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Cultural Organization

Organisation
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la science et la culture

Organización
de las Naciones Unidas
para la Educación,
la Ciencia y la Cultura

Организация
Объединенных Наций по
вопросам образования,
науки и культуры

منظمة الأمم المتحدة
للتربية والعلم والثقافة

联合国教育、
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Diversity of Cultural Expressions

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INTERGOVERNMENTAL COMMITTEE FOR THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS

Second Extraordinary Session
Paris, UNESCO Headquarters
23 - 25 March 2009

INFORMATION DOCUMENT

REFERENCE DOCUMENTS CONCERNING

ARTICLE 16 OF THE CONVENTION

This document includes the questionnaire sent to Parties and civil society, the coordinators' presentations during the second ordinary session of Committee and the PowerPoint presentations of the expert' reports

TABLE OF CONTENTS

Questionnaire.....	5
Overview by Vera Thorstensen.....	7
Introductory remarks concerning expert reports on Article 16 by Pierre Defraigne	11
PowerPoint Presentations	
Mr Bilel Aboudi, Tunisia	19
Mr Edouard Bourcieu, European Community	25
Prof. Mandla Makhanya, South Africa.....	33
Dr Keith Nurse, Barbados	39
Prof. Madhukar Sinha, India.....	47
Ms Vera Thorstensen, Brazil.....	55

QUESTIONNAIRE

Article 16 – Preferential treatment for developing countries

Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.

CONTENT OF ARTICLE 16

- Article 16

The debate underlined that preferential treatment under Article 16 of the Convention is to be understood as having both a trade and a cultural cooperation dimension and that Article 16 must be put in relation to other articles of the Convention.

- 1. Please list the articles that seem to you particularly relevant to Article 16 and explain briefly the overall rationale.**

- Role of Parties

The debate underlined that Article 16 is binding on developed countries.

- 2. Should developing countries have a proactive role as beneficiaries? If yes, please provide examples.**

IMPLEMENTATION OF ARTICLE 16

- Frameworks

Preferential treatment should be granted “*through appropriate legal and institutional frameworks*”.

- 3. Please provide examples of the main legal and institutional frameworks to be used by taking into account the following dimensions:**

- a) trade**
- b) cultural cooperation**
- c) a combination of the trade dimension and the cultural cooperation dimension**

- Categories

In accordance with Article 16 developed countries grant a preferential treatment to:

- a) “*artists and other cultural professionals and practitioners*” from developing countries
- b) “*cultural goods and services*” from developing countries

4. Please provide examples of priority measures relevant to each of these categories.¹

- Criteria

In the trade environment, preferential treatment involves criteria such as: eligibility, rules of origin, graduation, reciprocity and conditionality.

5. Are all or some of these criteria relevant for preferential treatment under Article 16? Please explain briefly why.

- Measures at national level

The debate underlined the role of national measures and policies in increasing the supply of cultural goods and services in developing countries. Coordination of different national institutions is therefore of the utmost importance.

6. In your country, is there an existing coordination mechanism between the ministry responsible for culture and the ministry responsible for trade? Or other mechanisms?

- Civil society

7. What role should civil society play with regard to preferential treatment under Article 16?

MONITORING AND MEASURING

In order to monitor and measure the processes of implementation and the impact of Article 16, the mechanisms foreseen in articles 9 and 19 of the Convention (periodical reporting, information sharing and best practices) could be invoked.

8. Are these mechanisms sufficient? Should other mechanisms (e.g. research, a specially created body, other) be considered?

9. Would you have any other comment to add?

Thank you for your valuable cooperation.

Please reply by 31 January 2009 at the latest to Ms Galia Saouma-Forero, Secretary of the Convention, preferably by e-mail: convention2005@unesco.org, or by mail at the following address: UNESCO, 1, rue Miollis, 75732 Paris Cedex 15, tel: (33 1) 45.68.42.77, fax: (33 1) 45.68.55.95

¹ Please refer to the document attached 'Overview'.

**EXPERT REPORTS ON PREFERENTIAL TREATMENT
FOR DEVELOPING COUNTRIES**

**ARTICLE 16 OF THE CONVENTION ON THE PROTECTION AND PROMOTION
OF THE DIVERSITY OF CULTURAL EXPRESSIONS**

OVERVIEW

Presented by

VERA THORSTENSEN

COORDINATOR

Vera Thorstensen has been the Economic Advisor for the Mission of Brazil in Geneva since 1995. She is also Professor of Trade Policy in São Paulo, Paris and Lisbon.

