culture in sustainable development

Parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.

Article 14 – Cooperation for development

Parties shall endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector by, inter alia, the following means:

(a) the strengthening of the cultural industries in developing countries through:

(i) creating and strengthening cultural production and distribution capacities in developing countries;

(ii) facilitating wider access to the global market and international distribution networks for their cultural activities, goods and services;

(iii) enabling the emergence of viable local and regional markets;

(iv) adopting, where possible, appropriate measures in developed countries with a view to facilitating access to their territory for the cultural activities, goods and services of developing countries;

(v) providing support for creative work and facilitating the mobility, to the extent possible, of artists from the developing world;

(vi) encouraging appropriate collaboration between developed and developing countries in the areas, inter alia, of music and film;

(b) capacity-building through the exchange of information, experience and expertise, as well as the training of human resources in developing countries, in the public and private sector relating to, inter alia, strategic and management capacities, policy development and implementation, promotion and distribution of cultural expressions, small-, medium- and micro-enterprise development, the use of technology, and skills development and transfer;

(c) technology transfer through the introduction of appropriate incentive measures for the transfer of technology and know-how, especially in the areas of cultural industries and enterprises;

(d) financial support through:

(i) the establishment of an International Fund for Cultural Diversity as provided in Article 18;

(ii) the provision of official development assistance, as appropriate, including technical assistance, to stimulate and support creativity;

(iii) other forms of financial assistance such as low interest loans, grants and other funding mechanisms.

Article 15 – Collaborative arrangements

Parties shall encourage the development of partnerships, between and within the public and private sectors and non-profit organizations, in order to cooperate with developing countries in the enhancement of their capacities in the protection and promotion of the diversity of cultural expressions. These innovative partnerships shall, according to the practical needs of developing countries, emphasize the further development of infrastructure, human resources and policies, as well as the exchange of cultural activities, goods and services.

Article 16 – Preferential treatment for developing countries

Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.

Article 17 – International cooperation in situations of serious threat to cultural expressions

Parties shall cooperate in providing assistance to each other, and, in particular to developing countries, in situations referred to under Article 8.

Article 18 – International Fund for Cultural Diversity

1. An International Fund for Cultural Diversity, hereinafter referred to as "the Fund", is hereby established.

2. The Fund shall consist of funds-in-trust established in accordance with the Financial Regulations of UNESCO.

3. The resources of the Fund shall consist of:

(a) voluntary contributions made by Parties;

(b) funds appropriated for this purpose by the General Conference of UNESCO;

(c) contributions, gifts or bequests by other States; organizations and programmes of the United Nations system, other regional or international organizations; and public or private bodies or individuals;

(d) any interest due on resources of the Fund;

(e) funds raised through collections and receipts from events organized for the benefit of the Fund;

(f) any other resources authorized by the Fund's regulations.

4. The use of resources of the Fund shall be decided by the Intergovernmental Committee on the basis of guidelines determined by the Conference of Parties referred to in Article 22.

5. The Intergovernmental Committee may accept contributions and other forms of assistance for general and specific purposes relating to specific projects, provided that those projects have been approved by it.

6. No political, economic or other conditions that are incompatible with the objectives of this Convention may be attached to contributions made to the Fund.

7. Parties shall endeavour to provide voluntary contributions on a regular basis towards the implementation of this Convention.

Article 19 – Exchange, analysis and dissemination of information

1. Parties agree to exchange information and share expertise concerning data collection and statistics on the diversity of cultural expressions as well as on best practices for its protection and promotion.

2. UNESCO shall facilitate, through the use of existing mechanisms within the Secretariat, the collection, analysis and dissemination of all relevant information, statistics and best practices.

3. UNESCO shall also establish and update a data bank on different sectors and governmental, private and non-profit organizations involved in the area of cultural expressions.

4. To facilitate the collection of data, UNESCO shall pay particular attention to capacity-building and the strengthening of expertise for Parties that submit a request for such assistance.

5. The collection of information identified in this Article shall complement the information collected under the provisions of Article 9.

V. Relationship to other instruments

Article 20 – Relationship to other treaties: mutual supportiveness, complementarity and non-subordination

1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,

(a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and

(b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

Article 21 – International consultation and coordination

Parties undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties

shall consult each other, as appropriate, bearing in mind these objectives and principles.

VI. Organs of the Convention

Article 22 – Conference of Parties

1. A Conference of Parties shall be established. The Conference of Parties shall be the plenary and supreme body of this Convention.

2. The Conference of Parties shall meet in ordinary session every two years, as far as possible, in conjunction with the General Conference of UNESCO. It may meet in extraordinary session if it so decides or if the Intergovernmental Committee receives a request to that effect from at least one-third of the Parties.

