The New Cultural Diversity Convention and its Implications on the WTO International Trade Regime: A Critical Comparative Analysis

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SUMMARY

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I. INTRODUCTION

On October 20, 2005, 148 nations from the United Nations Educational, Scientific and Cultural Organization (UNESCO) approved the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Convention).[1] Only two nations, the United States and Israel, voted against the Convention.[2] This Convention was the culmination of almost two years of drafting, a process set in motion by the approval of the 2001 Universal Declaration of Cultural Diversity (Declaration) and anticipated by UNESCO's historical treatment of cultural goods and services.

The goal of the Convention is to preserve global cultural diversity, and it empowers nations to affirmatively protect their own cultures by, among other measures, restricting the import of competing cultural goods and services from other countries. Such a trade measure would seem contradictory to the generally liberal international trade regime set out by the World Trade Organization (WTO) agreements, particularly the General Agreement on Tariffs and Trade (GATT).[3] Although the Convention stresses "mutual supportiveness" with other treaties such as the GATT, it also insists that it must not be "subordinat[ed]" to these other treaties.[4] The United States couches its objections to the Convention in terms of preferability of democratization and increased access as ways to promote cultural diversity. But as the world's leading exporter of movies, television programs and other audio-visual cultural products,[5] the United States faces a potentially significant restriction of its imports. With the Convention operative in February 2006, the stage is set for a conflict between a WTO nation that might attempt to restrict the import of cultural goods and services under the Convention, and the United States, who will likely assert the supremacy of the WTO agreements to which both nations are parties over the Convention it does not recognize.

In this paper, I attempt to predict what will happen in such a conflict by analyzing (1) whether the Convention and the GATT can be reconciled, and (2) if

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1. Press Release, U.N. Educational, Scientific and Cultural Organization [UNESCO], General Conference Adopts Convention on the Protection and Promotion of the Diversity of Cultural Expressions, U.N. DOC. 2005-138 (Oct. 20, 2005), *available at* http://portal.unesco.org/en/ev.php-URL_ID=30298&URL_DO=DO_TOPIC&URL_SECTION=201.html.

2. Molly Moore, *U.N. Body Endorses Cultural Protection*, WASH. POST, Oct. 21, 2005, at A14.

3. This paper does not analyze the implications of the Agreement on the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") or the General Agreement on Trade in Services ("GATS"). As for GATS, a WTO Appellate Body decision has demonstrated that cultural services entered into international trade fixed in some physical form will likely be treated as a good, and analyzed under GATT. *See* Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, at 17-20, WT/DS31/AB/R (June 30, 1997) [hereinafter *Canada – Periodicals*].

4. UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions art. 20, Oct. 20, 2005 [hereinafter Convention], *available at* http://unesdoc.unesco.org/images/0014/001429/142919e.pdf.

5. Alan Riding, *A Global Culture War Pits Protectionists Against Free Traders*, N.Y. TIMES, Feb. 5, 2005, at B9.

they cannot, who shall decide the conflict between them and how they might do so. I begin by highlighting the special status and inclusive definition given to "cultural goods and services," which present a case for pulling these goods and services out of the WTO framework. Next, I discuss the various trade measures explicitly and implicitly endorsed by the Convention under the headings of "promotion" and "protection," and analyze their validity within the framework of the GATT and WTO jurisprudence. Finding the most potentially effective of these measures to be unavailable within that framework, I move on to pit the Convention against it, under the rules governing conflicts between international agreements. Finally, after finding that the GATT will trump the Convention in such a conflict, I inquire whether the Convention might at least influence the WTO Dispute Settlement Body (DSB) interpreting the GATT in trade disputes. In doing so, I find that the principle of "evolutive interpretation," along with prior DSB jurisprudence, offers hope to champions of the Convention who wish to protect and promote cultural diversity while remaining in good standing with the WTO.

II. THE CONVENTION AND ITS CONTROVERSIAL PROVISIONS

The Convention represents the execution of an action plan set out by UNESCO in the 2001 Universal Declaration. It reaffirms that instrument's recognition of cultural diversity as "the common heritage of humanity,"[6] and stresses its status as a crucial element for "sustainable human development."[7] In keeping with these underlying principles, the Convention recognizes that cultural goods and services "have both an economic and a cultural nature . . . and must therefore not be treated as solely having commercial value."[8] This notion of a dual nature provides the intellectual foundation for the argument that cultural goods and services should be considered as lying outside the WTO trade regime, or at least must require an expansive interpretation of that regime's conventions. Pierre Curzi, co-chair for the Canadian Coalition for Cultural Diversity, stated: "The proposed UNESCO Convention . . . represents a landmark achievement [in obtaining recognition] in international law for the principle that cultural goods and services are fundamentally different from other goods and services. A book, or film, or piece of music is not the same as an automobile, or a computer."[9]

The Convention's definition of "cultural activities, goods and services" is broad enough to include Curzi's examples and much more: an examiner must find only that goods or services "embody or convey cultural expressions."[10] One can imagine many goods and services that would qualify under the language of this definition, and this expansiveness is one of the aspects of the Convention to which the United States objects. Under the United States' argument, the generality of the "cultural good or

6. UNESCO, Universal Declaration on Cultural Diversity art. 1, Nov. 2, 2001, 41 I.L.M. 57 [hereinafter Universal Declaration]; *see also* Convention, *supra* note 4, Preamble, § 2.

7. *Id.* art. 11; *see also* Convention, *supra* note 4, art. 2.6.

8. Convention, *supra* note 4, pmble.

9. Press Release, Coalition For Cultural Diversity (Canada), Canada's Cultural Organizations Hail Successful Conclusion of UNESCO Negotiations for Treaty on Cultural Diversity, Urge Its Adoption at October General Conference (June 8, 2005), *available at* http://www.cdc-ccd.org/Anglais/Liensenanglais/nouveautes_eng/CDC_News_Release_ ENG_ 08_ 06_05.pdf.