Reports on Article 16 Overview

Section B (The Concept of Preferential Treatment)

- All experts have endorsed the view that the concept of preferential treatment within the meaning of Article 16 of the Convention must be interpreted in the light of other relevant provisions of the Convention, in particular **Article 14 on cooperation for development**.
- All experts have argued that the concept of preferential treatment under Article 16 is **wider than a narrow trade understanding**. Aimed at facilitating cultural exchanges between developed and developing countries, preferential treatment must not be construed in mere trade terms but rather build on **partnership** and **cooperation**.
- All experts agreed that preferential treatment can be provided through **a variety of means and methods**. Trade instruments are obviously one option. However, preferential treatment, as understood from the Convention's perspective, must also draw on **cultural cooperation mechanisms**. The latter could involve:
 - funding agreements and exchange arrangements,
 - sharing of resources and experience on best practices,
 - technical capacity building and transfer of technology,
 - specific fiscal incentives,
 - visa facilitation arrangements,
 - education and training,
 - joint production and diffusion of cultural expressions,
 - joint investment, etc.
- The experts of **Tunisia, South Africa, India and Brazil** have also discussed some common concepts developed in the field of trade with a view to avoiding circumvention of preferential treatment. **Positions have varied, representing a rich source for the IGC's debate**.
- With regard to the **eligibility of developing countries to benefit from preferential treatment in the field of culture**, some authors have taken the position that a distinction among developing countries that are at different stages of development could undermine attainment of the Convention's objectives. Others have argued that existing classification criteria based on economic indicators or a country's self-declaration could be used, coupled with additional cultural policy-related considerations.
- As regards **reciprocity**, namely the granting of reciprocal preferences, most experts have advocated that non-reciprocity is congruent with the objective of supporting the emergence of viable cultural industries in developing countries and correcting imbalances in cultural exchanges.
- Experts have also agreed that preferential treatment can be **conditional** upon respect for the guiding principles of the Convention (Article 2).
- Regarding **graduation**, that is the phasing out of preferences as the beneficiary countries reach a certain level of development, whilst some experts have argued against graduation, noting amongst others the difficulty in determining objective and

transparent criteria in this respect, others suggested considering graduation on a case-by-case basis.

- Finally, in relation to **rules of origin** and their relevance for the provision of preferential treatment in the field of culture, some experts took the view that there can be no alternative to preventing circumvention of the mechanism of preferential treatment. For others, rules of origin are not suitable when preferential treatment is granted to cultural expressions which are not locally specific.

Section C (The legal and institutional framework concerning preferential treatment granted by/to the country/group of countries under study)

- **All experts have investigated the structures put in place for the provision of preferential treatment by/to the country/group of countries under study, as well as the scope, extent and nature of the preferences granted.**
- On the basis of the information provided, a broad distinction between donors and beneficiaries of preferential treatment may be drawn. **Tunisia** and the **ACP** countries enjoy preferential treatment in the field of culture, including by the **EU**. **India and Brazil** are principally portrayed as donors of preferential treatment towards developing and least developing countries. The evidence provided in relation to **South Africa** revealed that preferential treatment for culture is not a central feature of the agreements concluded.

Section D (Analysis of existing agreements and preferential treatment mechanisms)

- The experts' reports attested to the **variety of the preferential treatment mechanisms used or needed in the cultural field** and revealed how different policy spaces can be used in order to facilitate cultural exchanges between developed and developing countries.
- The **Tunisian** case-study was based on the EU-Tunisian association agreement and the bilateral French-Tunisian cultural cooperation agreement. The **EU** and the **Caribbean reports** discussed the Economic Partnership Agreement (EPA), signed between the EU and Cariforum on 15 October 2008. The **Brazilian** case study examined preferential treatment for the audiovisual sector mainly on the basis of various bilateral and regional co-production agreements with developed and developing countries. The **Indian case study** focused on the audiovisual sector and yoga, investigating the need for the provision of preferential treatment in their regard. The **South African report** confirmed that preferential treatment for culture is not readily inscribed in the country's bilateral, regional and multilateral agreements and explored the need for preferences for most South African cultural sectors.

