Trade meets Culture

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Anke Dahrendorf

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The Legal Relationship between WTO rules and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

Anke Dahrendorf[1]

Introduction

On 20 October 2005, 148 Members of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted a law-setting instrument on cultural diversity: the 'Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (in the following 'UNESCO Convention').[2] The Convention allows contracting parties to protect expressions of cultural diversity, such as expressions of domestic culture such as books, magazines, TV programmes, music, theatre performances, etc. This Convention has however not yet entered into force.[3] The ratification procedure, which is under its way in all signatory States, may take some time due to lengthy national procedures. Many States have waited a long time for the creation of such a legally binding agreement. Since the Members of the World Trade Organization (WTO) failed in the Uruguay Round to agree on a special agreement on audiovisual services, various initiatives have seen the light of day to protect cultural expressions. One association, made up of the cultural ministers of several Members of the UNESCO, the International Network of Cultural Policy (INCP), was particularly successful. It provided the draft that was given in the hands of the UNESCO to create what has become the UNESCO Convention today.[4] With so many States in favour of such an agreement, why has it then provoked a controversial debate? There are several reasons. First of all, one major State, the United States, has objected to the creation of the Convention. They called the treaty "deeply flawed, protectionist, and a threat to freedom of expression."[5] Second, it is even more problematic that the relationship between the UNESCO Convention and the WTO rules is far from clear. This creates difficulties in the case of a dispute between Members of the UNESCO Convention that are also Members of the WTO. A measure that was taken by one State pursuant to the UNESCO Convention may be in conflict with a WTO obligation. Both the WTO and the UNESCO Convention provide for dispute resolution

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[2] According to Article IV (4) of the Constitution of the UNESCO, the General Conference adopts conventions by a two third majority. After the formal adoption, each Member State must submit the convention to their competent national authorities.

[3] Only after the thirtieth instrument of ratification has been deposited with the UNESCO, the Convention will enter into force (Article 29 of the UNESCO Convention).

[4] See Acheson K./ Maule C. 'Convention on Cultural Diversity' in: *Journal of Cultural Economics* 28, 2004, p. 247.

[5] Pauwelyn J. 'The UNESCO Convention on Cultural diversity, and the WTO: Diversity in International Law-Making?' in*: ASIL Insight*, 15 November 2005, available at http://www.asil.org/insights/2005/11/insights051115.html (16 October 2006).

procedures, however very different from each other.[6] Which is the competent tribunal to bring the dispute to? Are the two provisions in real legal conflict with each other? Which law would prevail? And what happens if only one party to the dispute is a Member to the UNESCO Convention, but both are bound by WTO rules? These questions concerning the relationship between an international agreement and the *Marakesh Agreement Establishing the World Trade Organization* (in the following 'WTO Agreement') including its multiple Annexes[7] are not as new as they might seem. The same issues have already been discussed within the Committee on Trade and Environment (CTE) in relation to Multilateral Environmental Agreements (MEAs) for more than ten years under the auspices of the WTO. Currently, these discussions have been continuing under the Doha Mandate, paragraph 31 (i). 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. Reference will be made to some results of the debate concerning the MEA-WTO relationship in order to draw parallels whenever it seems feasible.

This paper discusses the relationship between the UNESCO Convention and the WTO rules. It will examine the situation in which a dispute occurs between, on the one hand, two WTO Members that are parties to the UNESCO Convention, and, on the other hand, two WTO Members of which only one is party to the UNESCO Convention. The first part of this paper discusses the objective and the scope of the UNESCO Convention, the definition of a legal conflict in international law and possible areas of conflict between the UNESCO Convention and the most important obligations of WTO law. The second part consists of an analysis of the questions that have to be answered by the dispute settlement tribunal addressed. Such a tribunal first has to establish its jurisdiction. This will primarily depend on whether both parties to the dispute are also parties to the UNESCO Convention and the WTO Agreement, including its Annexes. In the case that they are parties to both treaties, the dispute settlement procedure provided for in the UNESCO Convention and the procedure established within the WTO framework are relevant and therefore further analysed. In a second step the competent tribunal will determine which law is applicable. In order to decide which law prevails in the situation of a legal conflict between the two agreements, conflict rules have to be applied. These derive from two different sources: either from one of the treaties in conflict with each other or from conflict rules of public international law. The third and last step regards the interpretation of the applicable law. The law that has been found to prevail over the rules of the other treaty must be interpreted according to the general rules of interpretation, in particular Article 31 and 32 of the Vienna Convention on the Law of Treaties (in the following 'Vienna Convention'). This last part will focus on the interpretation of relevant obligations and justifications found in the WTO Agreement, particularly in its Annexes.[8]

[6] See Section 1.3 of Part II.

[7] The Annexes to the basic WTO Agreement includes numerous other agreements and understandings. Annex 1A contains the Multilateral Agreements on Trade in Goods, *inter alia* the *General Agreement on Tariffs and Trade 1994* (GATT 1994), in Annex 1B the *General Agreement on Trade in Services* (GATS) and Annex 1C provides for the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement).

[8] As will be established, the law that most likely is to prevail is WTO law. See Section 2 of Part II.

PART I

1. Objective and scope of the application of the 'Convention on the Protection and Promotion of the Diversity of Cultural Expressions'

1.1. The objective

The title of the UNESCO Convention indicates that this international legal instrument is intended to reflect a balance between on the one hand the protection and on the other hand the promotion of the diversity of cultural expressions. In fact, protectionist cultural policies as well as measures promoting the openness to other cultural influences are covered by its objectives. These objectives are reflected most prominently in the Preamble and in the Convention's guiding principles, expressed in Articles 1 and 2, but also run through the entire agreement. For instance, the Convention strives to preserve the diversity of cultural expressions in order to create the conditions for cultures to flourish, to raise the awareness of their value and to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity and values.[9] At the same time it fosters the access to cultures, openness to other cultures in order to enhance cultural diversity and encouragement of mutual understanding.[10] This double-sided purpose is an interesting feature of the UNESCO Convention that may give rise to internal conflicts of interpretation. Contracting parties could probably undertake measures in furtherance of the objectives of the Convention that are meant to have essentially opposite effects: State A imposes minimum quotas for the transmission of domestic music with the intention to protect the national culture, while State B reduces these quotas in order to promote the "equitable access to a rich and diversified range of cultural expressions from all over the world."[11] The two policies are both permitted under the Convention. Surely, an internal conflict will only have to be resolved if one contracting party feels its rights under the UNESCO Convention are being impaired by a measure of another contracting party. Nevertheless, this wide range of objectives will also have an impact on the decision made by an adjudicating body that has to decide on the existence of a legal conflict between this international instrument and another agreement, like the WTO Agreement, including its Annexes. However, as the objective of WTO law as well as of the UNESCO Convention is *inter alia* to ensure market access of cultural goods and services, a genuine conflict does not necessarily have to arise.

1.2. The scope of application

The UNESCO Convention states in Article 3: "This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity

[9] UNESCO Convention on the protection and promotion of the diversity of cultural expressions, Paris, adopted 20 October 2005, Article 1.
[10] See Article 2 of the UNESCO Convention.
[11] Article 2, principle 7 of the UNESCO Convention.

of *cultural expressions*" [emphasis added]. The scope seems to be very broad, including basically any measure aimed at cultural expressions. This is supported by the definitions given in Article 4 and furthermore by the changes made compared to the preliminary draft of December 2004.[12] First, Article 4.3 defines cultural expressions as "expressions that result from the creativity of individuals, groups and societies, and that have *cultural content"* [emphasis added]. 'Cultural content' is further specified in Article 4.2 as "symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities". Article 4 does not provide for a definition of 'cultural identities', but from the concept of 'cultural diversity' in Article 4.1 it seems clear that cultural identity is the way in which a culture finds its expression. This includes "diverse modes of artistic creation, production, dissemination, distribution and enjoyment, *whatever the means and technologies used*"[13] [emphasis added]. Therefore, *all forms* of cultural expressions, including movies, theatre, periodicals or music, and *all modes* of expression, such as tangible goods, digital broadcasting, internet or other technologies are covered by these definitions. Second, the scope of application defined in Article 3 has been changed since the preliminary draft of December 2004 to a language containing a broader span of measures.[14] This wide scope of application of the UNESCO Convention therefore suggests a concept of cultural diversity that includes essentially all forms and modes of cultural expressions.[15]

2. The definition of a legal conflict in international law

Before examining what the specific rights and obligations under the UNESCO Convention are and where they might be in conflict with a WTO right or obligation, it is crucial to define when and how a conflict between provisions of international treaties arises. This is especially relevant in the situation involving the UNESCO Convention, given the fact that it merely contains rights and good faith efforts, however no hard obligations.[16] In international law, true conflicts between provisions of different treaties rarely occur because of a presumption against conflicts, recognized by international law.[17] This presumption is in accordance with the idea that States, when concluding later treaties, are aware of their obligations and rights stemming from other pre-existing treaties. Unless otherwise provided for, these obligations

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[12] Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions (CLT/CPD/2004/CONF.607/6), Paris, 23 December 2004.

[13] Article 4.1 of the UNESCO Convention

[14] See Article 3 of the Preliminary Draft December 2004 is worded in the following way: "This Convention shall apply to the cultural policies and measures that States Parties take for the protection and promotion of the diversity of cultural expressions." In the final version of the UNESCO Convention, the word "cultural" was dropped. "Cultural policies and measures" became "policies and measures". Consequently, more measures are covered by the actual language of the UNESCO Convention.

[15] Note that the sociological notion of culture, such as lifestyles, traditions or value systems, is not covered. See Bernier I., *A UNESCO International Convention on Cultural Diversity*, available at www.screenquota.org/home2/down.asp?filename=UNESCO%20Intl%20Conv%20on%20C.Diversity%20by%20I.Bernier.pdf (16 October 2006), p. 2.

[16] See Section 3 of Part I.

[17] See International Court of Justice (ICJ)-Report of 1957, *Right of Passage over Indian Territory (Portugal v. India),* p. 142.

continue to exist and have to be complied with.[18] Thus, States are assumed to have the intention of following earlier treaties when concluding later ones. For this reason, it is preferred to apply a harmonious interpretation of allegedly conflicting provisions where it is feasible.[19] However, conflict cannot always be avoided.

For a legal conflict to arise, international law requires two preconditions to be fulfilled. First, the parties to the dispute must be bound by both treaties. Second, the two treaties have to deal with the same subject matter.[20] Having established this, the next step is to determine whether both treaties contain provisions that are allegedly in conflict with each other. International law scholars have accepted the existence of a narrow and a broad definition of conflict. According to the first one, a conflict only arises if the treaty provisions provide for *obligations* that mutually exclude each other.

> "A conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible […]. There is *no* conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a *privilege or discretion* accorded by another"[21] [emphasis added].

Opposed to this narrow definition, the broad concept of legal conflict acknowledges the existence of conflict when a *right* explicitly granted by one agreement contravenes an *obligation* in another agreement. According to the narrow concept, a legal conflict would *not* exist in that situation. Abstaining from the usage of the right explicitly granted in one agreement can ensure compliance with both treaties. Therefore, simultaneous compliance is *not impossible*. However, by applying the broad concept to a conflict between the WTO Agreement, including its Annexes, and the UNESCO Convention, a legal conflict exists where an obligation (for example, not to restrict trade flows) prohibits what a rule in another agreement permits (for example, the restriction of trade flows in order to protect cultural diversity).

Which concept should be applied when determining the existence of a legal conflict between WTO rules and provisions of other international agreements, such as the UNESCO Convention? Or more precisely, what definition will the competent tribunal apply when confronted with that question? As will be established later, the tribunal that will most likely be addressed by WTO Members also being parties to the UNESCO Convention are WTO Panels.[22] For this reason, the following analysis focuses on what concept of legal conflict WTO Panels are likely to choose in the relationship between WTO law and the UNESCO Convention.

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[18] 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.

[19] See Pauwelyn J. 'The Role of Public International Law in the WTO: How Far Can We Go?' in: *American Journal of International Law* 95, July 2001, p. 550/1.