3. The Conference of Parties shall adopt its own rules of procedure.

4. The functions of the Conference of Parties shall be, inter alia:

(a) to elect the Members of the Intergovernmental Committee;

(b) to receive and examine reports of the Parties to this Convention transmitted by the Intergovernmental Committee;

(c) to approve the operational guidelines prepared upon its request by the Intergovernmental Committee;

(d) to take whatever other measures it may consider necessary to further the objectives of this Convention.

Article 23 – Intergovernmental Committee

1. An Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, hereinafter referred to as "the Intergovernmental Committee", shall be established within UNESCO. It shall be composed of representatives of 18 States Parties to the Convention, elected for a term of four years by the Conference of Parties upon entry into force of this Convention pursuant to Article 29.

2. The Intergovernmental Committee shall meet annually.

3. The Intergovernmental Committee shall function under the authority and guidance of and be accountable to the Conference of Parties.

4. The Members of the Intergovernmental Committee shall be increased to 24 once the number of Parties to the Convention reaches 50.

5. The election of Members of the Intergovernmental Committee shall be based on the principles of equitable geographical representation as well as rotation.

6. Without prejudice to the other responsibilities conferred upon it by this Convention, the functions of the Intergovernmental Committee shall be:

(a) to promote the objectives of this Convention and to encourage and monitor the implementation thereof;

(b) to prepare and submit for approval by the Conference of Parties, upon its request, the operational guidelines for the implementation and application of the provisions of the Convention;

(c) to transmit to the Conference of Parties reports from Parties to the Convention, together with its comments and a summary of their contents;

(d) to make appropriate recommendations to be taken in situations brought to its attention by Parties to the Convention in accordance with relevant provisions of the Convention, in particular Article 8;

(e) to establish procedures and other mechanisms for consultation aimed at promoting the objectives and principles of this Convention in other international forums;

(f) to perform any other tasks as may be requested by the Conference of Parties.

7. The Intergovernmental Committee, in accordance with its Rules of Procedure, may invite at any time public or private organizations or individuals to participate in its meetings for consultation on specific issues.

8. The Intergovernmental Committee shall prepare and submit to the Conference of Parties, for approval, its own Rules of Procedure.

Article 24 – UNESCO Secretariat

1. The organs of the Convention shall be assisted by the UNESCO Secretariat.

2. The Secretariat shall prepare the documentation of the Conference of Parties and the Intergovernmental Committee as well as the agenda of their meetings and shall assist in and report on the implementation of their decisions.

VII. Final clauses

Article 25 – Settlement of disputes

1. In the event of a dispute between Parties to this Convention concerning the interpretation or the application of the Convention, the Parties shall seek a solution by negotiation.

2. If the Parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.

3. If good offices or mediation are not undertaken or if there is no settlement by negotiation, good offices or mediation, a Party may have recourse to conciliation in accordance with the procedure laid down in the Annex of this Convention. The Parties shall consider in good faith the proposal made by the Conciliation Commission for the resolution of the dispute.

4. Each Party may, at the time of ratification, acceptance, approval or accession, declare that it does not recognize the conciliation procedure provided for above. Any Party having made such a declaration may, at any time, withdraw this declaration by notification to the Director-General of UNESCO.

Article 26 – Ratification, acceptance, approval or accession by Member States

1. This Convention shall be subject to ratification, acceptance, approval or accession by Member States of UNESCO in accordance with their respective constitutional procedures.

2. The instruments of ratification, acceptance, approval or accession shall be deposited with the Director-General of UNESCO.

Article 27 – Accession

1. This Convention shall be open to accession by all States not Members of UNESCO but members of the United Nations, or of any of its specialized agencies, that are invited by the General Conference of UNESCO to accede to it.

2. This Convention shall also be open to accession by territories which enjoy full internal self-government recognized as such by the United Nations, but which have not attained full independence in accordance with General Assembly resolution 1514 (XV), and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters.

3. The following provisions apply to regional economic integration organizations:

(a) This Convention shall also be open to accession by any regional economic integration organization, which shall, except as provided below, be fully bound by the provisions of the Convention in the same manner as States Parties;

(b) In the event that one or more Member States of such an organization is also Party to this Convention, the organization and such Member State or States shall decide on their responsibility for the performance of their obligations under this Convention. Such distribution of responsibility shall take effect following completion of the notification procedure described in subparagraph (c). The organization and the Member States shall not be entitled to exercise rights under this Convention concurrently. In addition, regional economic integration organizations, in matters within their competence, shall exercise their rights to vote with a number of votes equal to the number of their Member States that are Parties to this Convention. Such an organization shall not exercise its right to vote if any of its Member States exercises its right, and vice-versa;