Section E (Conclusions and recommendations)

- Many of the recommendations formulated by the experts display similarities, suggesting a certain level of **convergence**.
- The effective implementation of Article 16 requires the exploration of **both trade and non-trade instruments**.
- Preferential treatment is facilitated when **it links partners which formulate and implement policies conducive to the promotion of cultural activity**.
- **Coherence must be ensured between preferential treatment and other development cooperation instruments for preferential treatment to have a lasting impact on cultural exchanges between developed and developing countries.** Development cooperation measures which target the emergence and development of viable local cultural markets, as well as the training of artists, cultural professionals and practitioners on key competencies are particularly pertinent.
- **Regional cooperation** between developing countries and between developed and developing countries is considered to be an asset for preferential treatment.
- **Civil society** can make an important contribution to the identification and clarification of the needs of developing countries in the cultural sector.
- **Most experts** also agree that the **formation of appropriate institutions** to manage and monitor preferential treatment schemes should be given serious consideration

**EXPERT REPORTS ON PREFERENTIAL TREATMENT
FOR DEVELOPING COUNTRIES**

**ARTICLE 16 OF THE CONVENTION ON THE PROTECTION AND PROMOTION
OF THE DIVERSITY OF CULTURAL EXPRESSIONS**

Introductory remarks by

PIERRE DEFRAIGNE

COORDINATOR

Executive Director of the Madariaga – College of Europe Foundation, Brussels, Belgium

Crisis and cultural diversity

The systemic crisis triggered by the collapse of Wall Street shows how highly dangerous it is for the world to rely on an ideology closed to modes of analysis, concepts and practices other than those that are “market-oriented” only. By giving impetus to the restoration of world economic and political balance initiated by the rise of Asia, the crisis will lead to new theories, comparing different analyses and values and thus exploiting cultural diversity, source of enrichment for shared thinking.

In its quest for unity in handling the major challenges of our times, the world will thus be able to work out more balanced agreements in order to achieve sustainable development.

This new context confirms the merits of the intuition that has led UNESCO to assert the value of cultural diversity and strong political commitment to cultural preference as a key tool for promoting such diversity.

Strength of cultural preference

The concept of cultural preference concerns collective willingness to correct powerful market dynamics and, over and above commercial interests, to give prominence to minority cultures in response to the hegemony of the dominant cultures in cultural exchanges.

The assertion of the principle of cultural preference in the Convention on the Protection and Promotion of the Diversity of Cultural Expressions gives it very strong legitimacy. It places cultural preference on an equal footing with other multilateral standards relating to trade, the protection of intellectual property and cooperation.

Scope of cultural preference

The main purpose of this series of reports by the experts and practitioners in trade and cultural cooperation, namely Mr Bilel Aboudi (Tunisia), Mr Edouard Bourcieu (EU), Mr Eugène Mthetwa (South Africa), Dr Keith Nurse (Barbados), Mr Madhukar Sinha (India) and Ms Vera Thorstensen (Brazil) is to ascribe specific content to cultural preference. They have reviewed and analysed multilateral texts on cultural preference and have examined various types of bilateral applications, both South-South and North-South. Their reports contain many practical proposals that cannot be summarized in an introduction.

These reports show that the obstacles to the improvement of cultural flows from a weak to a strong partner vary considerably in nature and can be overcome only by the partners' firm determination to cooperate with each other.

The concept of cultural preference advanced in Article 16 is quite substantial, inasmuch as it is premised on the Convention in its entirety:

- it covers in full the scope of trade, national policies and cooperation;
- it sets the goal of expanding – and in fact rebalancing – cultural exchanges, key to diversity;
- it refers to development as the ultimate goal of cultural diversity and exchanges.

Cultural preference does not aim to maintain the status quo; rather, it addresses a country's capacity to develop its cultural provision through domestic cultural policies and cooperation with foreign partners, governments and the private sector, especially through co-production.

Parameters of cultural preference

Cultural preference (Article 16) strengthens market mechanisms and national cultural policies, primary vehicles for cultural exchanges. It is bilateral and uses two channels:

- trade preference which acts mainly on **the demand** for cultural goods and services originating in the developing countries;
- cultural cooperation which acts on **the supply** from these countries, by supporting their national policies.

