ON THE RELATION OF A FUTURE INTERNATIONAL CONVENTION ON CULTURAL DIVERSITY TO OTHER INTERNATIONAL AGREEMENTS

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At the close of its 166th session on April 11, 2003, the UNESCO Executive Board unanimously decided, at the request of some of its members[1], to add the question of "a preliminary study on the technical and legal aspects relating to the desirability of a standard-setting instrument on cultural diversity" to the agenda of the 32nd session of UNESCO's General Conference, set to begin on September 29, 2003. It also recommended to the General Conference that it "decide to continue action aimed at drawing up a new international standard-setting instrument on cultural diversity and to determine the nature of that instrument." At the same time, the Executive Board asked UNESCO's Director General to submit a report to the 32nd session of the General Conference on the preliminary study on the desirability of a new international standard-setting instrument for cultural diversity, along with the observations and decisions made in that regard by the Executive Board, and to include in the report references to the relevant international instruments.[2]

However, the success of this first step towards adopting an international convention on cultural diversity negotiated under the auspices of UNESCO poorly hides the important division that arose in the Executive Board during the debate on a draft amendment concerning "the links between the new instrument and other instruments already existing or in preparation." The draft amendment, which seeks to specify that the new instrument "would be without prejudice to other existing instruments or to those being prepared by the WTO," won the support of close to ten member nations on the Executive Board. But some fifteen other members found the amendment to be unacceptable, resulting in a periodically stormy debate. It was only by way of a sub-amendment calling for the

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1 Germany, Canada, France, Greece, Morocco, Mexico, Monaco and Senegal. See http://www.unesco.org/exboard/fr/166ex1provf.pdf

2 UNESCO- Executive Board, 166th session, Paris, April 4-16, 2003. Decisions Adopted by the Executive Board, item 3.4.3: "Preliminary study on the technical and legal aspects relating to the desirability of a standard-setting instrument on cultural diversity," doc. 166 EX/SR.10 (May 14, 2003).

report of the Director General to include references to the relevant international instruments that a unanimous decision could be made. But the root of the conflict remains untouched.

If it persists, this division on the issue of the link between the future international convention on cultural diversity and other international agreements could considerably harm the chances of success for the next step, which entails adopting by a majority of votes in the General Assembly, a motion giving the Director General of UNESCO the mandate to elaborate a draft convention on cultural diversity. It is therefore crucial that consensus be reached on this matter, which will make it possible to begin concrete negotiations for the new convention, but also to facilitate, by clarifying the scope of the convention's objectives, the continuation of those negotiations. For that to happen, two questions in particular must be elucidated: 1) the first has to do with the legal status of the new convention in relation to the other instruments and the responsibilities of signing parties in the event of conflict between it and existing or future agreements, and 2) the second concerns the establishment of links between the convention and other agreements.

I. Legal status of the new convention in relation to other international agreements and the responsibility of signatory States in cases of conflict

It is becoming more and more common to find a clause entitled "Relation to other international agreements" in international agreements The proliferation of international agreements in practically every field of activity is making such a clause increasingly necessary in order to facilitate the resolution of differences in the event of conflict between two or more agreements. The actual effect of this kind of clause is that it determines the legal status of the agreement or convention incorporating the clause in relation to other agreements or conventions. Three approaches for establishing this legal status are possible.

The first model is illustrated by Article 103 (2) of North American Free Trade Agreement (NAFTA). This article, which gives precedence to NAFTA over other agreements in the event of incompatibility, reads as follows:

> Article 103: Relation to Other Agreements
> 1. …

> 2. In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.