[20] See Marceau G. 'Conflicts of Norms and Conflicts of Jurisdictions. The Relationship between the WTO Agreement and MEAs and other Treaties' in: *Journal of World Trade* 35(6), 2001, p. 1084.

[21] Jenks W. 'The Conflict of Law-Making Treaties' in: *The British Yearbook of International Law (BYIL)* 1953, p. 425.

[22] See Section 1.3.1 of Part II.

First of all, a WTO Panel will verify whether both parties to the dispute are bound by both treaties. The second question to answer is whether both treaties deal with the same subject matter.[23] Only after having determined these two issues, the WTO Panel must decide whether it will apply the narrow or the broad definition of conflict. WTO Panels and the Appellate Body have not yet been confronted with a situation where the existence of a conflict between an agreement within the WTO framework and an agreement outside of it had to be determined. However, they have ruled on legal conflicts between provisions of WTO law. The first Panel that dealt with this question was the *EC-Bananas III*[24] Panel in 1997, a situation involving rules of the *General Agreement on Tariffs and Trade* of 1994 (GATT 1994) and two other agreements listed in Annex 1A to the WTO Agreement. In particular, it was about the *Agreement on Import Licensing Procedures* and the *Agreement on Trade-Related Investment Measures*. The Panel looked at the *General Interpretative Note to Annex 1A* which reads:

> "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the WTO […], the provision of the other agreement shall prevail to the extent of the conflict."

It defined the notion of conflict laid down in the Interpretative Note in two ways. The *EC-Bananas III* Panel referred to clashes between obligations contained in the GATT 1994 and other agreements listed in Annex 1A, and to situations where one provision explicitly permits what an obligation of another agreement prohibits. This last track suggests a broad definition of legal conflict. The Panel explained this wide notion of conflict by reference to the object and purpose of the agreements listed in Annex 1A, which are intended to create rights and obligations.[25] One year later, the *Indonesia – Automobile* Panel[26] stated "that the obligations of the SCM Agreement and Article III:2 [of the GATT 1994] are not mutually exclusive. It is possible for Indonesia to respect its obligations under the SCM Agreement without violating Article III:2 [of the GATT 1994]."[27] Without rejecting the broad concept established in *EC-Bananas III*, this Panel applied the narrow notion of conflict. Finally, in *Guatemala-Cement*[28], the Appellate Body gave its definition of a conflict in the context of an alleged conflict between the general provisions of the *Understanding on the Rules and Procedures governing the Settlement of Disputes* (DSU) and the special and additional rules in the *Anti-Dumping Agreement* (ADA), listed in Annex 2 of the DSU.

> "[…] it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where

[23] For a discussion of the term 'same subject matter', see Section 2.1 of Part II.
[24] Panel Report *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27/R/USA), adopted on 22 May 1997, para. 7.159.
[25] See Footnote 24, therein Footnote 401.
[26] Panel Report *Indonesia – Certain Measures Affecting the Automobile Industry* (WT/DS54, 55, 59 & 64/R), adopted on 23 July 1998.
[27] Panel Report, *Indonesia – Certain Measures*, para. 14.99.
[28] Appellate Body Report *Guatemala – Anti-Dumping Investigation regarding Portland Cement from Mexico* (WT/DS60/AB/R), adopted on 25 November 1998.

> adherence to the one provision will lead to a violation of the other provisions, that is, in the case of a *conflict* between them"[29] [emphasis added].

The Appellate Body has applied a narrow definition of legal conflict. There is hardly any doubt that this case-law suggests a strict concept of conflicts between provisions of WTO law.[30] Whether this notion will also be applied for alleged conflicts between provisions of WTO law and non-WTO law is not so obvious. In that case, the treaty containing the obligation (most often the WTO Agreement, including its Annexes) overrules the later treaty rule if it contains 'only' an explicit right instead of a mutually exclusive obligation (such as it is the case for the UNESCO Convention that only grants rights, no obligations). Panels would not even be able to apply the conflict rules of international law because a conflict does not exist to which they could apply them. In the context of MEAs, Joost Pauwelyn argues that

> "for the new environmental rule to have any effect, it should be recognized that in these circumstances *as well* there is conflict, namely, conflict between an obligation in the WTO and an explicit right granted elsewhere"[31] [emphasis added].

Arguably, Pauwelyn's argument also applies for rules to protect cultural diversity. Furthermore, WTO law does not contain an explicit justification for WTO-inconsistent measures taken in furtherance of cultural protection. Accordingly, if Panels do not establish the existence of legal conflict by applying the broad notion of conflict, the objectives of the UNESCO Convention will hardly have any chance to be respected. WTO law can be interpreted in light of later treaties, such as the UNESCO Convention. This interpretation is however limited, due to the lack of an explicit justification concerning the protection of cultural goods and services. It is therefore suggested that a broad concept of legal conflict is applied.

3. Possible points of conflict

Parties to the UNESCO Convention are granted a wide range of rights. However, no obligation can be found in this legal instrument that requires contracting parties to undertake certain measures in order to protect or promote the diversity of cultural expressions.[32] Given this, it would be impossible to establish any conflict between WTO law and the rules of this Convention *if* a narrow notion of conflict was adopted. For the purpose of identifying possible areas of conflicts, a broad definition will serve as a basis for the following analysis of rights under the UNESCO Convention and obligations under the WTO Agreement as suggested in the preceding section.

According to Article 5.1 of the UNESCO Convention, every Party has the "sovereign right to formulate and implement their cultural policies". Hence, States may choose without

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[29] Appellate Body Report *Guatemala – Anti-Dumping*, para. 65.

[30] Generally, reports by WTO Panels or the Appellate Body are only binding between the parties to the dispute. For that reasons, Panels and the Appellate Body are not bound to follow the existing case law. However, that is usually what Panels and the Appellate Body do. At least, after the Appellate Body has expressed its interpretation of a provision, Panels normally take that view in consideration when reaching their conclusion.

[31] Pauwelyn 'The role of public international law', p. 551.

[32] The only clear obligation regards Article 20 on the relationship to other treaties, discussed in Section 2.1.1.1 of Part II.

consultation of a supervisory body measures protecting and promoting the diversity of cultural expressions. Nevertheless, these "measures shall be consistent with the provisions of this Convention"[33]. Looking at these provisions, Article 6 provides for a list of measures that may be adopted if the measure falls within the definition of Article 4.6.[34] That definition of 'Cultural policies and measures' is rather broad and therefore relatively easy to fulfil. If this requirement is met, paragraph 2 suggests various measures that a Party may choose to adopt. These will be examined in the following by referring to a number of possible inconsistencies with WTO law.

3.1. Regulatory measures aimed at protecting and promoting diversity of cultural expressions[35]

If a party to the UNESCO Convention adopts a measure that restricts the access of, for example, periodicals to the domestic market by quotas, Article XI of the GATT 1994 (Elimination of Quantitative Restrictions) would *prima facie* be breached. In the case of cultural services, a regulatory measure such as limitations on the participation of foreign capital in cultural industries is a *prima facie* violation of Article XVI:2(f) of the *General Agreement on Trade in Services* (GATS) on market access, under the caveat that market-access commitments in that category are laid down in that country's 'Schedule of specific commitments'. These GATS schedules exemplify the flexible liberalization method provided by the WTO in the field of services. Therefore, market access has to be granted only to those foreign services that are specifically included in the list of commitments.[36]

3.2. Measures providing opportunities for the creation, production and enjoyment of domestic cultural activities, goods and services[37]

Any opportunities granted to domestic goods and services that are more favourable than those accorded to 'like'[38] goods and services of another WTO Member poses problems under the national treatment obligation under GATT 1994, GATS and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement). A law or regulation that affects, for example, the distribution of foreign music tapes or DVDs breaches Article III:4 of the GATT 1994. Under the GATS, measures requiring that all artistic services, such as public readings, have to be offered in the national language violate Article XVII:1 GATS, under the caveat that national treatment commitments for these services have been made. With regard to intellectual property (IP) rights, the mandatory collective administration of the revenues from

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[33] Article 5.2 of the UNESCO Convention.

[34] "'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." (Article 4.6 of the UNESCO Convention).

[35] See Article 6.2 (a) of the UNESCO Convention.

[36] The flexibility granted in the field of services also has to be considered in the application of the principles of national treatment and most-favoured nation treatment.

[37] See Article 6.2 (b) of the UNESCO Convention.

[38] The concept of a 'like' product in WTO law has a wide scope. The exact meaning of a 'like' product in a certain WTO provision has been defined by jurisprudence. For an analysis of the concept of 'like' product under Article III of the GATT 1994, see Bossche P., *The law of the World Trade Organization*, Cambridge, Cambridge University Press, 2005, p. 315.

secondary use rights allegedly violates Article 3 of the TRIPS Agreement, the national treatment obligation.[39] This is the case when governments administer the revenues from foreign copyright holders as well as from national ones. They reserve a certain percentage of the sum for the promotion of local artists or artistic production which puts national artists at an advantage compared to foreign artists.

3.3. Measures aimed at providing public financial assistance[40]

Public financial assistance may take the form of funds or liabilities. They constitute subsidies actionable under the SCM Agreement if the financial assistance by the government is targeted either at a particular enterprise or industry, such as national theatres performing national plays. Such subsidies are only prohibited if they affect the interests of other Members of the WTO (for example injury to the domestic industry of another Member).[41] If no other WTO Member can prove the existence of adverse effects, these subsidies are allowed and there is no conflict between the UNESCO Convention and the SCM Agreement.

3.4. Measures aimed at enhancing diversity of the media[42]

A country that faces the dominant influence of foreign periodicals on its domestic market uses preferential tax rates applicable to periodicals with national content in order to enhance the diversity of the media.[43] Such an internal tax breaches Article III:2 of the GATT 1994, concerning the National Treatment on Internal Taxation. In relation to the broadcasting area, different States try to enhance the diversity of the media by restricting the ownership on broadcasting companies to a maximum percentage of for example 40%. As broadcasting services fall under the GATS, a violation of Article XVI:2 of the GATS on market access exists only if that Member has made commitments in this sector, in its Schedule of specific commitments.

3.5. Measures to protect cultural expressions in special situations

The UNESCO Convention contains one provision that allows the parties to the Convention to take "all appropriate measures to protect and preserve cultural expressions"[44] in a manner consistent with the Convention. This is possible under certain circumstances. In Article 8 (1), these special situations are defined as regarding "cultural expressions on its territory at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding". It is not clear whether the test for these conditions to be fulfilled is rather strict or broad. Regardless, it is the individual Member that determines whether such a special situation exists, as it is only under an obligation to report to the Intergovernmental Committee (a body established by the parties to promote and monitor the objectives of the Convention) *after* these measures have

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[39] See for an overview on the different schemes for collective administration of secondary use rights World Intellectual Property Organization, *Collective Administration of Copyright and Neighbouring Rights*, Geneva, 1990.

[40] See Article 6.2 (d) of the UNESCO Convention.

[41] See Article 5 of the SCM Agreement.

[42] See Article 6.2 (h) of the UNESCO Convention.

[43] Canada had introduced preferential tax rates for Canadian magazines which were under scrutiny in the *Canada – Periodicals* case. See Appellate Body Report *Canada - Certain Measures Concerning Periodicals* (WT/DS31/AB/R), adopted on 30 July 1997.

[44] See Article 8.2 of the UNESCO Convention.

been taken.[45] What is more important, the Intergovernmental Committee may only give appropriate *recommendations*. As long as no other party to the Convention questions the existence of such a special situation, the parties are relatively free to determine that such a situation exists and adopt any kind of measure that is consistent with the provisions of the Convention. As described above, given the broad objectives of the Convention, a measure is probably covered by the Convention's objectives. This broad mandate renders possible breaches of WTO law rather likely.

Part I of this paper has shown that both the objective and the scope of application of the UNESCO Convention are very broad. Consequently, measures that either protect or further open up the market for cultural goods and services are likely to be covered by the objectives of the UNESCO Convention. Two definitions of legal conflict have been examined: a broad and a narrow concept. For a number of reasons it has been argued that a WTO dispute settlement Panel should apply the broad definition of conflict when confronted with a situation of two international agreements that contradict each other. Subsequently, possible points of conflict between the WTO Agreements and the UNESCO Convention have been analysed.