(c) A regional economic integration organization and its Member State or States which have agreed on a distribution of responsibilities as provided in subparagraph (b) shall inform the Parties of any such proposed distribution of responsibilities in the following manner: (i) in their instrument of accession, such organization shall declare with specificity, the distribution of their responsibilities with respect to matters governed by the Convention; (ii) in the event of any later modification of their respective responsibilities, the regional economic integration organization shall inform the depositary of any such proposed modification of their respective responsibilities; the depositary shall in turn inform the Parties of such modification;

(d) Member States of a regional economic integration organization which become Parties to this Convention shall be presumed to retain competence over all matters in respect of which transfers of competence to the organization have not been specifically declared or informed to the depositary;

(e) “Regional economic integration organization” means an organization constituted by sovereign States, members of the United

Nations or of any of its specialized agencies, to which those States have transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to become a Party to it.

4. The instrument of accession shall be deposited with the Director-General of UNESCO.

Article 28 – Point of contact

Upon becoming Parties to this Convention, each Party shall designate a point of contact as referred to in Article 9.

Article 29 – Entry into force

1. This Convention shall enter into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States or regional economic integration organizations that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date. It shall enter into force with respect to any other Party three months after the deposit of its instrument of ratification, acceptance, approval or accession.

2. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by Member States of the organization.

Article 30 – Federal or non-unitary constitutional systems

Recognizing that international agreements are equally binding on Parties regardless of their constitutional systems, the following provisions shall apply to Parties which have a federal or non-unitary constitutional system:

(a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central

government shall be the same as for those Parties which are not federal States;

(b) with regard to the provisions of the Convention, the implementation of which comes under the jurisdiction of individual constituent units such as States, counties, provinces, or cantons which are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform, as necessary, the competent authorities of constituent units such as States, counties, provinces or cantons of the said provisions, with its recommendation for their adoption.

Article 31 – Denunciation

1. Any Party to this Convention may denounce this Convention.

2. The denunciation shall be notified by an instrument in writing deposited with the Director-General of UNESCO.

3. The denunciation shall take effect 12 months after the receipt of the instrument of denunciation. It shall in no way affect the financial obligations of the Party denouncing the Convention until the date on which the withdrawal takes effect.

Article 32 – Depositary functions

The Director-General of UNESCO, as the depositary of this Convention, shall inform the Member States of the Organization, the States not members of the Organization and regional economic integration organizations referred to in Article 27, as well as the United Nations, of the deposit of all the instruments of ratification, acceptance, approval or accession provided for in Articles 26 and 27, and of the denunciations provided for in Article 31.

Article 33 – Amendments

1. A Party to this Convention may, by written communication addressed to the Director-General, propose amendments to this Convention. The Director-General shall circulate such communication to all

Parties. If, within six months from the date of dispatch of the communication, no less than one half of the Parties reply favourably to the request, the Director-General shall present such proposal to the next session of the Conference of Parties for discussion and possible adoption.

2. Amendments shall be adopted by a two-thirds majority of Parties present and voting.

3. Once adopted, amendments to this Convention shall be submitted to the Parties for ratification, acceptance, approval or accession.

4. For Parties which have ratified, accepted, approved or acceded to them, amendments to this Convention shall enter into force three months after the deposit of the instruments referred to in paragraph 3 of this Article by two-thirds of the Parties. Thereafter, for each Party that ratifies, accepts, approves or accedes to an amendment, the said amendment shall enter into force three months after the date of deposit by that Party of its instrument of ratification, acceptance, approval or accession.

5. The procedure set out in paragraphs 3 and 4 shall not apply to amendments to Article 23 concerning the number of Members of the Intergovernmental Committee. These amendments shall enter into force at the time they are adopted.

6. A State or a regional economic integration organization referred to in Article 27 which becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention, be considered to be: (a) Party to this Convention as so amended; and (b) a Party to the unamended Convention in relation to any Party not bound by the amendments.

Article 34 – Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, all six texts being equally authoritative.

Article 35 – Registration

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of UNESCO.

ANNEX

Conciliation Procedure

Article 1 – Conciliation Commission

A Conciliation Commission shall be created upon the request of one of the Parties to the dispute. The Commission shall, unless the Parties otherwise agree, be composed of five members, two appointed by each Party concerned and a President chosen jointly by those members.

Article 2 – Members of the Commission

In disputes between more than two Parties, Parties in the same interest shall appoint their members of the Commission jointly by agreement. Where two or more Parties have separate interests or there is a disagreement as to whether they are of the same interest, they shall appoint their members separately.

Article 3 – Appointments

If any appointments by the Parties are not made within two months of the date of the request to create a Conciliation Commission, the Director-General of UNESCO shall, if asked to do so by the Party that made the request, make those appointments within a further two-month period.