Regardless of whether cultural preference is trade matter or the outcome of cooperation, the criteria must establish its target and ensure its predictability for beneficiary countries: **eligibility** of the recipient countries may vary according to their level of development, as explicitly provided for by WTO for the LDCs; under the **graduation** mechanism preferences must be ended on the basis of the results obtained rather than the donor countries' sensitivity to imports; **the degree of asymmetry** in reciprocity can constitute a means of variability to reflect the level of development; **rules of origin**, particularly complex in regard to cultural products and services, owing to their multifarious input sources (copyright, funding, implementation, execution, place of production, filming and others), would be improved if they were simplified and concomitantly have a real impact on development; **the conditionality** can link the granting of preferences to effective fulfilment of the beneficiary country's international obligations in such areas as human rights, sustainable development, ILO framework-conventions and action to combat drugs.

Cultural preference must be:

- always specific, because it is necessarily based on affinity between countries, on a fellowship among communities; ability to mobilize civil society to give substance to cultural exchanges attests to such concurrence of cultures, which implies interest and respect;
- always ad hoc, as trade, cooperation and national cultural policies never combine to give identical results owing to the countries' differing potential. Latent comparative advantages must be exploited at all times, while avoiding standardization and routine;
- targeted and therefore not unfocused, as no State has the means to enter into a particular relationship and envisage ad hoc cooperation with all others, unless it is seeking to impose its own model;
- far-reaching and enduring, as it does not connote an occasional partnership but structured long-term relations;
- sensitive to each society's right to invent its own future for human advancement.

1. Cultural preference in trade is important, but insufficient

The multilateral trade rules deal both with market access for goods and services and with the disciplines that guarantee fairness in trade. Cultural preference therefore covers both market access and the scope for national policies to promote and diversify cultural supply and to support emerging industries.

Once the principle of cultural preference is enshrined in a multilateral treaty with the scope of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the trade rules are no longer an obstacle to the introduction of corrective mechanisms favourable to developing countries. The WTO charter and the body of multilateral regulations authorize a sufficient number of exceptions, for the purposes either of regional integration or of development, or indeed both, to permit strong cultural preference in market access and cultural policies.

With regard to goods, the central principle of special and differential treatment, the enabling clause (1979) and Article XXIV of the General Agreement on Tariffs and Trade (GATT) (regional trade arrangements) are strong bases for creating asymmetry in the reciprocity of obligations favourable to the developing countries, either by developed countries or among developing countries.

With regard to services, the flexibility inherent in the General Agreement on Trade in Services (GATS), special and differential treatment and Article V of GATS (Regional Trade Agreements (RTAs)) allow positive discrimination to the benefit of developing countries.

Bilateral agreements are the key to cultural preference. They are all the more effective when they form part of broader cooperation covering culture, trade and development, and even more highly political goals, and when they open up access to larger and more dynamic markets. The inherent risk in bilateral agreements always lies in the balance of concessions between unequal partners. Cultural preference allows the stronger partner to give an advantage to the weaker, but its coercive value in bilateral negotiations is moral and not legal.

It is therefore for developing countries party to such agreements to make full use of the leverage afforded by Article 16 by insisting on explicit reference to it in the agreement.

To guard against any protests, waivers approved by a two-thirds majority of WTO Members could legalize the preferential treatment granted in bilateral agreements, in particular, in cases of non-reciprocity.

Difficulties may remain, leading to appeals before the WTO's Dispute Settlement Body (DSB). The import of Article 16 of the UNESCO Convention augurs well for the outcome of any litigation.

Preferential trade agreements are a pre-requisite for the expansion and rebalancing of cultural trade, but they are insufficient for obtaining significant results because asymmetry in markets and national policies is usually stronger than positive trade discrimination. Trade preferences are like string: they can be pulled, but not pushed. Accordingly, it is through cooperation that the opportunity opened up by preferences can be used.

Trade preferences that are not backed by a cooperation agreement may develop trade but they will tend to consolidate, and will not suffice to expand and diversify, the structure of the export of goods or services from developing countries. Furthermore, and above all, they will leave non-trade cultural exchanges outside the scope of preferences.

2. Cultural preference requires cooperation above all

The shortfall in domestic cultural supply and the lack of channels for international cultural trade are the main two obstacles to the development of trade once preferential market access has been secured.

Cooperation necessarily involves interaction: responsibility for its success lies as much with the beneficiary of aid as with the donor, as a developing country must first develop a strategy to promote its cultural supply. If the country does not have a policy to develop its media industry, support its artists, promote the indigenous culture, protect its heritage and encourage trade, cooperation will fail.