But giving precedence here applies only to the parties that are signatory to NAFTA, and it in no way diminishes, as we shall see later, the extent of their commitment to third party States. Another example of this kind of clause is found in Article 103 of the Charter of the United Nations, which reads:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The above article is necessary for the implementation of a text establishing quasi-constitutional rules (known as *jus cogens* in international law) applicable to all States. But due to its exceptionally vast scope, it raises a serious problem in terms of its concrete application, particularly when there is disagreement as to whether or not a conflict exists. The fact is that this first model clause on the relationships between conventions or agreements is not very common. In this regard, we note that it came under strong criticism in the GATT study of the Canada-United States Free Trade Agreement, which contained a clause similar to the one in NAFTA.[3]

A second model clause, opposed in some ways to the first model, is one which stipulates that the agreement it covers is subordinate to previous or future treaties or that it must not be considered as being incompatible with another treaty.[4] We find an example of this kind of clause in the bilateral free trade agreements Canada has signed to date, namely those with Israel, Chile and Costa Rica. The clause, identical in each agreement, reads as follows:

> In the event of any inconsistency between this Agreement and the specific trade obligations set out in
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> a) the *Convention on International Trade in Endangered Species of Wild Fauna and Flora,* done at Washington, March 3, 1979, as amended June 22, 1979;
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> b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 29, 1990;
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> c) the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, upon its coming into effect for Canada, Mexico and the United States; or
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> d) agreements listed in Annex 104.1,

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[3] See I. Bernier, "GATT and Regional Economic Arrangements: Report of the Working Group on the Canada-United States Free Trade Agreement," *Les Cahiers de droit*, 1992, vol. 33, pp. 313-344.

[4] *Vienna Convention on the Law of Treaties*, Article 30 (2)

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

Another example of this second model clause is found in Article 1, Paragraph 1 of the *WIPO Performance and Phonograms Treaty*, which stipulates that:

> 1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* done in Rome, October 26, 1961 (hereinafter the "*Rome Convention*").

The intended effect here is illustrated by Article 30 of the *Vienna Convention on the Law of Treaties*, which reads in part as follows: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Put into the framework of an eventual convention on cultural diversity, a clause expressly prohibiting any derogation from the conditions of the WTO would have the concrete effect of subordinating that convention to the trade considerations of the WTO.

A third and final model clause purely and simply specifies that the parties to a treaty confirm the existing rights and obligations they have with respect to each other as set out in other agreements to which they are parties. Most of the clauses used by international agreements to stipulate relations with other treaties are based on this model. An example here is seen in Article 1.3 (1) of the Canada-Costa Rica Free Trade Agreement, which reads: "The Parties affirm their existing rights and obligations with respect to each other under the *Marrakesh Agreement Establishing the World Trade Organization* and other agreements to which such Parties are party."[5] The same formulation, but with an exclusionary provision regarding emergency situations, is seen in Article 22 of the *Convention on Biodiversity* as follows: "The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biodiversity." Another interesting formulation of this model comes from the preamble to the *Cartagena Protocol on Biosafety*, which includes the following wording:

> *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,
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> *Understanding* that the above recital is not intended to subordinate this Protocol to other international agreements.[6]

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5 See http://www.dfait-maeci.gc.ca/tna-nac/1-en.asp

6 See http://www.biodiv.org/doc/legal/cartagena-protocol-en.pdf

Even though this preamble is not, strictly speaking, part of the text of the agreement, it is easy to imagine a clause that would incorporate such wording. A last variant, again having to do with the environment, is found in the preamble to the *International Treaty on Plant Genetic Resources for Food and Agriculture*, which reads in part:

> *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;
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> *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 international agreements;
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> *Understanding* that the above recital is not intended to create a hierarchy between this Treaty and other international agreements.[7]

The third model clause we are describing here simply affirms that all treaties signed by a given party are legally equal. It is applicable by default in international law when the provisions of an agreement have nothing to say about that agreement's relationship with other agreements.