Article 4 – President of the Commission

If a President of the Conciliation Commission has not been chosen within two months of the last of the members of the Commission being appointed, the Director-General of UNESCO shall, if asked to do so by a Party, designate a President within a further two-month period.

Article 5 – Decisions

The Conciliation Commission shall take its decisions by majority vote of its members. It shall, unless the Parties to the dispute otherwise agree, determine its own procedure. It shall render a proposal for resolution of the dispute, which the Parties shall consider in good faith.

Article 6 – Disagreement

A disagreement as to whether the Conciliation Commission has competence shall be decided by the Commission.

Annex 2: Agreement Establishing The World Trade Organization (Marrakesh Agreement)

The *Parties* to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system,

Agree as follows:

Article I

Establishment of the Organization

The World Trade Organization (hereinafter referred to as "the WTO") is hereby established.

Article II

Scope of the WTO

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").

Article III

Functions of the WTO

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

Article IV

Structure of the WTO

1. There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO

and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7.

3. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

5. There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related

Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

6. The Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS shall establish subsidiary bodies as required. These subsidiary bodies shall establish their respective rules of procedure subject to the approval of their respective Councils.

7. The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration, which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of the least-developed country Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.

8. The bodies provided for under the Plurilateral Trade Agreements shall carry out the functions assigned to them under those Agreements and shall operate within the institutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

Article V

Relations with Other Organizations

1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.

2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

Article VI

The Secretariat

1. There shall be a Secretariat of the WTO (hereinafter referred to as "the Secretariat") headed by a Director-General.

2. The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.

3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.

4. The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

Article VII

Budget and Contributions

1. The Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO. The Committee on Budget, Finance and Administration shall review the annual budget estimate and the financial statement presented by the Director-General and make recommendations thereon to the General Council. The annual budget estimate shall be subject to approval by the General Council.

2. The Committee on Budget, Finance and Administration shall propose to the General Council financial regulations which shall include provisions setting out:

(a) the scale of contributions apportioning the expenses of the WTO among its Members; and

(b) the measures to be taken in respect of Members in arrears.

The financial regulations shall be based, as far as practicable, on the regulations and practices of GATT 1947.

3. The General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO.

4. Each Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council.

Article VIII

Status of the WTO

1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.

2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.

3. The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.

4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

5. The WTO may conclude a headquarters agreement.

Article IX

Decision-Making

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.[411] Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States[412] which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes

[411] The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

[412] The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.

cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.[413]

2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths[414] of the Members unless otherwise provided for in this paragraph.

(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths[415] of the Members.

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[413] Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

[414] A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus.

[415] A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member

(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

5. Decisions under a Plurilateral Trade Agreement, including any decisions on interpretations and waivers, shall be governed by the provisions of that Agreement.

Article X

*Amendment*s

1. Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corre-

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has not performed by the end of the relevant period shall be taken only by consensus.

sponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply.

2. Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:

Article IX of this Agreement;

Articles I and II of GATT 1994;

Article II:1 of GATS;

Article 4 of the Agreement on TRIPS.

3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any

amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.

5. Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members.

6. Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.

7. Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.

8. Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.

9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.

10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XI

Original Membership

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

Article XII

Accession

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XIII

Non-Application of Multilateral Trade Agreements between Particular Members

1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.

2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.

3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the

approval of the agreement on the terms of accession by the Ministerial Conference.

4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations.

5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement.

Article XIV

Acceptance, Entry into Force and Deposit

1. This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance.

2. A Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.

3. Until the entry into force of this Agreement, the text of this Agreement and the Multilateral Trade Agreements shall be deposited

with the Director-General to the CONTRACTING PARTIES to GATT 1947. The Director-General shall promptly furnish a certified true copy of this Agreement and the Multilateral Trade Agreements, and a notification of each acceptance thereof, to each government and the European Communities having accepted this Agreement. This Agreement and the Multilateral Trade Agreements, and any amendments thereto, shall, upon the entry into force of this Agreement, be deposited with the Director-General of the WTO.

4. The acceptance and entry into force of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. Such Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. Upon the entry into force of this Agreement, such Agreements shall be deposited with the Director-General of the WTO.

Article XV

Withdrawal

1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.

2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XVI

Miscellaneous Provisions

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING

PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

2. To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director-General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director-General in accordance with paragraph 2 of Article VI of this Agreement, shall serve as Director-General of the WTO.

3. In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.

4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

5. No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

6. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four, in a single copy, in the English, French and Spanish languages, each text being authentic.

Explanatory Notes:

The terms "country" or "countries" as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.

In the case of a separate customs territory Member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.

Annex 3: General Agreement on Trade in Services (GATS Agreement)

Members,

Recognizing the growing importance of trade in services for the growth and development of the world economy;

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral

negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;

Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness;

Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;

Hereby *agree* as follows:

PART I: SCOPE AND DEFINITION

Article I

Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.