10. Convention, *supra* note 4, art. 4.4.

service" definition could enable nations to restrict import of any item for which a colorable claim of "cultural expression" can be made, whether or not such a restriction was made in the name of cultural diversity. "The problem is that the French and others are expanding the lists of cultural objects and things to now include wine and foie gras . . . . [Therefore,] we are not sure where the expansion of the lists of cultural goods will end."[11] Thus, a nation seeking to circumvent the WTO trade regime and restrict imports might attempt to use an expansive definition as a cover.

The central conflict with the WTO trade regime is the Convention's empowerment of individual nations to determine and implement measures for protecting and promoting cultural diversity within their own territories. Article 6 of the Convention provides a non-exhaustive list of measures at a nation's disposal including "regulatory measures" and "measures that, in an appropriate manner, prove opportunities for domestic cultural activities, goods, and services among all those available within the national territory." Article 7 defines promotional measures as those which "create in their territory an environment that encourages" the creation of home-grown cultural goods and services, as well as access to those cultural goods and services of other nations. No specific examples of acceptable measures are given in either of these Articles. Article 8 makes clear that a nation has considerable power with regard to the protection and preservation of cultural expressions, sanctioning the use of "all appropriate measures" provided that the acting nation has found those expressions are "at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding."

III. PROMOTION

Promotional measures encouraging the creation and dissemination of accessible cultural expressions within a nation likely involve affirmative aid to the creators and disseminators, rather than negative aid in the form of market pressure relief through restrictions of competing imports. Such promotional measures usually take the form of subsidies. The Convention even sets up an International Fund for Cultural Diversity from which UNESCO could provide monetary aid to nations where domestic cultural expression is floundering.[12] Promotion through subsidy is the only Convention-enabled measure that has the approval of the United States,[13] and that is compatible with the GATT provision stating that the agreement's trade regulations shall not prevent "payment of subsidies exclusively to domestic producers."[14] The WTO Appellate Body has even held that the form of such subsidies is not limited to actual grants of monetary aid, but may include indirect aid, like exemptions of domestic products from internal taxes, transportation rates, and postal rates otherwise charged to imported products.[15] Thus, the Convention's aim of promotion,

11. Interview by Foreign Journalists with Louise Oliver, U.S. Ambassador to UNESCO, On-the-Record Roundtable on the Convention on Cultural Diversity, in Paris, France (Oct. 21, 2005) [hereinafter Roundtable Discussion], *available at* http://www.state.gov/p/io/rls/rm/56586.htm.

12. Convention, *supra* note 4, art. 18.

13. *See* Roundtable Discussion, *supra* note 11.

14 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. III, para. 8(b) [hereinafter GATT].

15. *Canada – Periodicals*, *supra* note 3, at 34.

as affirmative aid to creators of cultural goods and services, will likely not create conflict with the GATT.

Of course, the efficacy of such affirmative aid in promoting cultural expression will vary depending on a nation's relative resources and cultural market position. Developing countries will be less able to promote domestic creators of cultural expression, and more likely to utilize protective, trade-restrictive measures to keep their domestic cultural industry from drowning in a flood of imported cultural product from more developed nations.

IV. PROTECTION

Nothing in Articles 6 or 8 of the Convention prevents a nation from protecting its own domestic cultural industry by restricting import of cultural goods and services, either through external or internal charges or quotas, and thus decreasing foreign competition in their marketplace. But the foundational tenets of the GATT would not permit such a restriction in trade, barring some sort of justifying exemption. Article XI specifically prohibits quantitative restrictions on importation of products from another contracting party, including quotas and import and export licenses, barring specific exemptions which do not apply here.[16] Thus, under Article XI, a nation cannot clear market space for domestic cultural goods and services by ensuring that only a certain, limited percentage of the total available is imported. (There is a notable exception to this prohibition in Article IV, which I will discuss shortly.) A WTO dispute settlement panel has already struck down such a space-clearing measure for domestic cultural goods.[17]

A nation also cannot impose an inordinately high importation fee or charge in order to deter imports, since Article VIII requires that such fees and charges be "limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products."[18] Also, any customs, duties, and other charges on importation must be applied evenly to "like products" of all contracting nations, barring the existence of a customs union or free trade area agreement, under the "most-favoured-nation" (MFN) provision of Article I.[19] This means that more resourceful exporters will be better able to pay the unilateral duties or charges and enter the importer's marketplace than the less resourceful, and still provide domestic creators with competition. If the less resourceful exporters cannot enter, the selection of goods and services available might actually become less diverse. Thus, the GATT would not allow for effective "protective" measures that would keep cultural goods and services out of a country.

Once those goods are within a country's borders, Article III dictates that the country cannot tax, charge, regulate, or legislate against imported products from another party "so as to afford protection to domestic production."[20] Disparate

16. GATT, *supra* note 14, art. XI.

17. *See* Panel Report, *Canada – Certain Measures Concerning Periodicals*, para. 6.1, WT/DS31/R (Mar. 14, 1997) (discussing Canada's institution of Tariff Code 9958 to prohibit the importation of certain periodicals).

18. GATT, *supra* note 14, art. VIII, para. 1(a).

19. *Id.* art. I, para. 1.

20. *Id.* art. III, para. 1.

treatment of like products[21] or directly competitive or substitutable products[22] equate to protection of domestic production. Thus, a nation would have to demonstrate "unlikeness" and non-competition/non-substitution between the taxed foreign and non-taxed domestic products for its measure to pass muster under Article III.

However, the WTO Appellate Body has made it clear that, in a cultural goods and services context, Article III is not easily evaded. In *Canada – Certain Measures Concerning Periodicals* (*Canada – Periodicals*), decided in 1997 (before either the Declaration or the Convention), the Appellate Body struck down Canada's excise tax on split-run periodicals, or versions of foreign periodicals marketed to a Canadian audience.[23] Canada's stated goal in imposing this excise tax, specifically on sales of advertising in split-runs, was to ensure the presence of "original" Canadian content on newsstands by directing Canadian advertising dollars away from foreign (predominantly American) magazines toward domestic magazines, thus ensuring their continued existence and expression of Canadian culture.[24] This goal is in line with the mission of the Convention: protecting cultural diversity by allowing nations to protect their own domestic cultural heritage, thus maintaining the plurality of cultural expressions.