PART II

1. Jurisdiction in the case of a dispute

In the situation that two parties have a dispute with each other about the application or interpretation of a provision of the UNESCO Convention, it must be determined which dispute settlement system has jurisdiction over the dispute. This is however only contentious if the two parties to the dispute are Members to the UNESCO Convention as well as to the WTO. Before going into the analysis of this particular case, two other situations will shortly be examined: 1) the parties to the dispute are only parties to the UNESCO Convention; and 2) the parties to the dispute are WTO Members, but only one is party to the UNESCO Convention.

1.1. The parties to the dispute are only parties to the UNESCO Convention

Of the 148 countries which have signed, though not yet ratified, the UNESCO Convention, 26 countries[46] are *not* Members of the WTO.[47] In case of a dispute about the interpretation or

[45] See Article 8.3 of the UNESCO Convention.

[46] Among others, these countries are Afghanistan, Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia and Herzegovina, Cape Verde, Ethiopia, Eritrea, Kazakhstan, Lebanese Republic, Uzbekistan, Syrian Arab Republic, Lao People's Democratic Republic, Democratic People's Republic of Korea, Serbia and Montenegro, Seychelles, Somalia, Sudan, Tonga, Tajikistan, Ukraine, Yemen, Vietnam, Vanuatu.

application of the UNESCO Convention among non-WTO Members (and those who will fail to ratify the Convention), the procedure laid down in Article 25 in connection with the Annex to the Convention applies.[48] The WTO dispute settlement is no option for these parties of the UNESCO Convention.

1.2. The parties to the dispute are WTO Members, but only one is party to the UNESCO Convention

This situation applies for any dispute about the application or interpretation of the UNESCO Convention in which the United States of America is involved. The United States have persistently objected to the UNESCO Convention and have not signed it either; hence they will not ratify the Convention and are therefore not bound by it. In the relationship between a party of the UNESCO Convention and a non-party, e.g. the US, the UNESCO Convention does not apply. However, it is possible that the United States, being a WTO Member, claims a violation of WTO law by another WTO Member that is also a party to the UNESCO Convention. For example, that Member uses a right granted under the Convention that breaches WTO law. The Dispute Settlement Body (DSB) of the WTO[49] has exclusive jurisdiction in the case that the legal claim is based on a violation of obligations or the nullification or impairment of benefits under the 'covered agreements'[50] of the WTO. The compulsory and exclusive nature of its jurisdiction is further examined in Section 1.3.2 of Part II on the WTO dispute settlement system.

1.3. Both parties to the dispute are WTO Members and parties to the UNESCO Convention

Most WTO Members have signed the UNESCO Convention. Dependent on whether all signatories will also ratify the UNESCO Convention, this situation is most likely to occur. In case of a dispute between WTO Members that are also parties to the UNESCO Convention, two dispute settlement mechanisms apply: 1) the procedure laid down in Article 25 of the UNESCO Convention for claims brought pursuant to the Convention; and 2) the procedure elaborated in the DSU of the WTO for claims based on one of the 'covered agreements' of the WTO.

1.3.1. The dispute settlement procedure of the UNESCO Convention

The dispute settlement procedure provided for by the UNESCO Convention is not compulsory, except for mandatory negotiations as a first stage of conflict resolution. According to Article 25.1, the parties "*shall* seek a solution by negotiation" [emphasis added]. This obligation has to be respected by the parties. If however the parties to the dispute cannot reach agreement by negotiation, they "*may* jointly seek the good offices of, or request mediation by, a third party"[51] [emphasis added]. Furthermore, if no agreement has been

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[47] Note that the ratification procedure following the signature of the Convention has not been concluded yet by all signatories of the Convention.
[48] For the examination of this procedure, see Section 1.3.1 of Part II.
[49] See Article 23.1 of the DSU.
[50] The term 'covered agreements' refers to the agreements listed in Appendix 1 to the DSU and includes the WTO Agreement, the GATT 1994, the other multilateral agreements on trade in goods, the GATS, the TRIPS Agreement and the DSU.
[51] Article 25.2 of the UNESCO Convention.

reached, one party to the dispute "*may* have recourse to conciliation in accordance with the procedure laid down in the Annex of this Convention"[52] [emphasis added]. Once a party to the dispute has requested the creation of a Conciliation Commission according to Article 1 of the Annex, a mechanism is triggered that will necessarily lead to a proposal for resolution of the dispute by the Commission.[53] The parties are then under an obligation to consider in good faith the proposal made.[54]

Without doubts, the dispute settlement procedure outlined here has some weaknesses. First, the procedure is not mandatory for its parties. Consequently, the parties will strive for other mechanisms that seem more advantageous to them, such as a binding system or a tribunal that is likely to take best account of that party's position. Second, the provisions in Article 25 of the Convention and in the Annex are far less refined than those in the WTO dispute settlement procedure. Therefore, disputes about procedural aspects that are not clarified in the Convention are subject to determination by the Commission.[55] This possible delay of the final proposal by the Commission and the merely good faith obligation to consider its proposal render the procedure unattractive for the parties. In conclusion, parties to the UNESCO Convention and to the WTO might have an incentive to choose the WTO dispute settlement procedure which is argued to be "the most prolific of all international dispute settlement systems."[56]

1.3.2. The WTO dispute settlement procedure

The most distinctive feature of the WTO dispute settlement is its compulsory and exclusive nature. Article 23.1 of the DSU 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" [emphasis added].

This provision has been interpreted as an obligation of all Members to bring a claim of WTO inconsistency to the WTO dispute settlement body, to the exclusion of any other system.[57]

1.3.2.1. Substantive Jurisdiction

The WTO dispute settlement system is competent to determine disputes "brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to the Understanding."[58] These 'covered agreements' include, *inter alia,* the GATT 1994, the GATS and the TRIPS Agreement. The requirements that have to be fulfilled in order to start

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[52] Article 25.3 of the UNESCO Convention.

[53] Any failure by one party to appoint the members of the Conciliation Commission is remedied by the General-Director of the UNESCO who shall, if asked by a Party, appoint these members or the President of the Commission (Article 3 and 4 of the Annex to the Convention).

[54] See Article 25.3 of the UNESCO Convention; Article 5 of the Annex to the Convention.

[55] See Article 6 of the Annex to the UNESCO Convention.

[56] Bossche, *The Law and Policy of the WTO*, p. 173.

[57] See Panel Report *United States – Section 301-310 of the Trade Act of 1974*, (WT/DS152/R) adopted on 27 January 2000, para. 7.43.

[58] Article 1.1 DSU.

the dispute settlement procedure is found in Article XXII and XXIII of the GATT 1994 for trade in goods, in Article XXIII of the GATS, and in Article 64 of the TRIPS. All of them have in common that parties seek redress for either a violation of an obligation or another impairment or nullification of benefits under the relevant agreement.[59] It becomes clear that WTO Panels only have jurisdiction over claims that are brought pursuant to one of the 'covered agreements'. This is confirmed by Articles 3.2, 4.2, 7 and 11 of the DSU that include further references to the 'covered agreements' as a necessary requirement for a dispute to be brought before the DSB.

1.3.2.2. Implied jurisdiction

WTO Panels have further implied jurisdictional powers that are mostly described as the principle of 'Kompetenzkompetenz', e.g. to determine whether substantive jurisdiction ultimately exists to decide the matter. The Appellate Body in *US –1916 Act*[60] has confirmed that this principle also applies for the judicial bodies of the WTO system. A WTO Panel is therefore required to examine its jurisdiction on its own initiative, *proprio motu*.

1.3.2.3. Limited competence

The dispute settlement system of the WTO serves to:

> "preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB *cannot add to or diminish* the rights and obligations provided in the covered agreements"[61] [emphasis added].

This obligation not to add to or diminish the rights and obligations provided in the 'covered agreements' applies also to Panels and the Appellate Body.[62] These rules of the DSU limit the function of Panels, described in Article 11 of the DSU. It reads:

> "a Panel should make an *objective assessment* of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements" [emphasis added].

Such other findings however cannot modify the rights and obligations of any WTO Member. It is controversial when a ruling modifies the rights and obligations under WTO law. This question has been subject to debate in the context of the relationship between the WTO Agreement, including its Annexes, and other international agreements, such as MEAs. These international treaties cover in part the same subject matter as WTO law.[63] To the extent that their provisions conflict with each other, the Panel would have to apply conflict rules of

[59] Notwithstanding, to the extent that the 'covered agreements' provide for special and additional rules and procedures, it is them that prevail over the DSU rules and procedures in a case of a conflict between them (See Appellate Body Report, *Guatemala-Cement*, para. 65).
[60] Appellate Body report *United States – Anti-Dumping Act of 1916*, (WT/DS136/AB/R), adopted on 26 September 2000, para. 54.
[61] Article 3.2 DSU.
[62] See Article 19.2 DSU.
[63] See Section 2.1 of Part II.

international law.[64] Dependent on the outcome of the application of these conflict rules, Panels might come to the conclusion that the relevant WTO provisions have been overruled by provisions of another agreement, in relation to those WTO Members that are parties to the other agreement. To come to this conclusion means changing the rights and obligations of these WTO Members that is explicitly prohibited in Article 3.2 and 19.2 of the DSU.[65]

After having analysed the dispute settlement procedures of both the UNESCO Convention and the WTO system, it seems most likely that WTO Members have recourse to the dispute settlement procedure of the DSU rather than to the less elaborate procedure foreseen by the UNESCO Convention. When resorting to the WTO dispute settlement system for disputes involving the UNESCO Convention, the relationship of WTO rules and trade measures set out in MEAs is of interest as this might provide insights also on the relationship between WTO rules and provisions of the UNESCO Convention. The Committee on Trade and Environment (CTE) has been discussing the relationship between WTO rules and measures set out in MEAs for some time, recently re-emphasized by the mandate of the WTO Doha Ministerial Declaration in paragraph 31(i).[66] With the halt of the WTO Doha Development Round in June 2006, a final position of the WTO Members towards this relationship has not been agreed upon. However, already in its report of 1996 the CTE has recognized that WTO Members that are also parties to a MEA "should consider trying to resolve ... [their dispute regarding a measure taken pursuant to the MEA] through the dispute settlement mechanisms available under the MEA"[67], not under the WTO dispute settlement. This rather weak recommendation has little legal value in the sense that if a WTO Member did not comply with this recommendation, nothing would prevent it from submitting its claim about a WTO-inconsistency to the WTO dispute settlement. This fact has been confirmed by the CTE during the negotiations on the Doha mandate, thus the legal status has not changed.[68] However, the same report also recognizes that so far, no WTO Member has resorted to the WTO dispute settlement in a conflict involving a MEA. The CTE considers that this will remain the case. In fact, there has never been a formal dispute involving a conflict between the WTO and a MEA before a Panel.[69] It seems that WTO Member States do not want to

[64] See Section 2 of Part II.

[65] A Panel has the duty to give a ruling as to assist the DSB in making a recommendation (Article 11 of the DSU). In fact, Panel reports are adopted by DSB by reverse consensus, constituting a quasi-automatic adoption of these Panel reports (Article 16.4 of the DSU). The duty of the DSB referred to in Article 3.2 of the DSU not to modify the rights and obligations of the parties can only be fulfilled if the Panel complies with the same obligation.

[66] „The relationship between existing WTO rules and specific trade obligations set out in MEAs. The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question."

[67] Committee on Trade and Environment *Report (1996) of the Committee on Trade and Environment* (WT/CTE/1), 12 November 1996, para. 178.

[68] See Hoffmann U., *Specific Trade Obligations in Multilateral Environmental Agreements and Their Relationship with the Rules of the Multilateral Trading System – A Developing Country Perspective*, UNCTAD Background Paper for the Conference 'Sub-Regional Brainstorming Workshop on the Trade and Environment Issues Contained in Paragraphs 31 and 32 of the WTO Doha Ministerial Declaration' in Bangkok, July/August 2003, p. 12.