If we now compare the three above-described model clauses to determine which one is the most appropriate for the new international convention on cultural diversity, one striking fact appears. To the extent that the question of the relation between cultural concerns and other concerns can be resolved only in a framework where each concern is freely expressed, the last model is undoubtedly the most appropriate one for determining the relationship between the international convention on cultural diversity and other agreements. This is because of the relationship of equality that it implies. The third model is also the one that was proposed in the report entitled "Evaluation of the Legal Feasibility of an International Instrument Governing Cultural Diversity," which was prepared by a Franco-Quebec working group on cultural diversity. The authors of that report suggest, with support from the preamble to the *Cartagena Protocol on Biosafety*, that the new instrument to be developed should incorporate a clause specifying that "while the instrument should not be construed to affect the rights and obligations of parties under other international agreements (i.e., it should be interpreted as taking these rights and obligations into account), it should not be considered subordinate to other international agreements and obligations."[8] But we see that cultural diversity, like biodiversity, tends in reality to dwindle with time, as witnessed by the yearly disappearance of

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[7] See ftp://ext-ftp.fao.org/ag/cgrfa/it/ITPGRf.pdf

[8] Ivan Bernier and Hélène Ruiz-Fabri, Evaluation of the Legal Feasibility of an International Instrument Governing Cultural Diversity, Groupe de travail franco-québécois sur la diversité culturelle, Québec, 2002, p. 35. [http://www.mcc.gouv.qc.ca/international/diversite-culturelle/publications.htm].

numerous languages. There is room then for considering putting into such a clause a provision for dealing with urgent situations, as Article 22 of the *Convention on Biodiversity* does.

A provision of this kind should in principle win the support of a large majority of UNESCO members. But for that to happen, additional work is needed to clarify the relationship between the new instrument on cultural diversity and the WTO. Indeed, when the problem of the relationship between the proposed convention on cultural diversity and other agreements is brought up in concrete terms, it is very much the relationship with the WTO that is implicitly involved. It must be made clear that the new instrument is pursuing an exclusively cultural objective and is following a primarily cultural logic, and that its purpose is not to modify the rights and obligations of the WTO member states. In no way should this instrument be of the kind envisaged by Article 41 (Agreements to modify multilateral treaties between certain of the parties only) of the *Vienna Convention on the Law of Treaties*. In the case of the international convention on cultural diversity, the States that are signatory to the convention would keep all their WTO rights.

Even if these conditions are brought together, conflicts may still arise between the international convention on cultural diversity and other agreements, particularly those of the WTO. We must here immediately specify that the very existence of conflicts between agreements responding to different concerns is part of a much wider problem, namely that of international governance. And this problem has become a matter of concern for an increasing number of observers of the international trade system in recent years. It has already been thoroughly discussed in relation to concerns about environmental preservation, and it must now be brought up in relation to concerns about culture.[9] But the immediate problem raised by this kind of situation is that of knowing what will happen if an international instrument comes into conflict with other international instruments involving all or some of the same parties.

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[9] See, among others, Gabrielle Marceau, "*A Call for Coherence in International Law. Praises for the Prohibition Against 'Clinical Isolation' in WTO Dispute Settlement*," 33 Journal of World Trade, No 5, 87-152 (1999); Jeffrey L DUNOFF, "*The Death of the Trade Regime*," 10 European Journal of International Law, 733 (1998); Robert Howse and Kalypso Nicolaïdis, "*Legitimacy and Global Governance: Why Constituonalising the WTO is a Step Too Far*," in R.B. Porter, P. Sauvé, A. Subramanian and A. B. Zampetti, *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium*, 227 (2001); Stephan Ohlhoff and Hannes L. Schloemann, "*Ratrional Allocation of Disputes and 'Constitutionalisation: Forum Choice as an Issue of Competenc*e," Dispute Resolution in the World Trade Organisation, 302-329 (1998); P. Sauvé and A. B. Zampetti, "*Subsidiarity Perspectives on the New Trade Agenda*," 3 Journal of International Economic Law, 83-114 (2000); American Journal of International Law, "*Symposium: The Boundaries of the WTO*," Volume 96 (1), 2002.