Canada argued that because the editorial content of split-run publications is essentially developed for and aimed at a non-Canadian audience, such publications are unlike and not competitive with domestic periodicals whose content includes "Canadian events, topics, people and perspectives," rendering a tax on the former, but not the latter, non-discriminatory and acceptable under Article III.[25] This argument is a crucial one for potential actors under the Convention, who will want to focus on the origin of a cultural good or service, rather than its form or type, as the crucial distinguishing factor making the products unlike and thus outside the bounds of Article III. The Appellate Body found that there was insufficient evidence in this case to determine the issue of likeness, and reaffirmed their holding in *Japan – Taxes on Alcoholic Beverages*, that the term "must be construed narrowly, on a case-by-case basis, by examining relevant factors including: (i) the product's end-uses in a given market; (ii) consumers' tastes and habits; and (iii) the product's properties, nature and quality."[26] In *Japan – Taxes on Alcoholic Beverages*, the WTO found that shochu, a clear distilled spirit distinctive to Japan, was a like product to vodka, another clear distilled spirit,[27] but was not a like product to whisky, brandy, gin, and other alcoholic beverages that were not as physically similar (though it did find these beverages and shochu to be directly competitive or substitutable).[28] Because the Appellate Body did not determine the likeness issue in *Canada – Periodicals*, there is no definitive indication as to how a WTO Panel would decide, and an Appellate Body would review, likeness in a cultural goods and services context. For example, would a DVD of a Batman™ movie be considered sufficiently like a DVD of any French movie to justify an internal French tax or charge on the former?

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21. *Id.* art. III, paras. 1,-2.

22. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, at 25, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter *Japan – Taxes on Alcoholic Beverages*] (citation omitted).

23. *Canada – Periodicals*, *supra* note 3, at 73.

24. *Id.* at 12.

25. *Id.* at 6.

26. *Id.* at 21-22.

27. *Japan – Taxes on Alcoholic Beverages*, *supra* note 22, at 32.

28. *Id.* at 32.

In the end, *Canada – Periodicals* and *Japan – Taxes on Alcoholic Beverages* imply that the ambiguity surrounding the likeness question will not be a crucial factor in the examination of a protective measure taken under to the Convention, because of the direct competition or substitution factor imputed to the second sentence of Article III, section 2. The Appellate Body in *Canada – Periodicals* found that a foreign split-run periodical is directly competitive or substitutable with a domestic non-split-run periodical if the two are part of the same segment of the market, targeting the same group of consumers.[29] Thus, the American newsmagazine TIME, its split-run version TIME Canada, and the Canadian-based newsmagazine MacLean's are all considered directly competitive or substitutable, despite the "Canadian content" of MacLean's, because they all serve the newsmagazine market.[30] The implications of this holding on other forms of cultural expression are unclear. Would market segments for recorded music or DVDs, for example, be categorized by genre? In any case, because the focus of the inquiry is not on the inherent cultural content or national origin of the products, but on their expected market, it appears that any internal measures taken to protect domestic cultural goods and services will be doomed.

The Declaration proclaims that "market forces alone cannot guarantee the preservation and promotion of cultural diversity."[31] In fact, market forces are often responsible for creating the threat to cultural diversity in the first place; for example, the entertainment focus and economic scale of U.S. cultural product, coupled with the worldwide prevalence of the English language, has enabled this cultural product to flood other nations under free trade.[32] In France, the market for a Batman DVD and a French action-movie DVD would appear to be the same—French action-movie DVD purchasers. Given the popularity of the Batman franchise, it is not unreasonable to assume that these DVDs will claim a larger market share than the French action-movie. It is also not unreasonable to assume that DVDs of similar Hollywood blockbusters will claim a large market share in France that could have been taken by DVDs of their French counterparts, which contain French cultural content. But, as stated above, under *Canada – Periodicals*, any internal charge applied to the Hollywood DVD, but not the French DVD, would contradict Article III of the GATT. The WTO's disregard of cultural content as a distinguishing factor justifying disparate treatment of foreign and domestic cultural goods and services renders any Article III measure taken under the Convention void, barring only an applicable exception. And as the next Section indicates, there are no exceptions in the GATT that would clearly justify such disparate treatment.

V. GATT EXCEPTIONS TO REGULATORY MEASURES

The protective, trade-restrictive measures implicitly endorsed by the Convention cannot be reconciled with the WTO's generally liberal trade regime through any of the GATT's current exceptions. Article IV does include an exception for one type of cultural good: cinematograph films (films shown in movie

29. *Canada – Periodicals*, *supra* note 3, at 25-29.

30. *Id.* at 28.

31. Universal Declaration, *supra* note 6, art. 11.

32. *See* Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 203, 226-27 (1998).

theaters).[33] Under this provision, a country may set a screen quota requiring exhibition of domestic films for a specified minimum percentage of the country's total available screen time.[34] However, this narrow exception has not been extended to videotaped or filmed television programs,[35] and would not extend to DVDs or other marketed recordings of the cinematograph films.[36] As discussed below, Article IV better serves the Convention proponent with its symbolic, rather than legal, significance.

Article XX lists certain types of measures that are general exceptions to the rest of the GATT's rules, provided that they are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade."[37] At first blush, two of the listed exceptions appear to be potentially applicable to measures taken under the Convention. Article XX(f) authorizes measures "imposed for the protection of national treasures of artistic . . . value."[38] While this wording seems in line with the goals of the Convention, nevertheless commentators have read the reference to "national treasures" as limiting the exception to protection of "discrete items of tangible cultural property" rather than cultural expression generally.[39] No GATT Panel has ever heard a dispute on this provision.[40] Article XX(d) allows for measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [GATT]."[41] But as we have seen, restrictive trade measures appear to be inconsistent with the liberal trade regime of the GATT. Thus, upon a strict black-letter analysis, it appears that XX(d) would not apply to except protective measures under the Convention.