[69] The *Chile – Swordfish* dispute between the EC and Chile about the interpretation of the United Nations Convention on the Law of the Sea was suspended before the composition of the Panel. See Request for Consultations by the European Communities *Chile – Measures affecting the transit and importation of swordfish*, (WT/DS 193/1), filed on 19 April 2000.

make use of their right to bring a dispute involving a MEA before the WTO dispute settlement system. It is likely that the same will be true for disputes involving the UNESCO Convention. Notwithstanding, if a WTO Member really wants to bring a case before the WTO dispute settlement, it can do so without violating any law. Arguably, the advantages of the WTO dispute settlement procedure render this situation likely to happen.

To sum up, the establishment of the substantive jurisdiction of WTO Panels requires determining two issues. First, both parties to the dispute must be WTO Members. Second, a claim has to be based on a WTO-inconsistency. To answer this second question, the Panel will have to undertake a substantive examination of the applicability of the WTO obligation which has allegedly been breached. Whether the WTO obligation is still applicable depends on the outcome that conflict rules of international law suggest. Therefore, the question of substantive jurisdiction of WTO Panels in a dispute involving the relationship to the UNESCO Convention has to be postponed to be answered at a later stage.

2. Legal conflicts between treaties before a WTO Panel/ the Appellate Body

2.1. Conflict rules of international law

When a WTO Panel is confronted with a legal conflict between two international agreements about the same subject matter to which both parties of the dispute are parties, it has to apply conflict rules to decide on the law that is applicable in the case before it.[70] To apply conflict rules is a matter of fact that international law does not know any hierarchy of international norms such as treaties, general principles of law or international customary law.[71] When there is a conflict between provisions of WTO law and the UNESCO Convention, there are three possible sources from which conflict rules can derive: 1) the UNESCO Convention; 2) the WTO Agreement, including its Annexes; or 3) conflict rules of customary international law, as laid down in the Vienna Convention[72] and by international jurisprudence. It is important to keep in mind that rules of customary international law "apply [in the context of WTO law] to the extent that the WTO treaty agreements do not *contract out* from [them]."[73] This has been determined by the *Korea – Procurement* Panel. Hence, insofar as an expression in a 'covered agreement' implies that special rules, different from customary international law, apply to a certain area, the treaty has contracted out. However, if this is not the case, customary international law applies and has to be taken into account by WTO Panels and the Appellate Body.

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[70] As referred to earlier, one basic condition for a legal conflict to arise is that both parties to the dispute are parties to both agreements. The situation in which one party to the dispute has not ratified one of the two documents, there is no question of which law to apply as it is always the law to which both States are parties (Article 30 (4) (b) of the Vienna Convention on the law of Treaties).

[71] One exception are the rules of *ius cogens* which prevail over all international legal norms.

[72] International scholars regard the Vienna Convention as mainly codificatory of customary international law, with the exception of Part V on the Invalidity, Termination and Suspension of the Operation of Treaties, beginning with Article 42 and ending with Article 72. See Villiger, M. E., *Customary international law and treaties*, Dordrecht, 1985, para. 454.

[73] Panel Report *Korea – Measures Affecting Government Procurement* (WT/DS/163/R), adopted on 19 June 2000, paragraph 7.96.

Article 30 of the Vienna Convention deals with the application of successive treaties relating to the same subject matter. The notion of 'same subject matter' is disputed but has been argued to be construed strictly.[74] Treaties on the same subject matter exist if there is an overlap *ratione materiae.*[75] Martti Koskenniemi suggests to undertake an "assessment of whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another"[76] in order to decide whether both treaties are concerned with the same subject matter. Although the scope of the WTO framework is broader than that of the UNESCO Convention, the rules of both instruments apply to cultural goods and services. If a measure, e.g. subsidies for national theatres, is subject to an obligation under the SCM Agreement of the WTO and at the same time subject to a right contained in the UNESCO Convention, the fulfilment of the WTO obligation affects the fulfilment of a right granted by the UNESCO Convention. Both agreements concern the same subject matter, namely trade in cultural goods and services.

Paragraph 2 of Article 30 of the Vienna Convention regulates 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." If this is not the case, Article 30 (3) of the Vienna Convention provides a rule for situations where *all* parties to the earlier treaty are also parties to the later treaty,[77] specifying that the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. However, this situation is not very likely to occur in relation to the UNESCO Convention because not all parties to the WTO Agreement are also parties to the UNESCO Convention. Therefore, this provision is only relevant in connection with paragraph 4 of Article 30 of the Vienna Convention that reads:

> "When the parties to the later treaty do *not* include all the parties to the earlier one: a) as between State Parties to both treaties the same rule applies as in paragraph 3; b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations" [emphasis added].

To apply paragraph 4 however requires resort to paragraph 5. It states that paragraph 4 is without prejudice to Article 41 and Article 60 of the Vienna Convention.
Following this structure, it is necessary to first analyze the provisions in both treaties that concern the treaty's relationship to other treaties. Second, if the first step has not resolved the conflict, the *lex posterior* rule, specified in Articles 30 (3) and (4) of the Vienna Convention, and/or the *lex specialis* rule, confirmed as being a conflict rule of customary international law by jurisprudence,[78] shall be applied. Third, in contrast to the two previous steps, conflicts rule of international customary law that concern *third* States must be applied, in particular Article 41 of the Vienna Convention.

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[74] See Sinclair S. J., *The Vienna Convenion on the Law of Treaties, Manchester*, Manchester University Press, 1984, 2nd edition, p. 98.
[75] See Hartmann J. 'Current Developments – Public International Law – The Gillon Affair' in: *International and Comparative Law Quarterly* 54 (3), 2005, p. 751.
[76] Koskenniemi M., *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (A/CN.4/L.682), General Assembly of the United Nations, Geneva, 13 April 2006, p. 130.
[77] Article 30 (3) reads as follows: "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".
[78] See part Section 2.1.2.2 of Part II.

2.1.1. Treaty Provisions

2.1.1.1. Article 20 of the UNESCO Convention

Article 20 of the UNESCO Convention on the "Relationship to other treaties: mutual supportiveness, complementarity and non-subordination" reads as follows:

> 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. [emphasis added]

This Article does not provide for a 'clear-cut' answer to the question of the UNESCO Convention's relationship to other treaties. The first paragraph stresses the mutual supportiveness with other agreements. The parties to the UNESCO Convention shall perform in good faith all their obligations under any other treaties and shall take the Convention into account when interpreting and applying other treaties. Ultimately, this provision requires that the Convention is not subordinate to any other treaty.[79] All this suggests a relationship of equality, of complementarity between international agreements, with the result that provisions in the UNESCO Convention are in principle capable of overruling provisions of other international agreements, such as the agreements within the WTO framework. However, in its second paragraph, Article 20 stipulates that nothing shall be interpreted as modifying rights and obligations of the parties under other treaties. The fact that the Convention is not capable of changing existing rights and obligations can be argued to imply a *de facto* subordination to other treaties. Hence, paragraph 2 suggests what paragraph 1 has denied.

The article goes both ways in its wording and has been subject to intense debate about how it should be interpreted. In order to identify the intention of the parties when drafting this Article of the UNESCO Convention, an objective interpreter has to resort to the rules of interpretation as specified in Article 31 and 32 of the Vienna Convention which constitute customary international law.[80] Accordingly, the ordinary meaning of the terms of the treaty must be read in light of the object and purpose of that treaty. Tomer Broude has argued that the wording of Article 20 (2) is significantly stronger than the terms in paragraph 1. Under Article 3.2 of the DSU, also the judicial organs of the WTO are required to do so.[81] Paragraph

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[79] This does not affect agreements that stipulate to prevail to the extent of any inconsistency such as the *Charter of the United Nations*, Article 103. The UNESCO Convention would indeed be subordinated to those agreements.

[80] See Section 3.1 of Part II.

[81] See Broude T. 'Comment: Cultural Diversity and the WTO: A Diverse Relationship' in: *ASIL Insight*, 21 November 2005, available at http://www.asil.org/insights/2005/11/insightcomment051121_000.html (16 October 2006).

2 of Article 20 of the UNESCO Convention requires that nothing in the Convention, according to him, "*including* the obligation to take the convention into account" [emphasis added] as expressed in Art. 20 (1) (b), can modify rights and obligations under other treaties. He therefore stresses the non-modification rule. It however can be argued that the structure of the Article is opposed to this interpretation. First, the title of Article 20 of the UNESCO Convention (arguably a reflection of the main focus of that article) does not mention the non-modification rule, but rather focuses on mutual supportiveness, complementarity and non-subordination. Second, if paragraph 2 was meant to overrule paragraph 1 of the same Article, one has difficulties to see why the non-subordination requirement was introduced in paragraph 1 at all. The requirement not to subordinate an agreement to others gives that agreement the capability to prevail over others, subject to the application of conflict rules. Consequently, the UNESCO Convention must be capable of changing existing rights.

Another argument has been forwarded by Ivan Bernier who has argued that this type of provision has to be read as "purely and simply […] confirm[ing] the existing rights and obligations"[82] of the parties. He backs his argument by referring to the various approaches that have been used in different international agreements in order to clarify their legal status in relation to other agreements. In his view, there are mainly three different types of model clauses: 1) clauses stipulating that the agreement shall prevail to the extent of any inconsistency;[83] 2) clauses specifying that the agreement is subordinate to any other treaty;[84] and 3) clauses setting out that existing rights and obligations of the parties shall not be modified, however without subordinating the agreement to any other treaty.[85] Article 20 of the UNESCO Convention is an example of the third type of model clauses. Its function is different from pure prevalence or mere subordination as expressed in the first two approaches. According to Bernier, the third type of model clauses establishes a relationship of equality which is the situation applicable by default in international law, if the agreement does not specify its relationship with other agreements.[86] Following his arguments, the application of conflict rules of international law is possible.
Furthermore, resort to the preliminary draft article might further clarify the intention of the drafters on how Article 20 must be interpreted. Article 19 Option A, paragraph 2 of the Preliminary Draft of December 2004 reads as follows:

> "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" [emphasis added].

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[82] Bernier I., *On the Relation of a future International Convention on Cultural Diversity to other International Agreements*, available at www.screenquota.org/home1/down.asp?filename=27.pdf&table_name=bboard5 (16 October 2006), p. 4.
[83] Bernier refers to Article 103 of the *Charter of the United Nations* and Article 103 of the *North American Free Trade Agreement* as examples, see Bernier, *Relation of Convention to International Agreements*, pp. 2.
[84] Examples are the bilateral free trade agreements Canada has signed with Israel, Chile and Costa Rica and Article 1 (1) of the *WIPO Performances and Phonograms Treaty*, see ibid, pp. 3.
[85] As cited in Footnote 87, Article 22 of the *Convention on Biological Diversity*, the preamble to the *Cartagena Protocol on Biosafety* and the preamble of the *International Treaty on Plant Genetic Resources for Food and Agriculture* are mentioned as examples, see ibid, pp. 4
[86] See ibid, p. 5.

Similar to the version finally adopted, it prohibits the change of rights and obligations stemming from any other international agreement. However, the difference is that this obligation is subject to one exception. In situations of serious damage or threat to the diversity of cultural expressions, the provisions of the Convention are meant to affect the rights and obligations of other agreements. The fact that the drafting parties have dropped this alternative can be argued to strengthen the obligation not to modify rights and obligations under other treaties.