2. For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

3. For the purposes of this Agreement:

(a) "measures by Members" means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

(b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;

(c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

PART II: GENERAL OBLIGATIONS AND DISCIPLINES

Article II

Most-Favoured-Nation Treatment

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and

service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

Article III

Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3.

Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

Article III bis

Disclosure of Confidential Information

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

Article IV

Increasing Participation of Developing Countries

1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:

(a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis;

(b) the improvement of their access to distribution channels and information networks; and

(c) the liberalization of market access in sectors and modes of supply of export interest to them.

2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:

(a) commercial and technical aspects of the supply of services;

(b) registration, recognition and obtaining of professional qualifications; and

(c) the availability of services technology.

3. Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

Article V

Economic Integration

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage[416], and

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

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[416] This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

Article V bis

Labour Markets Integration Agreements

This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration[417] of the labour markets between or among the parties to such an agreement, provided that such an agreement:

(a) exempts citizens of parties to the agreement from requirements concerning residency and work permits;

(b) is notified to the Council for Trade in Services.

Article VI

Domestic Regulation

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this

[417] Typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.

would be inconsistent with its constitutional structure or the nature of its legal system.

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and

(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations[418] applied by that Member.

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

Article VII

Recognition

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate

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[418] The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

4. Each Member shall:

(a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;

(b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;

(c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

Article VIII

Monopolies and Exclusive Service Suppliers

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.

4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.

5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (*a*) authorizes or establishes a small number of service suppliers and (*b*) substantially prevents competition among those suppliers in its territory.

Article IX

Business Practices

1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.

2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

Article X

Emergency Safeguard Measures

1. There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.

2. In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.

3. The provisions of paragraph 2 shall cease to apply three years after the date of entry into force of the WTO Agreement.

Article XI

Payments and Transfers

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

Article XII

Restrictions to Safeguard the Balance of Payments

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia,* the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

2. The restrictions referred to in paragraph 1:

(a) shall not discriminate among Members;

(b) shall be consistent with the Articles of Agreement of the International Monetary Fund;

(c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;

(d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;

(e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.

3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.

4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council.

5. (a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payments Restrictions on restrictions adopted under this Article.

(b) The Ministerial Conference shall establish procedures[419] for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate.

(c) Such consultations shall assess the balance-of-payment situation of the Member concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia,* such factors as:

(i) the nature and extent of the balance-of-payments and the external financial difficulties;

(ii) the external economic and trading environment of the consulting Member;

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[419] It is understood that the procedures under paragraph 5 shall be the same as the GATT 1994 procedures.

(iii)alternative corrective measures which may be available.

(d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phaseout of restrictions in accordance with paragraph 2(e).

(e) In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member.

6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary.

Article XIII

Government Procurement

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

Article XIV

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable

discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;[420]

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective[421] imposition or

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[420] The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

[421] Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

(i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or

(ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or

(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or

(iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or

collection of direct taxes in respect of services or service suppliers of other Members;

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Article XIV bis

Security Exceptions

1. Nothing in this Agreement shall be construed:

(a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived;

(iii) taken in time of war or other emergency in international relations; or

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(v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or

(vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base. Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

Article XV

Subsidies

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects.[422] The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

2. Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.

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[422] A future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted.

PART III: SPECIFIC COMMITMENTS

Article XVI

Market Access

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[423]

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numeri-

[423] If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

cal units in the form of quotas or the requirement of an economic needs test;[424]

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

Article XVII

National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[425]

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

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[424] Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

[425] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

Article XVIII

Additional Commitments

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

PART IV

PROGRESSIVE LIBERALIZATION

Article XIX

Negotiation of Specific Commitments

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appro-

priate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.

4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

Article XX

Schedules of Specific Commitments

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

(a) terms, limitations and conditions on market access;

(b) conditions and qualifications on national treatment;

(c) undertakings relating to additional commitments;

(d) where appropriate the time-frame for implementation of such commitments; and

(e) the date of entry into force of such commitments.

2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

Article XXI

Modification of Schedules

1. (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.

(b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.

2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.

3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.

4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.

(b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.

5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.

PART V

INSTITUTIONAL PROVISIONS

Article XXII

Consultation

1. Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement. The Dispute Settlement Understanding (DSU) shall apply to such consultations.

2. The Council for Trade in Services or the Dispute Settlement Body (DSB) may, at the request of a Member, consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

3. A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services.[426] The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.

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[426] With respect to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement.

Article XXIII

Dispute Settlement and Enforcement

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU.

3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

Article XXIV

Council for Trade in Services

1. The Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.

2. The Council and, unless the Council decides otherwise, its subsidiary bodies shall be open to participation by representatives of all Members.