Authorization for "emergency action" is given under Article XIX and clarified by the Agreement on Safeguards.[42] An emergency action appears to be applicable when domestic industry of a product is seriously injured or under threat of serious injury. However, several qualifying provisos attest to the extremely narrow scope and temporary applicability of this provision: the injury or threat must have been "a result of unforeseen developments";[43] the measure can be instituted "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment";[44] and only after (or shortly before) consultation with all contracting parties.[45] The efficacy of this measure is severely limited in that quotas cannot bring the amount of

33. GATT, *supra* note 14, art. IV.

34. *Id.* art. IV(a).

35. *See* Robin L. Van Harpen, *Mamas, Don't Let Your Babies Grow Up to be Cowboys: Reconciling Trade and Cultural Independence*, 4 MINN. J. GLOBAL TRADE 165, 168-70 (1995).

36. *See Canada – Periodicals*, *supra* note 3, at 17 (holding periodicals to be goods, even though they have services attributes (editorial content and advertising content), because the end result is a physical product, the periodical).

37. GATT, *supra* note 14, art. XX.

38. *Id.* art. XX(f).

39. Chi Carmody, *When "Cultural Identity Was Not At Issue": Thinking about Canada – Certain Measures Concerning Periodicals*, 30 LAW & POL'Y INT'L BUS. 231, 255-56 (1999).

40. *Id.*

41. GATT, *supra* note 14, art. XX(d).

42. *Id.* art. XIX; Agreement on Safeguards art. 5(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Agreement on Safeguards].

43. *Id.* art. XIX, para. 1(a).

44. Agreement on Safeguards, *supra* note 42.

45. GATT, *supra* note 14, art. XIX, para. 2.

imports below the average quantity of imported goods for the three years prior to the measure.[46] Finally, no measure will be upheld unless the acting party demonstrates a causal link between the imports and the injury to domestic industry.[47]

As the preceding analysis shows, trade measures to protect cultural diversity under the Convention are not reconcilable with the black letter of the WTO agreements, absent quotas of cinematograph films or an immediate threat of cultural heritage extinction. Thus, the treaties cannot be readily reconciled, and conflict appears certain.[48]

VI. HOW WILL THE CONFLICT BE GOVERNED?

If a trade dispute occurs, and the GATT and the Convention directly conflict, the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) would govern their collision.[49] This instrument dictates that, between two states, the agreement to which both states are parties will govern their mutual rights and obligations, over another agreement "relating to the same subject matter" to which only one of those states is a party.[50] If we assume that GATT and the Convention relate to the same subject matter,[51] then the United States and its trading partner in our hypothetical dispute would both be subject to only the former, and the DSB would adjudicate the dispute. As we have seen from our comparative analysis above, the DSB would likely find the partner's restriction of U.S. cultural product to be a violation of GATT and therefore impermissible, barring some countervailing justification or exception.

Under the Vienna Convention, then, a restrictive trade measure taken under the Convention would trump the regime set out by GATT only if the "protection and promotion of cultural diversity" was considered a "peremptory norm of general international law," or a principle of *jus cogens*.[52] Such a norm is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[53] Any treaty which, at the time of its conclusion,

46. Agreement on Safeguards, *supra* note 42, art. 5(1).

47. *Id.* art. 4(2)(b).

48. However, the exceptions discussed above do become relevant once that conflict is acknowledged under an evolutive interpretation analysis. *See infra* Parts VIII-X.

49. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M 689 [hereinafter Vienna Convention]. The Vienna Convention applies to "treaties between States" or "international agreement[s] concluded between States in written form and governed by international law." *Id.* arts. 1-2.

50. *Id.* art. 30.

51. Of course, both GATT/GATS and the Convention deal with cultural goods and services. However, to those attempting to make the argument that the former deals with trade and economics and the latter with culture, and thus that the two do not relate to the same subject matter, one may counter that both relate to sustainable development. The Preamble to the WTO Agreements states that they operate "in accordance with the objective of" sustainable development. Marrakesh Agreement Establishing the World Trade Organization, Preamble, Apr. 15, 1994, Legal Instruments – Results of the Uruguay Round, 1867 U.N.T.S. 154, *reprinted in* 33 I.L.M. 1125 (1994). The Convention proclaims cultural diversity to be an essential requirement to sustainable development in Article 2. Convention, *supra* note 4, art. 2(6).

52. Vienna Convention, *supra* note 49, art. 53.

53. *Id.*

conflicts with a peremptory norm is considered void.[54] The Vienna Convention also allows for the emergence of new peremptory norms to void and terminate conflicting obligations under existing treaties,[55] so we may proceed to analyze those norms announced in this year's Convention.

Proponents of the Declaration and the Vienna Convention will claim that the nurturing of the common heritage of humanity and mainspring for sustainable development qualifies as such a peremptory norm. Yet the definition of norms that would qualify as peremptory, outside of a select few extreme examples, is an unsettled subject that has flummoxed international law scholars.[56] The principles and purposes outlined in the Charter of the United Nations would qualify as universally accepted by its members. But these principles and purposes are of a general nature, and are articulated in broad language. For instance, the Charter champions the promotion of "international cultural . . . cooperation"[57] in "solving international problems of [a] . . . cultural . . . character,"[58] but does not elaborate on what this promotion entails. The Vienna Convention endorses cultural diversity generally, and advocates the use of trade measures where necessary to protect and promote cultural diversity. But it does not hold any specific trade measure to be a peremptory norm, and Article 20's demand of "mutual supportiveness" with other instruments undermines the assumption of absolute inviolability altogether.[59] In an illustrative example, not even all measures taken to promote human rights—an undeniably clear *jus cogens* principle outlined in the Charter—can be treated as *jus cogens* and inviolable. The stated goal of "progressive" realization of recognized human rights by "appropriate means" in the United Nations Covenant on Civil and Political Rights demonstrates a limit on human rights laws that qualify for full UN legitimacy.[60] For example, a labor measure in a treaty that might seem oppressive from the human rights perspective of other, non-participating nations cannot necessarily be considered void under Article 53. Only those treaty provisions which endorse extreme human rights violations, such as genocide or slave trafficking, can be considered void under *jus cogens*.[61] In practice, hesitation to elevate norms derivative of broad *jus cogens* principles to peremptory status is apparent, as was most poignantly demonstrated by the International Court of Justice's 1997 refusal to invalidate a treaty concerning construction of dams that were expected to wreak large-scale and irreversible havoc on the ecosystem of the Danube River.[62]

Thus, only measures dealing with *extreme* violations of international cultural co-operation, such as looting and exportation of irreplaceable cultural artifacts of great historical significance, might qualify for non-interference. (Indeed, GATT Article XX(f) explicitly allows for such measures.) Such a violation must be so disastrous to

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54. *Id.*

55. *Id.* art. 64.