It is difficult to determine whether Article 20 of the UNESCO Convention is of the kind that would fall under Article 30 (2) of the Vienna Convention, namely specifying that the Convention is subject to other treaties. For the following reasons, it seems convincing that this is not the case. First, the ordinary meaning of the terms and the structure of the Article clearly focus on the mutual supportiveness, complementarity and non-subordination of the Convention with other agreements. This is expressed in the title of Article 20 of the UNESCO Convention which covers the entire Article, including paragraph 2. Second, the objective of the UNESCO Convention is to protect and promote cultural diversity. To deny the application of conflict rules of international law in a case of conflict involving provisions of the UNESCO Convention would result in its subordination to all other agreements, *including* those of the WTO. Against the background of the discussions among WTO Members since the Uruguay Round on how to deal with cultural goods and services, particularly audio-visual services (which several Members want to except from the ambit of WTO law), the UNESCO Convention can only fulfil its purpose of creating special rules for cultural products if it was meant to be on an equal footing with WTO rules. This is further supported by looking at environmental agreements which contain almost identical clauses to Article 20 in the UNESCO Convention.[87] To date, none of these agreements has been subject to a dispute before a WTO Panel and therefore no conclusion with regard to the relationship of a MEA to WTO law has been reached. It seems however unlikely that all these agreements are not meant to possibly overrule WTO obligations when conflict rules of international law suggest so. There will be no definite answer to this problem unless a Panel will be confronted with this question. Third, Article 20 of the UNESCO Convention, as elaborated, is in itself rather ambiguous on how it should be interpreted. The conclusion to be drawn from this provision cannot be clear-cut. Therefore, it is suggested that conflict rules of international law are applicable to determine which agreement is to prevail, as this is the situation that applies by

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[87] ARTICLE 22 OF THE *CONVENTION ON BIOLOGICAL DIVERSITY*: "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."

PREAMBLE OF THE *CARTAGENA PROTOCOL ON BIOSAFETY*: "*Recognizing* that trade and environment 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."

PREAMBLE OF THE *INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE*: "*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 international agreements;

Understanding that the above recital is not intended to create a hierarchy between this Treaty and other international agreements."

default, in the absence of any treaty clause specifying the relationship with other international agreements.

2.1.1.2. Article 3.2 of the DSU

Unlike the UNESCO Convention, the agreements of WTO law do not include a provision that is aimed at the relationship of the WTO Agreement, including its Annexes, with other international agreements.[88] None of the 'covered agreements' lays down special conflict rules for solving legal conflicts between the provisions of WTO law and other international law.[89] Consequently, the WTO has not 'contracted out' with regard to conflict rules,[90] and conflict rules of international customary law shall be applied.

At this stage, it is necessary to clarify the problem of the limited competence of WTO Panels to give effect to the outcome that conflict rules of international law might determine. Article 3.2 of the DSU requires the DSB

> "to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions* of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements" [emphasis added].

This limited competence poses difficulties when Panels are confronted with a situation in which one WTO Member claims the violation of a WTO obligation and the defendant party refers to another international agreement, such as the UNESCO Convention, as a justification for the breach of that WTO obligation.[91] The Panel must decide whether a legal conflict exists between the WTO obligation and the right explicitly granted under the UNESCO Convention. As argued in Section 2 of Part I of this paper, a broad definition of conflict should be favoured.[92] In this case, a legal conflict exists and the adjudicating body has to apply conflict rules of international customary law, which are explained in the following three subsections.
Having applied international conflict rules, the WTO Panel can come to two conclusions. It either finds that the later treaty rule does not prevail over a WTO provision, WTO law continues to apply and therefore the WTO obligation can only be justified by an exception provided in one of the agreements in the WTO framework. A Panel *could* however also determine that a WTO obligation has been overruled and that a right out of the UNESCO Convention prevails. This means that the WTO obligation is superseded by the later treaty rule. Since there is no applicable WTO provision, the situation would amount to a form of *non-liquet*, defined as a situation where there is no law on the matter.[93] In this case, the Panel

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[88] For a list of provisions in the agreements contained in the WTO framework that refer to certain international agreements, see Hu J. 'The Role of International Law in the Development of WTO Law' in: *Journal of International Economic Law* (*JIEL)* 7 (1), 2004, Footnotes 75-80.
[89] Note that the General Interpretative Note to the Annex 1A to the Agreement Establishing the WTO refers only to the situation of conflict between the GATT and agreements listed in the Annex 1A, namely 'covered agreements'.
[90] See Section 2.1 of Part II.
[91] Again, this question only arises if both WTO Members are also bound by the UNESCO Convention.
[92] See page 8.
[93] See Marceau 'Conflicts of Norms' p. 1104.

can simply declare that it is confronted with a *non-liquet* situation of WTO law and that it never had jurisdiction to hear the case.[94] Furthermore, a WTO Panel must not add to or diminish the rights and obligations contained in the 'covered agreements', as provided in Article 3.2 of the DSU. This obligation prevents Panels from maintaining jurisdiction and applying a rule of an agreement other than the WTO 'covered agreements'. Joost Pauwelyn has argued that a Panel would have to give effect to law created elsewhere by WTO Members themselves.[95] According to that author, Panels do not diminish the rights of WTO Members under WTO law when giving effect to law produced elsewhere. By creating the later treaty, these WTO Members have agreed to take the matter out of WTO law in the first place. Even if one accepts Pauwelyn's argument that the Panel would not diminish the rights of WTO Members, Panels lack the competence to do so. They would exceed their jurisdiction beyond the limits of Article 3.2, first sentence, of the DSU if it were to rule on such matter.

2.1.2. Conflict rules applicable between the parties to the dispute

2.1.2.1. Lex posterior rule

It has been argued that neither Article 20 of the UNESCO Convention nor Article 3.2 of the DSU stipulate that the respective agreement is subject to other treaties or that it is not to be considered as incompatible with another treaty. The rule provided for in Article 30 (2) of the Vienna Convention is therefore not fulfilled. This leads to the application of the conflict rules of Article 30 (3) and (4) of the Vienna Convention, the *lex posterior* rule. It determines that in the case of successive treaties on the same subject matter, the later treaty overrules the earlier treaty to the extent that their provisions are incompatible. This applies between parties to the earlier treaty, here the WTO Agreement, that are also parties to the later treaty, the UNESCO Convention. For the WTO Members that are *not* parties of the UNESCO Convention another rule is applicable: the treaty to which both States are parties governs their mutual rights and obligations.[96] An example shall illustrate the *lex posterior* rule. The GATT of 1994 obliges its Members to eliminate any quantitative restriction on cultural goods such as news magazines. The UNESCO Convention allows taking that measure in order to protect national news magazines as an expression of domestic culture. The GATT rule is therefore incompatible with the right granted by the UNESCO Convention. For those WTO Members that are also parties of the UNESCO Convention, the GATT obligation is superseded by the later treaty rule. In contrast, in the situation where two WTO Members have a dispute but only one of them is party to the UNESCO Convention, WTO law is the only law that is applicable between those parties. This will be the case in all disputes between a WTO Member being party to the UNESCO Convention and the United States. In that situation, a provision of the later agreement to justify the breach of a WTO obligation cannot be invoked, given that only justifications under WTO law are applicable.

2.1.2.2. The lex specialis derogat generali rule

Unlike the *lex posterior* rule, the *lex specialis* rule is not contained in the Vienna Convention; legal doctrine and the International Court of Justice (ICJ) in a number of cases have recognized the rule's status as international customary law.[97] It means that the special law

[94] See Section 1.3.2.3 of Part II.
[95] See Pauwelyn 'The Role of Public International Law' p. 566.
[96] See Article 30 (4) of the Vienna Convention.
[97] For a list of scholars and cases confirming that the *lex specialis* rule is widely accepted as a conflict rule of international law, see Marceau 'Conflicts of Norms' Footnote 27.

derogates from the general law. The purpose is to give effect to rules that deal with one subject matter more specifically than another treaty rule. The general treaty then would continue to apply to the greatest extent possible. Only where the specialized treaty contains special rules, the relevant provisions of the general treaty will be superseded. With regard to the UNESCO Convention, its rules are indeed much more specialized with regard to cultural goods and services than WTO law. The objective of the UNESCO Convention exclusively deals with the protection and promotion of the diversity of cultural expressions. WTO law rather provides rules for trade in all kinds of goods and services. In conclusion, also this conflict rule suggests so far that the provisions of the UNESCO Convention should prevail over the relevant WTO rules.

2.1.3. Obligations vis-à-vis states not party to the dispute

The *lex posterior* and the *lex specialis* rule are subject to three rules concerning the rights and obligations of third parties, as indicated in paragraph 5 of Article 30 of the Vienna Convention: Article 41 and Article 60 of the Vienna Convention, and any question of responsibility. These rules have to be fulfilled if the UNESCO Convention rule is found to prevail over the WTO obligation.

To begin with, Article 60 is concerned with the termination or suspension of the operation of a treaty as a consequence of its material breach. This is a right granted to the party that is affected by the breach of the multilateral treaty through another party. As mentioned above, it is highly disputed whether Part V of the Vienna Convention constitutes international customary law.[98] In the case of doubt, one should refrain from granting Article 60 this status. Supposedly, a Panel would not apply this Article.

Concerning state responsibility, the *lex posterior* rule and the *lex specialis* rule do not affect rules of international customary law on State responsibility. If the provisions of a later treaty are incompatible with the obligations under an earlier treaty, the State concluding the later treaty is responsible towards parties of the former treaty that are affected by the later treaty. For example, State A is party of a multilateral treaty between State A, B and C. State B and C conclude a later bilateral treaty that is incompatible with the obligations under the multilateral treaty. State B and C therefore breach the multilateral treaty which might cause damages to State A. State B and C are responsible towards State A for the wrongful act of breaching the multilateral treaty. International responsibility is to be dealt with next to the question of the law of treaties and may not be disregarded.
Article 41 of the Vienna Convention, concerned with agreements to modify multilateral treaties between certain of the parties only, is recognized as international customary law and has to be fulfilled in addition to the *lex posterior* and the *lex specialis* rule. It reads as follows:

> "1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (*a*) the possibility of such a modification is provided for by the treaty; or
>
> (*b*) the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

[98] See Footnote 72.

> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
>
> 2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

The first distinction made in this article is whether the treaty in question, here the WTO Agreement, including its Annexes, provides for the possibility of modification between certain parties only or for the option that this modification is not prohibited. In fact, the WTO law provides for certain rules of modification inter-se, as regards regional agreements for example (Article XXIV of the GATT, respectively Article V of the GATS). These provisions, however, concern agreements that further liberalize trade. This category of agreements is somehow different from an agreement such as the UNESCO Convention. There, trade can be restricted on the ground that cultural diversity is to be protected. Thus, one has to distinguish between trade-liberalising and trade-restricting agreements that modify WTO law. The former kind of modification is provided for by the WTO Agreement, including its Annexes, the latter kind of modification is not. It is Article 41 (1) (b) of the Vienna Convention that covers the situation of trade-restricting agreements and requires two additional conditions to be fulfilled in order to modify WTO law as it applies between them: 1) the modification does not affect the enjoyment and performance by the other parties of their rights and obligations; 2) the modification does not relate to a WTO "provision, derogation from which would be incompatible with the effective execution of the object and purpose of the treaty as a whole."[99] This first condition requires that States do not conclude treaties that affect the rights of third parties to the multilateral treaty, in this case the WTO Agreement, including its Annexes. If a State party to the UNESCO Convention subsidizes a national cultural industry such as national recording studios in accordance with Article 6.2 (d) of the UNESCO Convention, the effect will not be limited to the parties to the Convention. Foreign recording studios are not accorded the same advantage as their national counterparts. This concerns also recording studios of WTO Member States that are not party to the UNESCO Convention. Hence, third parties are prevented from enjoying a right granted under an agreement of the WTO framework.

Joost Pauwelyn argues that there is a distinction between certain types of treaties. He refers to reciprocal, interdependent and integral treaties, and argues that the WTO Agreement, including its Annexes, is of a reciprocal nature.[100] Most of the obligations of WTO law could be reduced to a "bilateral state-to-state relationship"[101] and therefore inter-se modifications of the WTO Agreement, including its Annexes, are less likely to indeed affect the rights of third parties. It should however be kept in mind that WTO law contains certain rules that grant rights to all WTO Members, not only to the other party in a bilateral relationship. This is the most-favoured nation treatment and national treatment obligation as expressed in Article I:1 and Article III of the GATT 1994, in Article II and Article XVII of the GATS and in Article 3 and 4 of the TRIPS. As soon as countries grant each other the right to impose, for example, subsidies for national industries only, in derogation from the national treatment obligation, the rights of third parties are affected despite of the general reciprocal nature of the WTO. Subsidies are not the only measures that would affect third parties. The same is true if language requirements are imposed on the performance of certain cultural services or screen

[99] Article 41 (1) (b) (ii) of the Vienna Convention.
[100] See Pauwelyn 'The Role of Public International Law' p. 549.
[101] Pauwelyn 'The Role of Public International Law' p. 549.

quotas regulate movies shown on television, etc. Arguably, there are measures taken pursuant to the UNESCO Convention that affect the rights of third parties.