Section 30 of the *Vienna Convention on the Law of Treaties*, which codifies customary international law in this regard, considers the question from the perspective of the application of successive treaties dealing with the same subject. Two distinct situations are considered in this context. The first situation is that in which all parties to the first treaty are also parties to the later treaty. Unless the earlier treaty has been terminated or suspended, it "applies only to the extent that its provisions are compatible with those of the later treaty." The second situation is that in which the parties to the first treaty are not all parties to the later treaty. In this case, relations between those States which are signatory to both treaties are governed by the rule given above for the first situation. As for the relations between a State that is party to both treaties and a State that is party to just one, "the treaty to which both States are parties governs their mutual rights and obligations." The provisions in this latter case apply, however, without prejudice to any issue regarding the responsibility that a State may incur upon the signing or application of a treaty of which the provisions are incompatible with that State's obligations towards another State under another treaty. The basic rule then is that the State in question remains responsible for executing both treaties and may end up in front of the appropriate authority for a ruling on whether or not it has fulfilled its international responsibilities towards another party or parties who feel it has not met its commitments under these treaties.

II. **The Question of Links**

When different agreements deal with the same subject in different contexts, it can be useful to create links to ensure appropriate continuity between the agreements. For example, several recent free trade agreements fully incorporate the provisions of the GATT and other WTO agreements. Accordingly, Article 301 (1) of the North American Free Trade Agreement (NAFTA) provides that:

> Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the *General Agreement on Tariffs and Trade* (GATT), including its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.[10]

A less formal way of proceeding would be simply to borrow the concepts and language of one agreement without specifically referring to that agreement. An example here is seen in Chapter 7, Section B of NAFTA, which deals with sanitary and phytosanitary measures. These measures are based largely on those seen in the WTO's *Agreement on the Application of Sanitary and*

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[10] For the text of NAFTA, see http://www.nafta-sec-alena.org/english/index.htm

Phytosanitary Measures. But to proceed this way, one essential condition must be met: the treaties in question must be sufficiently similar to ensure a solid basis for doing so.

Such provisions are more difficult to implement when different agreements cover the same subject from entirely different perspectives. We can easily see that if an agreement borrows rules and concepts developed in another context in response to a problem it is not seeking to resolve, its chances of success may be seriously compromised from the outset. But nothing prevents an agreement that is dealing with an issue from a given perspective to use the concepts and language of an earlier agreement in ways that are in keeping with that perspective, which leads to the possibility of compatibility with the perspectives in other agreements. An interesting example here is provided by the *International Treaty on Plant Genetic Resources for Food and Agriculture*, which uses the following terms to deal with the problem of reconciling the rights of governments to determine access to their plant genetic resources with the recognition that these genetic resources must be able to be exchanged freely in order to guarantee the conservation and use of crops for food and agriculture :

> **Article 10 – Multilateral System of Access and Benefit-sharing**
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> 10.1 In their relationships with other States, the Contracting Parties recognize the sovereign rights of States over their own plant genetic resources for food and agriculture, including that the authority to determine access to those resources rests with national governments and is subject to national legislation.
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> 10.2 In the exercise of their sovereign rights, the Contracting Parties agree to establish a multilateral system, which is efficient, effective and transparent, both to facilitate access to plant genetic resources for food and agriculture, and to share, in a fair and equitable way, the benefits arising from the utilization of these resources, on a complementary and mutually reinforcing basis.

This provision links the concerns of the *International Treaty on Plant Genetic Resources for Food and Agriculture* in some respects to the concerns of the WTO in terms of access to markets, even if the language is different and the objectives are not the same.

It would not be difficult to use such an approach to implement an international convention on cultural diversity. Current international draft agreements on cultural diversity show from the outset that they are based on a concept of cultural diversity affirming both the right of each culture to its own cultural expression and a necessary openness to the expression of other cultures. This concept, is translated into legal terms, takes the form of a basic principle calling for a balance between the promotion of national cultural expression and openness to other cultural influences. Without explicitly referring to access to markets, which is the concern of the WTO, this principle allows us

to see that there is no absolute antinomy between the two perspectives on the international circulation of cultural products, and opens the way to searching for common grounds of understanding where the two agreements complement one another, thus ensuring the preservation of cultural diversity.