56. *See generally* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 203-41 (2d ed. 1984).

57. U.N. Charter art. 55.

58. *Id.* art. 1, para. 3.

59. *Id.* art. 20.

60. *See* SINCLAIR, *supra* note 56, at 217.

61. *Id.*

62. *See* Francesco Francioni, *WTO Law in Context: The Integration of International Human Rights and Environmental Law in the Dispute Settlement Process in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 143 (Alan Yanovich & Jan Bohanes eds., 2006) (referring to the ICJ case Gabcikovo-Nagymoros (Hung. v. Slovk.), 1997 I.C.J. 92 (Sept. 25)).

a country's cultural heritage that no nation could realistically claim that maintaining the status quo of international trade was a sufficiently countervailing concern. However, it is not likely that measures taken to stem the slow erosion of a nation's cultural diversity through the vagaries of international trade would be considered untouchable. Like the progressive realization of human rights by appropriate means, the edict of mutual supportiveness charged by the Convention to protectors and promoters of cultural diversity will likely deny a champion of the Convention from claiming *jus cogens* preemptively against the world.

VII. THE CONVENTION SPURRING EVOLUTIVE INTERPRETATION OF THE WTO AGREEMENTS

If the Convention cannot override the liberal trade regime set out by GATT in our hypothetical trade dispute, can it at least influence the DSB that adjudicates its outcome? The protection and promotion of cultural diversity—so highly esteemed by the 148 nations who drafted and agreed upon the Convention—may warrant an interpretation, if not an expansion, of the GATT that would take this principle into account. The GATT exceptions listed above, while not specifically enabling of the Convention's ends, nevertheless show that the WTO recognizes that certain situations invoking settled principles of international law justify alterations of free trade. Even the United States has previously joined in disruptions of market forces made in the name of protection of cultural goods and objects.[63] As I shall demonstrate, through the practice of evolutive interpretation, the Convention would be most effective not in opposition to the GATT system, but as an influential rule of international law bearing on that system, particularly with regard to the Article XX exceptions.

The WTO Dispute Resolution Understanding (DSU) states that with regard to a dispute, the DSB will clarify provisions of the WTO agreements "in accordance with customary rules of interpretation of public international law."[64] In a dispute between two states involving rights and obligations stemming from separate international instruments, the DSB will look to the interpretative techniques set out in Article 31 of the Vienna Convention.[65] Article 31(1) states 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." Context, for the purpose of interpretation, is comprised of agreements relating to the conclusion of the treaty that have been made or accepted by all treaty parties.[66] And Article 31(3)(c) of the Vienna Convention dictates that subsequent interpretations of the treaty, subsequent practice in the application of the treaty, and relevant rules of international law applicable to relations between the parties be taken into account when interpreting a treaty.

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63. *See, e.g.*, UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

64. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

65. *See Japan – Taxes on Alcoholic Beverages*, *supra* note 22, at 10.

66. Vienna Convention, *supra* note 49, art. 31(2).

Under the Vienna Convention, the "starting point of interpretation is the elucidation of the meaning of the text."[67] The text is presumed to be the "authentic expression of the intentions of the parties."[68] Thus, the DSB hearing our hypothetical dispute must determine whether the GATT reflects an original intention of the contracting parties to allow for restrictive trade measures made to promote and protect cultural diversity. Only two provisions, the cinematograph film exception in Article IV and the national treasure of cultural value exception of Article XX(f), stand out in a textual analysis. The cinematograph film exception was insisted upon during the 1947 formation of the GATT by the governments of Britain, Norway, and Czechoslovakia, who already had screen quotas and wanted to continue to protect their domestic film industries with them.[69] GATT drafters likely exempted the films from the national treatment provision because they felt "its regulation was more related to domestic cultural policies than to economics and trade."[70] Such a rationale, if true, might be said to demonstrate sensitivity to domestic cultural policy. But this alleged sensitivity would have been based on cultural policy as understood in 1947, and the continued insistence of GATT members to read this exception narrowly to cover only screened film and not videotaped reproductions or television[71] further undercuts the sensitivity argument. Article XX(f), as stated above, appears to be limited to discrete cultural artifacts. Though it has not yet been officially defined by the DSB, the ordinary meaning of its limited language does not indicate an original intent to exempt commercial cultural product from the other GATT rules.

Turning to analyze the GATT "in [its] context" and "in light of its object and purpose," we can predict a more amenable approach of the WTO to the goals of the Convention. Extrinsic evidence such as subsequent agreements, subsequent practice, and relevant rules of international law were meant by the drafters of the Vienna Convention to play an essential role in interpreting the text of a treaty.[72] Because the Convention is not an agreement subsequent to the GATT that is "between the parties" (at least where the United States and Israel are concerned), if it is to exert influence on the GATT, it must do so as a "relevant rule of international law applicable in [their] relations." To predict whether it will have such an effect, we must determine (1) whether the Convention will be considered such a "relevant rule," and (2) whether it will sufficiently define, redefine, or expand Article XX(f) (the national treasures of artistic value exception), and/or Article XX(d) (the "necessity to secure compliance with agreements not inconsistent with GATT" exception). WTO jurisprudence suggests that either outcome is possible, and that the Convention might leave its mark on international trade after all.