With regard to the second condition of Article 41 (1) (b) (ii) of the Vienna Convention, namely that the derogation from a WTO provision must not be 'incompatible with the effective execution of the object and purpose of the treaty', a similar result to that established for the first condition has to be suggested. The derogation from the most-favoured nation (MFN) treatment or national treatment obligation can be argued to actually constitute such a situation referred to in Article 41 (1) (b) (ii) of the Vienna Convention. The principles of non-discrimination and reciprocity are at the heart of the purpose of the WTO system. Circumventing these obligations can be argued to be incompatible with the object and purpose of the treaty.

Conflict rules of international customary law suggest that the *lex posterior* rule as well as the *lex specialis* rule are subject to the condition that Article 41 of the Vienna Convention is fulfilled. It has been argued that this will not be the case for most measures taken in pursuance to the UNESCO Convention because the rights of third parties, namely WTO Member that are not parties to the UNESCO Convention, will be affected. In conclusion, international conflict rules suggest that provisions in the UNESCO Convention will most likely not prevail over WTO obligations and as a result WTO law is applicable to the dispute between the parties.[102] The next step of a WTO Panel's examination will be to interpret the relevant provisions of WTO law, including obligations and possible justifications. The interpretation of WTO law is also relevant in disputes between WTO Members of which only one party to the dispute is also party to the UNESCO Convention, as WTO law might be interpreted in the light of the rights granted under the UNESCO Convention.

3. The interpretation of the WTO law before a WTO Panel

3.1. Rules of interpretation used by a WTO Panel

Article 3.2 of the DSU stipulates in relevant part that the dispute settlement system serves "to clarify the existing provisions of [the covered] agreements in accordance with *customary rules of interpretation of public international law*" [emphasis added]. Both Article 31 and 32 of the Vienna Convention have been declared rules 'of customary or general international law' by international legal doctrine[103] and by the Appellate Body.[104] According to Article 31 of the Vienna Convention, Panels and the Appellate Body shall interpret a treaty "in good faith in accordance with the ordinary meaning" of the words of the provision, "in their context and in the light of the object and purpose" of the treaty as a whole. "Recourse to supplementary means of interpretation", as specified in Article 32 of the Vienna Convention, may only be had "in order to confirm the meaning resulting from the application of article

[102] As a consequence, jurisdiction has been established validly, following a claim based on an existing WTO obligation (see Section 2.1.3 of Part II).
[103] See Villiger, *Customary international law and treaties* Footnote 56.
[104] See Appellate Body Report *United States--Standards for Reformulated and Conventional Gasoline*, (WT/DS2/AB/R), adopted on 20 March 1996, para. 16; Appellate Body Report *Japan--Taxes on Alcoholic Beverages* (WT/DS8/AB/R), adopted on 1 November 1996, para. 104.

31." It has been confirmed by the Appellate Body that "interpretation must be based above all upon the text of the treaty"[105] and must give meaning and effect to *all* the terms of a treaty.[106]

The rules just outlined reflect the main purpose of treaty interpretation: to identify the *common* intentions of the parties.[107] It has therefore been argued that treaty interpretation in the first place should aim at avoiding conflict between provisions of two treaties. States that conclude later treaties are conscious about their concurrent obligations stemming from earlier treaties and should be regarded as intending to respect existing treaties.

In the debate about the relationship of WTO law and other international agreements, special attention has been devoted to Article 31 (3) (c) of the Vienna Convention. It states as follows:

> "There shall be taken into account together with the context: […] c. any relevant rules of international law applicable in the relations between the parties."

This provision might offer a WTO Panel the possibility to interpret the WTO Agreement, including its Annexes, in the light of the UNESCO Convention. To determine whether this is indeed possible, two requirements of Article 31 (3) (c) have to be further clarified. First, what are 'relevant rules of international law' that are applicable, and second, in the relations between which 'parties'?

To begin with, 'relevant rules of international law' applicable in the relations between the parties include general principles of international law, treaty provisions and international customary law.[108] Furthermore, this does not only encompass the rules of international law that already existed at the time of the conclusion of the treaty. These are already covered by the supplementary means of interpretation listed in Article 32. Article 31 (3) (c) refers to rules of international law that have emerged subsequent to the conclusion of the treaty and that exist at the time of interpretation. This type of interpretation is referred to as 'evolutionary interpretation' and has been confirmed by the ICJ and by legal doctrine to be an instrument that may "exercise a decisive influence on the meaning to be given to expressions incorporated in a treaty."[109]

The second part of Article 31 (3) (c) of the Vienna Convention refers to the 'parties' involved. Who has to be bound by the international rule, all Members to the treaty that is being interpreted (here the WTO Members), or only the parties to the dispute? Article 2 (1) (g) of the Vienna Convention defines 'party' as "a State which has consented to be bound by the treaty and for which the treaty is in force." This leads to the conclusion that the term 'parties' in Article 31 (3) (c) refers to the WTO Members, not to the parties of the particular dispute. This interpretation has recently been confirmed in the Panel Interim Report in the case involving European measures concerning GMOs.[110] As a supporting evidence, the *GMO*

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[105] Appellate Body Report *Japan-Alcoholic Beverages*, para. 105-6.
[106] See Bossche, *The law of the World Trade Organization* p. 208.
[107] See Appellate Body Report *European Communities--Customs Classification of Certain Computer Equipment*, (WT/DS62/AB/R), adopted on 26 June 1998, para. 84.
[108] See Sinclair S. J., *The Vienna Convention on the Law of Treaties*, Manchester, Manchester University Press, 2nd edition, 1984, p. 119.
[109] Sinclair, *The Vienna Convention on the Law of Treaties*, p. 139.
[110] See Interim Reports of the Panel *European Communities – Measures affecting the Approval and Marketing of Biotech Products* (WT/DS291-3/Interim), adopted on 7 February 2006, para. 7.68.

Panel referred to the interpretation of Article 31 (3) (b) of the Vienna Convention[111] by the Appellate Body in *EC-Chicken Cuts.*[112] In this report, the Appellate Body appears to accept that, in the WTO context, the term 'parties' in Article 31 (3) (b) has to be understood as meaning the WTO Members. If indent (b) had this meaning and provided that indent (b) is part of the immediate context of Article 31 (3) (c), there is no reason to give a different meaning to indent (c). It seems likely that the panel will adopt this reasoning also in the final Panel report, which can however be subject to judicial review by the Appellate Body that might come to another conclusion.

Furthermore, Joost Pauwelyn has argued that Article 31 (3) (c) does not require 'all' parties to the WTO formally and explicitly to agree to the later international rule; he rather argues that the later rule should express the common intentions or understanding of all Members to the WTO.[113] Following this line of reasoning, it is not required that all WTO Members are legally bound, but they must have "at least implicitly accepted or tolerated"[114] the later rule. He draws this conclusion from the International Law Commission (ILC) Commentary to Article 31 (3) (b), which states that the provisional text included "the understanding of *all* the parties" [emphasis added]. Omitting the word 'all' was merely intended to "avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice."[115] However, even Pauwelyn's less strict interpretation of 'in the relation of the parties' is not fulfilled in the case of the UNESCO Convention. Not all WTO Members have accepted the practice of following the rules of the UNESCO Convention. In particular, the WTO Members United States and Israel have openly objected to the creation of this international agreement. Arguing that the rules contained in the UNESCO Convention reflect the common understanding of *all* WTO Members is therefore not possible.[116] In conclusion, the UNESCO Convention itself cannot be taken into account pursuant to Article 31 (3) (c) of the Vienna Convention when interpreting the WTO Agreement, including its Annexes, even in disputes where both disputing parties are parties to the Convention. In the following, the most relevant obligations and justifications under the 'covered agreements' of the WTO will be analyzed in order to determine how WTO Panels will interpret them and how this might relate to measures taken in pursuance to the UNESCO Convention.

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[111] Article 31 (3) (b) reads as follows: "There shall be taken into account, together with the context: […] (b) any subsequent practice in the application of the treaty which establishes the agreements of *the parties* regarding its interpretation" [emphasis added].

[112] Appellate Body Report *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* (WT/DS269/AB/R, WT/DS286/AB/R), adopted on 27 September 2005, para. 272/3.

[113] See Pauwelyn 'The Role of Public International Law' p. 575/6.

[114] Ibid, p. 576.

[115] ILC Commentary to Article 31 (3) (b) of the Vienna Convention.

[116] In the *US – Shrimp* case, the Appellate Body interpreted the term "natural resources" by referring to certain MEAs to which not all WTO Members were parties, not even all parties to the dispute. In its report, the Appellate Body did not explicitly refer to Article 31 (3) (c) of the Vienna Convention when considering those MEAs. It is not entirely clear on what the reference to the MEAs was based. See Appellate Body Report *US – Import prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R), adopted on 6 November 1998, para. 130.

3.2. Obligations under the GATT 1994, GATS and the TRIPS Agreement

In order to illustrate how WTO law might be interpreted in a case that involves measures taken pursuant to the UNESCO Convention, the following imaginary case shall serve as a basis for the following analysis. State A and State B are WTO Members and at the same time parties to the UNESCO Convention. State A has implemented three measures against State B. *MEASURE 1* is a screen quota on television soap operas from State B. It has been taken on the ground that these programs threaten the public morals in State A, given that they reflect a way of life that is far too liberal and completely opposed to domestic cultural values of nationals from State A. *MEASURE 2* concerns a tax that State A has imposed on periodicals that are imported into State A in a language other than its official language. It argues that the tax was necessary to comply with another national law that requires State A to preserve and safeguard its cultural heritage. *MEASURE 3* establishes a grant for the protection of national arts and is paid to domestic associations of play writers within State A.

The GATT 1994 contains several obligations, such as the MFN treatment obligation in Article I:1, the national treatment obligation in Article III and the obligation to eliminate quantitative restrictions in Article XI. The MFN treatment obligation requires that all foreign producers of 'like' products are given the same treatment. The national treatment obligation concerns the treatment of foreign producers that must not be less favourable compared to domestic manufacturers. *MEASURE 2* regards an internal tax that is imposed only on foreign periodicals written in a language other than the official language of State A. It can be argued that domestic periodicals are treated more favourably than foreign periodicals if written in a different language. This would constitute a violation of the national treatment obligation under Article III:2 of the GATT 1994. Furthermore, foreign periodicals written in State A's official language are treated more favourably than foreign periodicals written in another language. Arguably, the MFN treatment obligation is violated, according to Article I:1 of the GATT 1994. Both obligations require the determination of 'likeness' of foreign and domestic products in order to establish a violation of the two non-discrimination principles. Whether *MEASURE 2* constitutes a violation of the national treatment and the MFN treatment obligation depends on the question whether the Panel regards foreign periodicals 'like' products compared to domestic periodicals. The scope of the concept of likeness varies between the different obligations of the GATT 1994.[117] The national treatment obligation thereof applies to both 'like' products *and* to the broader concept of 'directly competitive and substitutable' goods. The test of consistency for the latter category of goods is easier to fulfil than the test for 'like' products. The Appellate Body in *Canada-Periodicals* found that foreign periodicals were 'directly competitive or substitutable' to Canadian periodicals according to Article III:2, second sentence, of the GATT 1994.[118] According to that case-law, it seems that foreign and domestic periodicals, even if written in different languages, are likely to be regarded 'directly competitive and substitutable', or even 'like' products.[119]

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[117] See Footnote 38.

[118] See Appellate Body Report *Canada – Periodicals*, VI. (b) (1).

[119] Scholars have argued that the existence of the UNESCO Convention could influence the interpretation whether cultural products and services are considered to be 'like'. According to its basic assumption that cultural expressions are shaped by their cultural roots, cultural products and services are per se unlike products if they originate from different cultural backgrounds. However, as argued in Section 3.1 of part II, the UNESCO Convention itself cannot be taken into consideration when interpreting WTO law as not all WTO Members have accepted its content. Therefore, such an interpretation of the concept of likeness is unlikely to happen as the *Canada – Periodicals* Appellate Body has not done so. See Hahn M.