3. The Chairman of the Council shall be elected by the Members.

Article XXV

Technical Cooperation

1. Service suppliers of Members which are in need of such assistance shall have access to the services of contact points referred to in paragraph 2 of Article IV.

2. Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.

Article XXVI

Relationship with Other International Organizations

The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services.

PART VI

FINAL PROVISIONS

Article XXVII

Denial of Benefits

A Member may deny the benefits of this Agreement:

(a) to the supply of a service, if it establishes that the service is supplied from or in the territory of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;

(b) in the case of the supply of a maritime transport service, if it establishes that the service is supplied:

(i) by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement, and

(ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;

(c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of another Member, or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement.

Article XXVIII

Definitions

For the purpose of this Agreement:

(a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

(b) "supply of a service" includes the production, distribution, marketing, sale and delivery of a service;

(c) "measures by Members affecting trade in services" include measures in respect of

(i) the purchase, payment or use of a service;

(ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;

(iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;

(d) "commercial presence" means any type of business or professional establishment, including through

(i) the constitution, acquisition or maintenance of a juridical person, or

(ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service;

(e) "sector" of a service means,

(i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,

(ii) otherwise, the whole of that service sector, including all of its subsectors;

(f) "service of another Member" means a service which is supplied,

(i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part; or

(ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member;

(g) "service supplier" means any person that supplies a service;[427]

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[427] Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such

(h) "monopoly supplier of a service" means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service;

(i) "service consumer" means any person that receives or uses a service;

(j) "person" means either a natural person or a juridical person;

(k) "natural person of another Member" means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:

(i) is a national of that other Member; or

(ii) has the right of permanent residence in that other Member, in the case of a Member which:

1. does not have nationals; or

2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, with respect to those permanent residents, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals;

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presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.

(l) "juridical person" means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

(m) "juridical person of another Member" means a juridical person which is either:

(i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or

(ii) in the case of the supply of a service through commercial presence, owned or controlled by:

1. natural persons of that Member; or

2. juridical persons of that other Member identified under subparagraph (i);

(n) a juridical person is:

(i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;

(ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;

(iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;

(o) "direct taxes" comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

Article XXIX

Annexes

The Annexes to this Agreement are an integral part of this Agreement.

Annex 4: Universal Declaration on Cultural Diversity

The General Conference,

Committed to the full implementation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized legal instruments, such as the two International Covenants of 1966 relating respectively to civil and political rights and to economic, social and cultural rights,

Recalling that the Preamble to the Constitution of UNESCO affirms "that the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern",

Further recalling Article I of the Constitution, which assigns to UNESCO among other purposes that of recommending "such international agreements as may be necessary to promote the free flow of ideas by word and image",

Referring to the provisions relating to cultural diversity and the exercise of cultural rights in the international instruments enacted by UNESCO,(1)

Reaffirming that culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs, (2)

Noting that culture is at the heart of contemporary debates about identity, social cohesion, and the development of a knowledge-based economy,

Affirming that respect for the diversity of cultures, tolerance, dialogue and cooperation, in a climate of mutual trust and understanding are among the best guarantees of international peace and security,

Aspiring to greater solidarity on the basis of recognition of cultural diversity, of awareness of the unity of humankind, and of the development of intercultural exchanges,

Considering that the process of globalization, facilitated by the rapid development of new information and communication technologies, though representing a challenge for cultural diversity, creates the conditions for renewed dialogue among cultures and civilizations,

Aware of the specific mandate which has been entrusted to UNESCO, within the United Nations system, to ensure the preservation and promotion of the fruitful diversity of cultures,

Proclaims the following principles and adopts the present Declaration:

IDENTITY, DIVERSITY AND PLURALISM

Article 1 – Cultural diversity: the common heritage of humanity. Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.

Article 2 – From cultural diversity to cultural pluralism.
In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.

Article 3 – Cultural diversity as a factor in development.
Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence.

CULTURAL DIVERSITY AND HUMAN RIGHTS

Article 4 – Human rights as guarantees of cultural diversity.
The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

Article 5 – Cultural rights as an enabling environment for cultural diversity.
Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and

15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.

Article 6 – Towards access for all to cultural diversity.
While ensuring the free flow of ideas by word and image care should be exercised so that all cultures can express themselves and make themselves known. Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.

CULTURAL DIVERSITY AND CREATIVITY

Article 7 – Cultural heritage as the wellspring of creativity.
Creation draws on the roots of cultural tradition, but flourishes in contact with other cultures. For this reason, heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures.

Article 8 – Cultural goods and services: commodities of a unique kind.
In the face of present-day economic and technological change, opening up vast prospects for creation and innovation, particular attention must be paid to the diversity of the supply of creative work, to due recognition of the rights of authors and artists and to the specificity of cultural

goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods.