67. SINCLAIR, *supra* note 56, at 115 (citing Summary Records of the Eighteenth Session, [1966] Y.B. Int'l L. Comm'n 177, Vol. II: A/CN.4/SER.A/1966/Add.1 (67 V.2).) (internal quotations omitted).

68. *Id.*

69. Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT'L L. 1, 33 n.142 (2000).

70. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 293 (1969).

71. *See* Van Harpen, *supra* note 35, at 168-70.

72. *See* SINCLAIR, *supra* note 56, at 117.

VIII. IS THE CONVENTION RELEVANT AND APPLICABLE TO A WTO TRADE DISPUTE?

The Convention's principle of protecting and promoting cultural diversity must be considered relevant and applicable to the WTO and the GATT even though this principle was agreed upon and is entering into law more than a decade after the WTO came into existence. The drafters of the Vienna Convention understood the need for evolutive interpretation in certain situations.[73] More importantly, the WTO itself has acknowledged the need for an examination of contemporaneous conditions and understandings of law, most famously in the landmark *United States – Import Prohibition of Shrimp and Shrimp Products* (*United States – Shrimp*) Appellate Body decision.[74] In that case, the interpretation of Article XX(g)'s exception for measures relating to the conservation of exhaustible natural resources was at issue.[75] The United States based its import prohibition on their own Endangered Species Act of 1973, which required all shrimp trawlers to avoid killing sea turtles in areas where these turtles were endangered.[76] Other nations did not require such a measure of their trawlers, and the United States denied the shrimp imports of these nations, claiming justification for this trade restriction under Article XX(g).

The United States and the complaining parties differed on whether the term exhaustible natural resources included living things, such as sea turtles. The WTO Appellate Body rejected the complaining parties' evidence of the exception's drafting history, and instead proclaimed that "[t]he words of Article XX(g) . . . must be read by a treaty interpreter *in the light of contemporary concerns of the community of nations* about the protection and conservation of the environment."[77] The Appellate Body cited with approval an ICJ decision which held that concepts embodied in a treaty are "by definition, evolutionary" and that "their interpretation cannot remain unaffected by the subsequent development of law."[78]

Thus, the WTO accepted the United States' evolutive interpretation of the term exhaustible natural resources, which went against drafting history, prior understanding, and an ordinary language understanding of the term. The 148 nations who have agreed to the Convention have demonstrated their "contemporary concerns" about the protection and promotion of cultural diversity. This development bodes well for the evolutive interpretation of national treasures of artistic value that the trading partner in our hypothetical dispute might proffer under Article XX(f). *United States – Shrimp* dealt with environmental concerns, but one could imagine that a principle that has been described as being "as necessary for humankind as biodiversity is for nature"[79] will demand attention from the WTO.

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73. *Id.* at 139-40.

74. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *United States – Shrimp*].

75. *Id.*

76. *Id.*

77. *Id.* (emphasis added).

78. *Id.* para. 130 n.109 (quoting Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 31 (June 21)).

79. Universal Declaration, *supra* note 6, art. 1.

The acting nation in our hypothetical dispute should attempt to justify its trade restriction to the DSB by claiming an Article XX exception, either XX(f) or XX(d). The DSB's analysis of the nation's claim will involve two steps. First, the nation must prove that the nature of their restrictive trade measure justifies the claim of the special exemption. Second, the nation must prove that its application of the measure is not "arbitrary or unjustifiable" or tantamount to a "disguised restriction on international trade," according to the chapeau of Article XX.[80] Our analysis will follow the same order: first, we will examine the potential workability of XX(f) and XX(d), and then we will contemplate how a measure must be applied if indeed the exceptions are successfully claimed.

IX. THE POTENTIAL WORKABILITY OF ARTICLE XX(F): NATIONAL TREASURES OF ARTISTIC, HISTORICAL, OR ARCHAEOLOGICAL VALUE

No DSB has ever directly interpreted Article XX(f). As stated above, the "national treasures" language has been read to limit the exception to discrete artifacts or masterpieces of extraordinary repute originating in one's own country. Such a scope would resemble that of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership extant at the time of the GATT's drafting, and would exclude typical cultural goods and services in trade. But is the ordinary meaning of the language of Article XX(f) so unambiguous that the DSB would not make an evolutive interpretation that contemplated the Convention and its espoused principles?

In *United States – Shrimp*, the Appellate Body considered the "natural resources" language from Article XX(g) to be generic, and then turned to external references to define that language for the purposes of the case.[81] The complaining parties in *United States – Shrimp* argued that a reasonable interpretation of the ordinary meaning of the term connotes "finite resources such as minerals, rather than biological . . . resources" such as reptiles.[82] The Appellate Body disagreed only after reference to modern biological sciences and definitions of the term in other environmental law instruments.[83] As for the term exhaustible, the Appellate Body acknowledges the argument that living beings are, "in principle, capable of reproduction and, in that sense, 'renewable,'"[84] but sets this argument aside by again making reference to scientific experience as well as to a list of endangered species.[85]

In my opinion, based on this precedent it is possible that the DSB will consider the language "national treasures of artistic, historic, or archaeological value" not simply on its face, but in light of the Convention's principles. The Convention, after all, represents contemporary concerns similar to those examined by the Appellate Body in *United States – Shrimp*. If the DSB does so, it might consider either the *overall* diversity of cultural expression that has an artistic or historic (archaeological

80. *United States – Shrimp*, *supra* note 74, at paras. 118-20 (reaffirming the test set out in Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, at 22, WT/DS2/AB/R (Apr. 29, 1996)).

81. *Id.* paras. 128, 130.

82. *Id.* para. 127 (citation omitted).

83. *Id.* paras. 128-30.

84. *Id.* para. 128 (citation omitted).

85. *Id.* para. 132.

does not seem to fit here) component, or the existence of domestic cultural product that is also artistic or historic and threatened by importation, to be the national treasure whose protection is authorized. Thus, a restriction of importation of foreign cultural product that is artistic or historic made in order to protect either overall cultural diversity or similar domestic cultural production might be upheld by the WTO under this exception.