MEASURE 3 concerns subsidies paid to associations of domestic play writers. These grants constitute industry specific benefits conferred by the government. Subsidies which cause adverse effects to the interests of other Members are prohibited under Article 5 of the SCM Agreement and therefore constitute a violation of a WTO obligation if adverse effects can be proven.

With regard to *MEASURE 1* concerning the GATS, obligations only arise insofar as a country has laid down commitments in its Schedule of specific commitments.[120] Therefore, the identification of an obligation under GATS often involves the interpretation of that Member's Schedule. *MEASURE 1* violates the obligation to grant market access to service operations under Article XVI:2 (c) of the GATS *if* State A's Schedule contains commitments with regard to broadcasting services. Two further obligations that have to be respected in the framework of the GATS are the two non-discrimination principles MFN treatment and national treatment obligations.[121]

The interpretation of obligations may also be of relevance under the TRIPS Agreement that equally provides for the national treatment and MFN treatment obligations.[122] They are meant to avoid discrimination *among* foreign and domestic IP rights holders and *between* foreign IP rights holders. In addition, several provisions of the TRIPS Agreement refer to rights and obligations under other international agreements on intellectual property rights. Indeed, interpreting obligations concerning the area of copyright and related rights is likely to involve the interpretation of provisions of the Berne Convention for the Protection of Literary and Artistic Works (thereinafter 'Berne Convention') from 1886. For example, in a case involving Japanese measures for sound recordings, it had to be established how long sound recordings have to be protected, the determination of which involved the interpretation of the Berne Convention.[123]

3.3. Justifications under the GATT 1994 and the GATS

The most important article for justifications under the GATT 1994 is Article XX, entitled 'General Exceptions'. It is in most parts identical to the respective article under the GATS, Article XIV. The structure of Article XX of the GATT 1994, Article XIV of the GATS respectively, reveals that it is subdivided into two parts: 1) the chapeau of Article XX; and 2) ten, respectively five, specific exceptions. The requirements of both elements have to be fulfilled in order to justify a measure otherwise inconsistent with WTO law. In the following, the three specific exceptions that are most relevant to justify measures aimed at the protection of expressions of cultural diversity are examined first. Only after having determined that one specific exception is fulfilled, the requirements of the chapeau of Article XX of the GATT 1994, respectively of Article XIV of the GATS, must be discussed.

'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law' in: *JIEL* 9 (3), 2006, p. 549.

[120] See Section 3.1 of Part I.

[121] Article II and Article XVII of the GATS. Note that the MFN treatment obligation is subject to a list containing exemptions of WTO Members that wanted to exclude certain services from the application of that obligation.

[122] See Article 3 and 4 of the TRIPS Agreement.

[123] See Complaint by the United States *Japan – Measures Concerning Sound Recordings* (WT/DS/28/1), 9 February 1996, and Complaint by the EC (WT/DS/42/1), 24 May 1996.

3.3.1. Provisional Justifications

3.3.1.1. Article XX a) of the GATT 1994 and Article XIV a) of the GATS: Public morals

The exception to protect public morals exists in both the GATT 1994 and the GATS. To date, no Panel or the Appellate Body has defined the concept of public morals in the GATT context. However, in the *US-Gambling*[124] case about gambling services offered via internet, the Panel analysed the GATS provision on public morals and public order that reads as follows:

> "[…] 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 [Footnote 5: 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]"[125] [emphasis added].

There are two conditions in this provision that have to be fulfilled: 1) the measure has to fall under either the concept of public morals or the concept of public order;[126] and 2) the measure has to be necessary. First, the *US-Gambling* Panel stated that the concepts of public morals and public order are prone to vary in time and space, "depending upon a range of factors including prevailing social, cultural, ethical and religious values."[127] Furthermore, it granted States the right to determine the level of protection that they consider appropriate.[128] Thus WTO Members are granted some leeway to define, according to their own systems of values, what is covered by these concepts. The *US-Gambling* Panel defined public morals as being "standards of right and wrong conduct maintained by or on behalf of a community or nation."[129] It considered public order to constitute "the preservation of the fundamental interests of a society, as reflected in public policy and law."[130] In this case, the United States enacted two legal acts that were intended to protect society against the threat of money laundering, organized crime, fraud and risks to children (under-age gambling) and to health (pathological gambling), allegedly provoked by gambling services offered via internet. The Panel found that all of these objectives in general could fall either under the concept of public morals or the concept of public order.[131] As a matter of fact that States can choose their own level of protection and furthermore may define the concepts according to their own values, this provisional justification seems to be broad in scope. For this reason, one could argue that *MEASURE 1* concerning the screen quotas on television soap operas is covered by the scope of the public morals concept of Article XX (a) of the GATT 1994, as the content of these series arguably contradicts the values and interests of State A's society. However, there is still a second element in both Article XIV (a) of the GATS and Article XX of the GATT 1994 that has to be fulfilled: the measure has to be 'necessary'. The *US-Gambling* Panel referred to the

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[124] Panel Report *United States – Measures affecting the cross-border Supply of Gambling and Betting Services*, (WT/DS285/R), adopted on 10 November 2004.
[125] Article XIV (a) of the GATS.
[126] Note that the GATT exception only involves the concept of public morals, Article XX (a) of the GATT 1994 reads: "[…] a) necessary to protect public morals".
[127] Panel Report *US-Gambling*, para. 6.461.
[128] See Ibid.
[129] Ibid, para. 6.465.
[130] Ibid, para. 6.467.
[131] See Ibid, para. 6.481.

Appellate Body judgement in *Korea – Various Measures on Beef*[132] in which the concept of 'necessary' in the context of Article XX (d) of the GATT 1994 was described as containing a range of degrees of necessity. In order to determine what the exact meaning of 'necessary' is, certain factors have to be weighed and balanced. These factors include the

> "relative importance of the common interest or values that the law or regulation to be enforced is intended to protect […], the extent to which the measure contributes to the securing of compliance with the law or regulation at issue, […] and the extent to which the compliance measure produces restrictive effects on international commerce."[133]

In order to decide on the trade effects of a measure, the Panel has to determine whether any alternative measure exists, either WTO-consistent or less WTO-inconsistent, which a Member could 'reasonably be expected to employ'.[134] The outcome of the weighing-and-balancing approach must be carried out on a case-by-case basis. As mentioned before, WTO Members cannot challenge the level of protection chosen; they can only argue that the measure at issue is not necessary to achieve the level of protection chosen.[135] In the *US-Gambling* case, the Panel found that the legal acts could not be provisionally justified under Article XIV (a) of the GATS. This was mainly due to the fact that the United States had failed to enter into negotiations with Antigua, which constituted an alternative 'reasonably available' to the United States. For a case involving *MEASURE 1*, it has to be kept in mind that, in order to fulfil the 'necessary' test, all alternative measures 'reasonably available' must have been considered by the WTO Member. Furthermore, it probably would be necessary to provide evidence that the alternatives do not achieve the same level of protection than that chosen. In any case, it has been very difficult for most Member States to pass the 'necessary' test, which also exists under some of the other specific justifications.

3.3.1.2. Article XX (d) of the GATT 1994 and Article XIV (c) of the GATS: Compliance with National Law

The exception to comply with national law exists in the GATT 1994 and in the GATS-context. Article XX (d) of the GATT 1994, Article XIV (c) of the GATS respectively, reads as follows:

> "[…] nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: […] *necessary* to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement"[136] [emphasis added].

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[132] Appellate Body Report *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (WT/DS161/AB/R), adopted on 10 January 2001.
[133] Ibid, para. 162-3.
[134] See Ibid, para. 165-6.
[135] See Appellate Body Report *European Communities –Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS201/AB/R), adopted on 5 April 2001, para. 168.
[136] Note that in Article XIV (c) of the GATS, there are minor deviations from Article XX (d) of the GATT 1994: "(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".

This provisional justification contains also a two-tiered test: 1) the measure must be designed to secure compliance with a national law which, in itself, is not GATT/GATS-inconsistent; and 2) the measure must be 'necessary' to ensure compliance. For the first element, a Panel will begin to verify whether the national law is in compliance with GATT/GATS law. It will proceed to determine whether the measure taken actually secured the compliance with that national law. In this regard, it is necessary to demonstrate a close link between the measure and the enforcement of that law. In the *US-Gasoline* case, the Panel found that the measure did not secure compliance with the national law because it did not constitute an enforcement mechanism of the law, but merely had an incidental effect on the enforcement of that national law.[137] Regarding *MEASURE 2*, it could be possible to justify the tax on periodicals in a language other than the national language if it was taken 'to secure compliance' with a national law that in itself is GATT-consistent. It does not seem very likely that a law that could be similarly drafted to Article 151 of the Treaty establishing the European Communities (EC) is GATT-inconsistent. Article 151 EC requires for example that "the Community shall contribute to the flowering of the cultures of the Member States" and shall support and supplement their action in the area of, *inter alia*, the "conservation and safeguarding of cultural heritage of European significance". If cultural heritage was defined broadly and also included the languages of the Member States, the European Communities and State A in our case could argue that a restriction of the import of foreign periodicals written in a language other than the national language is in compliance with an article similar to Article 151 EC.[138] However, the test under this provisional justification is not yet fulfilled. A Panel would still have to determine whether this measure is 'necessary' or not. The elements how to determine this question have been described in detail in Section 3.3.1.1 of Part II of this paper. They are decisive whether the measure at issue can be provisionally justified.

3.3.1.3. Article XX (f) of the GATT 1994: Protection of National Treasures

The exception to protect national treasures exists only in the GATT-context. Article XX (f) of the GATT 1994 states:

> "[…] nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: […] (f) *imposed for* the protection of national treasures of artistic, historic or archaeological value" [emphasis added].

To date, this specific exception has not been subject to interpretation by a Panel. However, scholars have recognized that the terms used refer to discrete items of tangible cultural property, rather than culture in general.[139] This might be true if one takes into account the intention that the drafters of the GATT in 1947 had in mind. However, the objective interpreter of a treaty today, and therefore any WTO Panel, has different tools at hand. As referred to in Section 3.1 of Part II, Article 31 (3) (c) of the Vienna Convention allows for taking into account, together with the context of the treaty, rules of international law applicable in the relations between the parties. 'National treasures of artistic, historical or archaeological value' can be argued to constitute expressions of cultural treasures. Cultural

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[137] See Panel Report *United States – Standards for Reformulated and Conventional Gasoline* (WT/DS2/R), adopted on 20 May 1996, para. 6.33.

[138] In the European Communities, Article 28 EC on the free movement of goods prohibits such interpretation of Article 151 EC. This might be different in countries outside of the EC.

[139] See Carmody C. 'When "cultural identity was not at issue": Thinking about Canada—certain measures concerning periodicals' in: *Law & Policy in International Business* 30 (2), 1999, p. 256.

treasures, or in other terms cultural heritage, is a concept which has changed over time. The international organization primarily concerned with cultural heritage is the specialized UN agency UNESCO to which all WTO Members are parties, with the exception of Liechtenstein. The rules created under the auspices of UNESCO therefore should be taken into account in order to find the contemporary meaning of cultural heritage. The work done by the UNESCO suggests that the range of items under protection has broadened enormously. As regards the concept of 'cultural heritage', the Convention of 1972 was dedicated to the protection of the 'World Cultural and Natural Heritage'. It clearly focussed on tangible monuments and sites of cultural heritage. That Convention was followed by the recommendation on the 'Safeguarding of Traditional Culture and Folklore' which constituted a step further towards the protection of expressions of traditional culture, no longer defined only as primarily tangible goods. In 2003, the UNESCO adopted the 'Convention for the Safeguarding of the Intangible Cultural Heritage'. This was the culminating point in the "recognition of communities and groups as those who identify, enact, recreate and transmit the intangible or living heritage."[140] Finally, as already expressed in the 'Declaration on Cultural Diversity' of 2001, the adoption of the 'Convention on the Protection and Promotion of the Diversity of Cultural Expressions' in 2005 clearly shows that the concept of cultural heritage, including artistic, historic or archaeological forms of expression, has changed over the centuries and has led to a "holistic approach to the protection and safeguarding of cultural heritage in all its forms, tangible and intangible."[141] In light of these documents, which reveal how the concept of cultural heritage is understood today, an 'evolutionary' approach to the interpretation of Article XX (f) of the GATT 1994 is called for.[142] It is important to stress that it is not the UNESCO Convention itself that should be taken into account by the Panel pursuant to Article 31 (3) (c) of the Vienna Convention. As argued above, this is not feasible as at least the United States have persistently objected to the creation of this international agreement.[143] However, it is the entire approach developed under the framework of the UNESCO that reflects a change in perception of the concept of cultural heritage. In this light, the Panel should evaluate on a case-by-case basis whether the subject of a measure, such as *MEASURE 3* on a grant conferred to national play-writers, falls under the notion of 'national treasures of artistic, historical and archaeological nature'. Arguably, the protection of the national arts should be interpreted as being covered by this provisional justification.