Article 9 – Cultural policies as catalysts of creativity.
While ensuring the free circulation of ideas and works, cultural policies must create conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level. It is for each State, with due regard to its international obligations, to define its cultural policy and to implement it through the means it considers fit, whether by operational support or appropriate regulations.

CULTURAL DIVERSITY AND INTERNATIONAL SOLIDARITY

Article 10 – Strengthening capacities for creation and dissemination worldwide.
In the face of current imbalances in flows and exchanges of cultural goods at the global level, it is necessary to reinforce international cooperation and solidarity aimed at enabling all countries, especially developing countries and countries in transition, to establish cultural industries that are viable and competitive at national and international level.

Article 11 – Building partnerships between the public sector, the private sector and civil society.
Market forces alone cannot guarantee the preservation and promotion of cultural diversity, which is the key to sustainable human development. From this perspective, the pre-eminence of public policy, in partnership with the private sector and civil society, must be reaffirmed.

Article 12 – The role of UNESCO.
UNESCO, by virtue of its mandate and functions, has the responsibility to:

(a) promote the incorporation of the principles set out in the present Declaration into the development strategies drawn up within the various intergovernmental bodies;

(b) serve as a reference point and a forum where States, international governmental and nongovernmental organizations, civil society and the private sector may join together in elaborating concepts, objectives and policies in favour of cultural diversity;

(c) pursue its activities in standard-setting, awareness raising and capacity-building in the areas related to the present Declaration within its fields of competence;

(d) facilitate the implementation of the Action Plan, the main lines of which are appended to the present Declaration.

(1) Including, in particular, the Florence Agreement of 1950 and its Nairobi Protocol of 1976, the Universal Copyright Convention of 1952, the Declaration of the Principles of International Cultural Co-operation of 1966, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, the Convention for the Protection of the World Cultural and Natural Heritage of 1972, the Declaration on Race and Racial Prejudice of 1978, the Recommendation concerning the Status of the Artist of 1980, and the Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989.

(2) This definition is in line with the conclusions of the World Conference on Cultural Policies (MONDIACULT, Mexico City, 1982), of the World Commission on Culture and Development Our Creative Diversity, 1995), and of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998)

Annex 5: Main Lines of an Action Plan for the Implementation of the UNESCO Universal Declaration on Cultural Diversity

The Member States commit themselves to taking appropriate steps to disseminate widely the "UNESCO Universal Declaration on Cultural Diversity" and to encourage its effective application, in particular by cooperating with a view to achieving the following objectives:

1. 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 national and international level; taking forward notably consideration of the advisability of an international legal instrument on cultural diversity.

2. Advancing in the definition of principles, standards and practices, on both the national and the international levels, as well as of awareness-raising modalities and patterns of cooperation, that are most conducive to the safeguarding and promotion of cultural diversity.

3. Fostering the exchange of knowledge and best practices in regard to cultural pluralism with a view to facilitating, in diversified societies, the inclusion and participation of persons and groups from varied cultural backgrounds.

4. Making further headway in understanding and clarifying the content of cultural rights as an integral part of human rights.

5. Safeguarding the linguistic heritage of humanity and giving support to expression, creation and dissemination in the greatest possible number of languages.

6. Encouraging linguistic diversity – while respecting the mother tongue – at all levels of education, wherever possible, and fostering the learning of several languages from the earliest age.

7. Promoting through education an awareness of the positive value of cultural diversity and improving to this end both curriculum design and teacher education.

8. Incorporating, where appropriate, traditional pedagogies into the education process with a view to preserving and making full use of culturally appropriate methods of communication and transmission of knowledge.

9. Encouraging "digital literacy" and ensuring greater mastery of the new information and communication technologies, which should be seen both as educational disciplines and as pedagogical tools capable of enhancing the effectiveness of educational services.

10. Promoting linguistic diversity in cyberspace and encouraging universal access through the global network to all information in the public domain.

11. Countering the digital divide, in close cooperation in relevant United Nations system organizations, by fostering access by the developing countries to the new technologies, by helping them to master information technologies and by facilitating the digital dissemination of endogenous cultural products and access by those countries to the educational, cultural and scientific digital resources available worldwide.

12. Encouraging the production, safeguarding and dissemination of diversified contents in the media and global information networks and, to that end, promoting the role of public radio and television services in the development of audiovisual productions of good quality, in particular by fostering the establishment of cooperative mechanisms to facilitate their distribution.

13. Formulating policies and strategies for the preservation and enhancement of the cultural and natural heritage, notably the oral and intangible cultural heritage, and combating illicit traffic in cultural goods and services.

14. Respecting and protecting traditional knowledge, in particular that of indigenous peoples; recognizing the contribution of traditional knowledge, particularly with regard to environmental protection and the management of natural resources, and fostering synergies between modern science and local knowledge.