Interestingly, Article XX(f) does not include the qualifying "necessary to" language that is in XX(a), (b), or (d), or the "essential to" language of XX(j). The implications of this omission on the standard of proof for demonstration of true protection by the acting nation seem negligible, however, as the proof required by the "arbitrary/unjustifiable" analysis under the Article XX chapeau will ensure that a nation cannot simply claim XX(f) to render a "disguised restriction in trade."

X. THE POTENTIAL WORKABILITY OF ARTICLE XX(D): NECESSARY TO SECURE COMPLIANCE WITH LAWS OR REGULATIONS NOT INCONSISTENT WITH THE PROVISIONS OF THE GATT

In *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (*Korea – Beef*), the Appellate Body set out a two-element test for resolving claims made under Article XX(d), considering whether the measure at issue (1) actually secures compliance with a law or regulation, and (2) whether it is absolutely necessary to do so.[86] Turning to analyze the Convention, we find that each party has an obligation to all other parties to preserve the cultural heritage of the peoples within their own territory, as these individual cultural heritages make up the plurality that creates global cultural diversity.[87] Each party also has an obligation to its own peoples not only to protect and promote their individual cultural expressions, but to ensure the existence and access of a diverse marketplace of foreign cultural goods and services.[88] These obligations extend also to international cooperation toward helping other developing nations to preserve the cultural heritage of *their* peoples.[89] Thus, restrictive trade measures taken by a Convention party are not simply exercises of national prerogative but true obligations under the law of the Convention. Accordingly, we will apply the *Korea – Beef* analysis to our hypothetical dispute.

Yet there is a minor point of potential complication. Article XX(d) does not specify whether the laws and obligations to which it refers are meant to be both domestic and international. At this time, no DSB has ruled on this.[90] All the cases brought before the WTO dispute settlement bodies have involved domestic laws and obligations.[91] However, I believe it is unlikely that international laws such as the Convention will be excluded from the scope of XX(d), given the outward

86. Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter *Korea – Beef*].

87. *See* Convention, *supra* note 4, pmble.

88. *Id.* art. 7.

89. *Id.* art. 14.

90. Patricia Larios, *The Fight at the Soda Machine: Analyzing the Sweetener Trade Dispute Between the United States and Mexico Before the World Trade Organization*, 20 AM. U. INT'L L. REV. 649, 690-91 (2005).

91. *Id.* at 690.

perspective of DSU Article 3.2 and the willingness shown by the Appellate Body in its jurisprudence to refer to international law in GATT interpretation. Domestic laws pertaining to protection of endangered species (*United States – Shrimp*) and consumer protection (*Korea – Beef*) are hardly idiosyncratic domestic policies that might tend to prove the point of those who would limit XX(d). The protection and promotion of cultural diversity is not only similarly desirable to all nations, but is by definition a global conceit, "[a] common heritage of humanity."[92]

The first element of the *Korea – Beef* test is that the measure at issue must be designed to secure compliance with laws or regulations that are not themselves inconsistent with the GATT.[93] Securing compliance is shown by simply demonstrating that a trade measure would actually work to effect the goal of an inconsistent law or obligation. In *Korea – Beef*, the United States and Australia complained that Korea's use of dual retail channels of distribution for different types of imported beef discriminated in favor of domestic beef, in violation of GATT's Article III.[94] Korea claimed to have instituted this dual retail system in accordance with its Unfair Competition Act, in order to ensure that exporters could not confuse importers, and in turn consumers, as to the origin of their beef.[95] The Appellate Body affirmed the reviewing Panel's determination that the dual retail system secured compliance with the Act simply by acknowledging that the object of the Act, misrepresentation of beef origin, was a genuine problem, and that the measure appeared to address this problem by reducing the risk of exporter misrepresentation.[96] In our hypothetical dispute, any restrictive trade measure taken that would actually increase cultural diversity, or decrease the culturally homogenizing effect of cultural trade, would qualify.

But how to prove the Convention is not inconsistent with the GATT? In *Korea – Beef*, consistency was apparent as "prevention of deceptive practices" was listed among the non-exclusive examples in Article XX(d).[97] It is not enough to say that because the Convention sanctions restrictive trade measures, it cannot be consistent with a system facilitating liberal international trade, as Article XX demonstrates an acknowledgement by the WTO that nations will need to restrict trade in certain situations. I believe the answer to this question lies in the common objects of the Convention and the GATT, goods and services, and the common subject matter of both instruments, sustainable development.[98] Aside from its sanction of restrictive trade measures, the Convention cannot be considered inconsistent with the GATT; it is not an instrument primarily designed to restrict trade, but rather to acknowledge the effects of international trade on an element of sustainable development. In this way, it is akin to the Endangered Species Act (biodiversity) and the Unfair Competition Act (consumer protection), which the Appellate Body considered not inconsistent with the GATT.[99]

We move next to the "necessary" element outlined in *Korea – Beef*. This determination by the DSB is basically an investigation into whether the acting party

92. Convention, *supra* note 4, pmble.
93. *Korea – Beef*, *supra* note 86.
94. *Id.*
95. *Id.*
96. *Id.* para. 158.
97. *Id.*
98. *See supra* note 51 and accompanying text.
99. *Korea – Beef*, *supra* note 86.