The second part of the usual two-tiered test of the specific justifications concerns the notion of 'imposed for' the protection of national treasures. As this specific justification was never subject to interpretation by a Panel or the Appellate Body, it is unclear what relationship is required in order to fulfil this test. Surely, the concept of 'imposed for' is wider than the concept of 'necessary', therefore more measures will fall under its scope of application. Whether it contains the same degree of relationship as the concept of 'relating to' provided in Article XX (g) of the GATT 1994 is unclear. The Appellate Body has accepted in *US-Gasoline* that the term 'relating to' should be interpreted as "primarily aimed at"[144] the conservation of an exhaustible natural resource, reflecting a substantial relationship between the measure itself and the objective of preventing the deterioration of the level of air

[140] See http://portal.unesco.org/culture/en/ev.php-URL_ID=2225&URL_DO=DO_TOPIC&URL_SECTION=201.html (16 October 2006).
[141] UNESCO's Draft Programme 2006-2007, Paris 2005, para. 04004.
[142] Note that Michael Hahn recognizes in his article that the concept of national treasures of artistic value could indeed include popular culture such as Donald Duck. See Hahn 'A Clash of Cultures?' p. 548.
[143] See Section 3.1 of Part II.
[144] Appellate Body Report *US-Gasoline*, para. 18-9.

pollution. In conclusion, it is not clear how strict the test of 'imposed for' will be. Until then, 'imposed for' should be best understood in a similar manner as the notion of 'relating to'. Hence, it can be argued that a measure under scrutiny of Article XX (f) of the GATT 1994 would have to fulfil the requirement that it is not "merely *incidentally or inadvertently* aimed at"[145] [emphasis added] the protection of the cultural heritage, but '*primarily* aimed' at that protection.

3.3.2. The chapeau of Article XX GATT 1994 and of Article XIV GATS

In order for a WTO-inconsistent measure to be justified under Article XX of the GATT 1994 or Article XIV of the GATS, two requirements have to be fulfilled: 1) the measure must fall within the scope of one provisional justification under Article XX of the GATT 1994 or Article XIV of the GATS; and 2) the measure must comply with the requirements of the chapeau of Article XX of the GATT or Article XIV of the GATS. The chapeaux of Article XX of the GATT 1994 and Article XIV of the GATS demand the following:

> "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 Member of measures ..."[146] [emphasis added].

Jurisprudence in the context of the GATT 1994 suggests that the chapeau of Article XX of the GATT 1994 is primarily concerned with the manner how the exceptions are *applied* rather than with the specific content of that measure. This jurisprudence is also relevant for the interpretation of the chapeau of Article XIV of the GATS.[147] The object and purpose of the chapeau is twofold. First, it prevents the abuse of the provisional justifications listed in Article XX. Accordingly, applying an exception to a WTO obligation must be exercised in good faith, in other words in a reasonable manner. Second, a "balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX […] on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand"[148] shall be maintained. It requires the location of a 'line of equilibrium' between the respective rights of the two Members; this line is not fixed, it moves as the kind and the shape of the measure differ.[149] This search for the 'line of equilibrium' has to be kept in mind when examining the three requirements explicitly mentioned in the chapeau: the application of the trade-restrictive measure shall *not* constitute 1) an arbitrary or 2) unjustifiable discrimination between countries where the same conditions prevail; 3) nor shall it constitute a disguised restriction on international trade. An example of *arbitrary discrimination* would be the application of the measure in a rigid and inflexible manner, without any regard for the difference in conditions between countries.[150] *Unjustifiable discrimination* on the other hand is concerned with the question of whether Members, that impose trade-restrictive measures, have shown serious efforts to negotiate in good faith a multilateral solution before resorting to unilateral measures. The Appellate Body made clear

[145] Ibid, para. 19.
[146] Article XX of the GATT 1994.
[147] See Panel Report *US-Gambling*, para. 6.571.
[148] Appellate Body Report *US-Shrimp*, para. 156.
[149] See Ibid, para. 159.
[150] See Ibid, para. 177.

that failure to do so would lead to unjustifiable discrimination.[151] The third element of the chapeau – a *disguised restriction on international trade* – occurs if the design, architecture and the structure of the measure reveal a disguise to pursue protectionist objectives.[152]

In addition to the necessity test, it has also often been the chapeau of Article XX of the GATT 1994 or of Article XIV of the GATS that was violated. The *US-Gambling* Panel found that the ban on remote betting and gambling services was both 'unnecessary' and in violation of the chapeau of Article XIV of the GATS. The Panel stated that the United States had failed to demonstrate that its prohibition on the remote supply of betting and gambling was enforced in the same manner against domestic service suppliers as against foreign suppliers.[153] The measure consequently did not fulfil the criteria under the chapeau of Article XVI of the GATS. By analogy, any measure taken in pursuance of the UNESCO Convention has to be applied in a non-discriminatory manner, both among other Members and towards domestic operators of the good or service at issue. These requirements of the chapeau have to be fulfilled in all situations of *MEASURE 1, MEASURE 2* or *MEASURE 3* in order to justify them. As already noted, only in rare cases has a WTO Member managed to justify a WTO-inconsistent measure under the general exceptions contained in the GATT and the GATS.

3.4. Justifications under the TRIPS Agreement

The exceptions contained in the TRIPS Agreement differ from the GATT 1994 and GATS exceptions insofar as they are more specifically confined to certain matters and cannot be used to justify violations of any kind of obligation under the agreement.

A limitation of the national treatment obligation in the TRIPS Agreement exists with respect to the rights of performers, producers of phonograms and broadcasting organisations. Their rights are internationally governed by a multitude of multilateral, regional and bilateral agreements. Article 3.1, second sentence, of the TRIPS Agreement provides that additional rights provided under other international agreements, such as the *WIPO Performances and Phonograms Treaty (WPPT)* administered by the World Intellectual Property Organization (WIPO), do not have to be extended to WTO Members that are *not* party to the other agreement.

Complex exceptions from the MFN treatment principle are provided for in Article 4 of the TRIPS Agreement. Pursuant to Article 4 (b), a Member is exempted from the obligation to grant MFN treatment in cases where the Berne Convention allows for differential treatment of foreign nationals based on reciprocity. For example, the Berne Convention allows a party to limit the term of protection for a work of foreign origin to the term of protection granted in the country of origin.[154]

Article 4 (d) addresses the rights that derive from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the

[151] See Appellate Body Report *United States Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* (WT/DS58/AB/RW), adopted on 21 November 2001, para. 115-34.
[152] See Panel Report *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/R and Add.1), adopted on 5 April 2001, para. 8.236.
[153] See Panel Report *US-Gambling*, para. 6.589.
[154] See Article 7.8 of the Berne Convention.

TRIPS Agreement. In the case that these agreements have been notified to the TRIPS Council, their rights do not have to be extended on all other WTO Members. This exemption has been interpreted rather broadly by WTO Members. In several communications with respect to that article, they have made clear that future acts based on such agreements would also be covered.[155] This is however disputed.
With regard to copyrights, Article 13 of the TRIPS Agreement requires Members to confine limitations or exceptions from exclusive rights of copyright holders to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. This exception refers mainly to the limitation of copyrights in general, not to the discrimination between different nationalities of copyright holders. It therefore does not seem to be primarily relevant in a case where States want to protect or promote their national culture against foreign cultural influences. 'Certain special cases' refer to, for example, the unauthorized use of copyrighted material for quotations from works already available to the public[156], for teaching[157] and for press articles[158] as contained in the Berne Convention.

Conclusion

This paper has provided an analysis of the legal relationship between the law of the WTO and the recently adopted UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. This question is highly relevant in cases where a WTO Member who becomes a party of the UNESCO Convention takes a measure to protect an expression of national culture but at the same time breaches WTO law. Any other WTO Member could start a judicial procedure against the allegedly breaching party before a WTO Panel if it considers that a benefit under WTO law has been nullified or impaired.

A WTO Member that wants to invoke the UNESCO Convention as a defence in a procedure before a WTO Panel will be confronted primarily with seven problems.
The first difficulty arises if not both parties to the dispute are bound by the UNESCO Convention. In that case only the law to which both States are parties applies, namely WTO law. The only possibility then to take the UNESCO Convention then into account is when interpreting WTO law. With the United States opposing this later international instrument, any dispute between a party of the UNESCO Convention and the US will fall under this situation.

Second, if the parties to the dispute are bound by both treaties, the Panel has to decide whether a legal conflict exists between a provision of WTO law and a rule under the UNESCO Convention. This might be denied should the Panel apply the narrow definition of legal conflict. In this case, WTO law is applicable as the UNESCO Convention does not contain substantive obligations. It is unclear which definition of legal conflict a Panel will apply.

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[155] See Notification under Article 4(d) of the Agreement, European Communities and their Member States, IP/N/4/EEC/1, 29 January 1996.
[156] See Article 10.1 of the Berne Convention.
[157] See Article 10.2 of the Berne Convention.
[158] See Article 10*bis*.1 of the Berne Convention.

Thirdly, if a broad definition of legal conflict has been chosen, international conflict rules must be used in order to determine which agreement is to prevail. As discussed, the meaning of Article 20 of the UNESCO Convention on the relationship to other international agreements is far from clear. It might be found to subordinate the UNESCO Convention to WTO law. Fourthly, also other international conflict rules seem to suggest that WTO law shall prevail over the UNESCO Convention, such as Article 41 of the Vienna Convention on the law of Treaties.

The limited competence of Panels poses the fifth difficulty. Even if conflict rules suggested the prevalence of a UNESCO Convention provision over a WTO treaty rule, a Panel would add to or diminish the rights and obligations of the WTO Members bound by both treaties when finding that WTO law has been superseded by a later Treaty rule. The Panel would exceed its competence. Thus, it is required to reject its jurisdiction to hear the case.

All this demonstrates that WTO law most likely will be found to prevail over the UNESCO Convention. In that case, a WTO Member could try to invoke the UNESCO Convention when interpreting WTO obligations and exceptions. In this regard the sixth problem arises: WTO law does not contain a specific exception for the protection of cultural goods and services which could be used to justify a violation of a WTO obligation.

The UNESCO Convention could still be relevant for the interpretation of existing obligations and exceptions under WTO law. However, according to the jurisprudence of the WTO judicial organs, international rules of interpretation (particularly Article 31 (3) (c) of the Vienna Convention) suggest that only other international agreements to which *all* WTO Members are parties shall be taken into account when interpreting the WTO Agreement, including its Annexes. As not all WTO Members will become parties to the UNESCO Convention the legal strength of the latter agreement is limited with regard to its relevance for the interpretation of WTO law. This constitutes the seventh problem.

Under current circumstances, the UNESCO Convention's impact on the law of the WTO is limited to only a few circumstances. In order to give cultural diversity legal importance within the WTO framework, an amendment of the GATT 1994 and the GATS is necessary. A cultural exception should be added to the currently existing exceptions on public interests, such as environment and public health. The majority of WTO Members have shown deep concern with the protection of cultural diversity; this should be reflected in the World Trade Organization of today.

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