15. Fostering the mobility of creators, artists, researchers, scientists and intellectuals and the development of international research programmes and partnerships, while striving to preserve and enhance the creative capacity of developing countries and countries in transition.

16. Ensuring protection of copyright and related rights in the interest of the development of contemporary creativity and fair remuneration for creative work, while at the same time upholding a public right of access to culture, in accordance with Article 27 of the Universal Declaration of Human Rights.

17. Assisting in the emergence or consolidation of cultural industries in the developing countries and countries in transition and, to this end, cooperating in the development of the necessary infrastructures and skills, fostering the emergence of viable local markets, and facilitating access for the cultural products of those countries to the global market and international distribution networks.

18. Developing cultural policies, including operational support arrangements and/or appropriate regulatory frameworks, designed to promote the principles enshrined in this Declaration, in accordance with the international obligations incumbent upon each State.

19. Involving the various sections of civil society closely in the framing of public policies aimed at safeguarding and promoting cultural diversity.

20. Recognizing and encouraging the contribution that the private sector can make to enhancing cultural diversity and facilitating, to

that end, the establishment of forums for dialogue between the public sector and the private sector.

The Member States recommend that the Director- General take the objectives set forth in this Action Plan into account in the implementation of UNESCO's programmes and communicate it to institutions of the United Nations system and to other intergovernmental and non-governmental organizations concerned with a view to enhancing the synergy of actions in favour of cultural diversity.

Annex 6: Agreement on Subsidies and Countervailing Measures ("SCM Agreement")

Part I: General Provisions

Article 1: Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[428];

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which

[428] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-1

would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

Article 2: Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[429] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, reg-

[429] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-2

ulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy[430]. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

[430] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-3

Part II: Prohibited Subsidies

Article 3: Prohibition

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact[431], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[432];

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

Article 4: Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.4 If no mutually agreed solution has been reached within 30 days[433] of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB")

[431] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-4
[432] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-5
[433] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-6

for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts[434] (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel's terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform

[434] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-7

the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[435]

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate[436] countermeasures, unless the DSB decides by consensus to reject the request.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.[437]

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

Part III: Actionable Subsidies

Article 5: Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

(a) injury to the domestic industry of another Member[438];

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[435] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-8
[436] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-9
[437] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-10
[438] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-11

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994[439];

(c) serious prejudice to the interests of another Member.[440]

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 6: Serious Prejudice

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

(a) the total ad valorem subsidization[441] of a product exceeding 5 per cent[442]:

(b) subsidies to cover operating losses sustained by an industry;

(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.[443]

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

[439] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-12
[440] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-13
[441] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-14
[442] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-15
[443] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-16

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[444] as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: (a) there is an increase in the market share of the subsidized product; (b) the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; (c) the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated

[444] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#ftnt17

through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist[445] during the relevant period:

(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;

(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;

(c) natural disasters, strikes, transport disruptions or other force majeure substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

(d) existence of arrangements limiting exports from the complaining Member;

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[445] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-18

(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, inter alia, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);

(f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 7: Remedies

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question, and (b) the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice[446] caused to the interests of the Member requesting consultations.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of

[446] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-19

the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days[447], any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel's terms of reference.

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB[448] unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[449]

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the

[447] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-20
[448] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-21
[449] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-22

Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

Part IV: Non-Actionable Subsidies

Article 8: Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable[450];

(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:[451][452][453] the assistance covers[454] not more than 75 per cent of the

[450] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-23
[451] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-24

costs of industrial research[455] or 50 per cent of the costs of pre-competitive development activity[456][457]; and provided that such assistance is limited exclusively to:

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;

(iv) additional overhead costs incurred directly as a result of the research activity;

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development[458] and non-specific (within the meaning of Article 2) within eligible regions provided that:

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria[459], indicating that the region's

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[452] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#ftnt25
[453] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-26
[454] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-27
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[457] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-30
[458] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-31
[459] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-32

difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

— one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;

— unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

(c) assistance to promote adaptation of existing facilities[460] to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and

(iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such

[460] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-33

notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.[461]

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to

[461] https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#fnt-34

the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

Article 9: Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

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A Portrait of Trade in Cultural Goods

in Respect of the WTO and the UNESCO Instruments in the Contexts of Hard-Law and Soft-Law

Cultural Goods have the dual nature of being related to both culture and economy. The WTO considers the trade aspects and UNESCO gives value to the cultural aspects of cultural goods. Therefore, there are interactions between the provisions, institutions and practices of the WTO Agreement and UNESCO CDCE on trade in cultural goods. This book examines potential conflicts between the two agreements. In doing so we are proposing three routes to enhance legal coherence between them: propose an improved interpretation of the instruments; harmonise through hard law; and foster mutual supportiveness through soft law.

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