"could 'reasonably be expected to employ'" an alternative measure that would secure compliance with the external law or obligation yet remain consistent with the WTO agreements, and if not, whether a less-inconsistent measure is "reasonably available."[100] This determination a balancing test of three prominent factors: (1) the extent of the contribution made by the measure towards achieving compliance; (2) the importance of the common interests or values protected by the external law or obligation; and (3) the extent to which the measure is inconsistent with GATT Article III, paragraph 4, the "national treatment" provision dictating "treatment no less favourable" to imports than to like domestic products once the imports have entered the territory.[101] Once a less-inconsistent alternative measure has been identified, the burden is on the acting country to prove that this alternative is not "reasonably available."[102]

In *Korea – Beef*, the Appellate Body identified WTO-consistent measures taken by Korea in other related product areas to combat unfair competition, and held that because Korea did not prove that these other measures were not "reasonably available" to beef importation, it could not claim the Article XX(d) exception for its dual-retail system.[103] The dual-retail system treated imported beef differently than domestic beef,[104] which contradicted Article III, one of the prominent balancing test factors. Of course, in our hypothetical dispute, differential treatment of foreign and domestic cultural goods and services might be essential to the promotion and protection of cultural diversity, if the import enters the country. Yet the Appellate Body's emphasis on Article III puts any internal measure claimed under Article XX(d), such as retail quotas which clear market space for domestic cultural product, at a disadvantage.

This disfavor of internal trade-restrictive measures is crucial. As discussed above, external measures (made before imports enter the territory) such as taxes or duties on foreign cultural product might not achieve the goal of cultural diversity. Some exporters may be better equipped to pay those duties and gain entry to the importing country's marketplace than others, and those exporters less able or willing to pay the duties may not export their goods at all, causing a less diverse cultural marketplace in their absence. Also, market forces may thwart the diversifying purpose of the import duties or taxes, as citizens might be more willing to assume these costs from the exporters via higher prices in order to obtain desirable foreign cultural product. Even if these import duties or taxes were funneled into subsidies for the creation of domestic cultural product ("promotion"), it is uncertain that domestic production would in fact increase and lead to a more diverse cultural marketplace. Also, an increase in domestic production alone would not necessarily address the market preferences that might have caused the cultural homogeneity in the first place. Thus, internal measures that would normally contravene Article III might still be "necessary."

The Convention's acknowledgment of cultural diversity's great importance and the extent of the internal measure's efficacy in compliance may tip the *Korea – Beef* balancing test in the acting country's favor. Nonetheless, Article III will likely play a

100. *Id.* para. 166.

101. *Id.*; GATT, *supra* note 14, art. III, para. 4.

102. *Korea – Beef, supra* note 86, para. 173.

103. *Id.* paras. 170-82.

104. *Id.* para. 168.

significant role in the dispute; as *Canada – Periodicals* has shown us, even if the DSB does not find foreign and domestic cultural product to be like (perhaps accepting the Convention's definition of cultural goods as not just having economic value), it will find them directly competitive or substitutable and within the ambit of the national treatment provision. Thus, to sustain a measure otherwise inconsistent with Article III of the GATT, an acting nation will have to prove to the satisfaction of the DSB that a restrictive and thus non-GATT-consistent trade measure is not reasonably available, and that there is no feasible alternative to favorable national treatment of domestic over foreign cultural product. The key to doing this will likely involve proving that market conditions are inexorably pushing toward cultural homogeneity, and must be disrupted in order to protect and promote domestic cultural diversity and the "common heritage of mankind."

XI. GOOD FAITH: THE DEMAND OF ARTICLE XX'S CHAPEAU

As we have seen, a restrictive trade measure taken under the Convention will have to fall within either Article XX(f) or XX(d) to pass muster with the WTO. Assuming that either or both of these exceptions would apply, under what conditions can a nation invoke them? The second step of the *United States – Shrimp* analysis for Article XX exemption applicability, the chapeau test, examines whether a disputed measure is "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or constitutes "a disguised restriction on international trade."[105] The chapeau is essentially a good-faith requirement for countries seeking to invoke an Article XX exception, requiring that they exercise restrictive trade measures in a bona fide and reasonable manner.[106] This good-faith requirement applies both to the substantive content of a trade measure and to the procedure with which it is applied.[107] This means that the exercise of the right must be appropriate and necessary for the purpose of the right, and must be applied in a fair and equitable manner to all parties with which a nation deals.[108] In *United States – Shrimp*, the "unjustifiable" investigation focused on the effect of the acting party's measure on others, which in that case involved the United States requiring partners to adopt a certain type of regulatory measure.[109] This investigation also considered the uniformity of treatment that the United States gave to all nations. An actor under the Convention would not require its trading partner to adopt any measure or conform their cultural product to any standard; it would only restrict the quantity of their import of that partner's cultural product in pursuit of cultural diversity. Measures such as market-clearing quotas focusing on domestic cultural goods and services, uniform import charges, and uniform internal charges would presumably treat all trading partners equally. Thus, such measures may not be considered "unjustifiable." The "arbitrariness" of a measure was explained in *United States – Shrimp* as a rigidity or inflexibility that demonstrates a lack of consideration of attendant circumstances. Thus, a nation will likely have to show some nexus between the threat to cultural diversity and any quota they impose or charge they

105. *See United States – Shrimp*, *supra* note 74.

106. *Id.* para. 158.

107. *See id.* para. 160.

108. *See id.* para. 158.

109. *See id.* paras. 161-76.

assess. The check for "disguised restrictions on international trade," though not discussed in *United States – Shrimp*, appears to weed out potential "wine and foie gras"-type claims that concern the United States.

XII. CONCLUSIONS

There is a danger that a nation purporting to act under the Convention might not be doing so to protect cultural diversity, but to engage in impermissible protectionism. But I believe that three factors would confine nations acting under the Convention to do so strictly in good faith[110] pursuit of cultural diversity. The first factor would be the nature of cultural diversity itself, which requires access as well as plurality. Nations might be required to restrict trade in order to protect domestic cultural product, but they also have to facilitate trade to ensure that diversity exists in their own national marketplace. The second factor would be the equivocal nature of the Convention, which counsels openness and balance[111] even as it advocates protection and promotion, and calls for mutual supportiveness with other, possibly conflicting documents. The third and most significant factor would be the chapeau to Article XX, which is meant to prevent disguised restrictions in international trade. These three factors should combine to ensure that restrictions under the Convention are taken as rarely and narrowly as possible, and provide an acceptable balance between the policies of that instrument and the GATT.

110. Convention, *supra* note 4, art. 20.1.

111. *Id.* art. 2.8.