The first stage in such cooperation may consist in analysing the development and trade potential of the local cultural supply in order to raise the awareness of leaders and encourage them to devote the resources required to launch such a policy. In and of itself, however, the idea of encouraging a country's cultural development from outside is somewhat contradictory, for such a development need should arise from a collective desire to assert cultural identity and engage in exchanges with other cultures.

A cooperation agreement may deal with culture only. It may also be part of a broader agreement aimed at development, in which case, three aspects, namely trade, development cooperation and preference in cultural exchanges, will be addressed. Cultural diversity can thus be included in all three aspects and the interplay of synergy among them can be achieved.

In any event, reference to UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions as the framework for the cultural dimension of the agreement is invaluable for two reasons. First, only a few countries (such as Canada, South Africa and India) or groups of countries (such as the European Union and CARIFORUM), have to date enshrined cultural diversity as a key component of their own identity and are thus specifically prepared to enter into bilateral cooperation agreements to promote cultural diversity in trade with third countries. A reference to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions now incorporates the founding principles of the promotion and protection of cultural diversity automatically into the body of rights and obligations contained in any bilateral cultural agreement and will make them even weightier.

Second, the Convention provides a strong legal basis for the prevention of any conflict between divergent international standards.

There is, of course, no standard cultural agreement. A cultural agreement is, by definition, adapted to the demographic, economic, cultural and political characteristics of the two partners. For instance, the establishment of film and television co-production agreements requires some technical and financial capacity. Network building involving civil society will be facilitated by the existence of a diaspora. Linguistic proximity will facilitate cultural exchanges.

Cooperation agreements should not be confined to exchanges between developed countries and developing countries; they can also promote exchanges among developing countries themselves, in particular those with cultural and/or geographical affinities. Such South-South exchanges can be an indirect means of increasing the cultural supply in the less developed countries.

3. Two promising priorities

(a) Mobility of natural persons

Exchanges can be boosted through parallel official or voluntary (civil society) non-commercial channels. It is through such exchanges, in particular when natural persons (artists and other cultural professionals and practitioners) are involved, that the distinction between commercial and non-commercial channels makes the most sense.

Cultural exchanges through the movement of artists and professionals are a particularly rich dimension of cultural diversity because they bring people together and encourage individuals and collective partners from different cultures to meet each other.

Cultural preference implies giving priority to the entry and temporary stay by artists and other cultural professionals and practitioners, as natural persons. There are two parallel and complementary options. First, amateurs and professionals must be able to travel¹ for non-trade exchanges so that they may perform tasks connected with the preparation of projects, identification of partners, identification of filming or performance locations, bibliographical and museum research, procurement and testing of cultural equipment, and study and lecture tours. Second, for commercial activities as such (mode four services under Article XXVIII(b) of GATS) market access also involves temporary stays for the execution of a contract for services.

In the second case, the duration of stays may be longer (up to six months in a 12-month period), on production of certificates of qualification or experience and a contract of employment by a

¹ The EU-CARIFORUM agreement provides for stays of up to 90 days within a period of 12 consecutive months.

company holding a contract for services, drawn up for a maximum duration to be agreed. The facilities accorded must be proportional to the trade imbalance to be redressed. Provision must be made for mechanisms complementary to the exchange of natural persons, namely information and complaints procedures, training and coaching, technical assistance and the transfer of technology and skills.

Two types of action are required to facilitate such exchanges: first, the establishment of trade and non-trade networks; second, facilitation through preferential measures relating to the granting of visas, double taxation and the protection of intellectual property and of cultural and traditional knowledge and expressions.

The non-trade option is underpinned by its own rationale. It does, however, aim to promote the second case which is, of course, the main goal in regard to the promotion of cultural trade that creates added value and jobs and generates hard currency.

(b) Co-production

Co-production is a powerful means of promoting exchanges in that it reduces considerably the technical, financial and programme-related obstacles to the production and effective distribution of films and television programmes. The key problem, the gap between production and distribution, may be resolved by including co-produced items in national and regional distribution quotas.²

Conclusions

Cultural diversity transcends trade in the cultural goods and services that it sustains. It expresses each society's capacity to organize its development and human progress for all of its members as it sees fit.

Given the imbalances in the world – economic, ecological but above all in the condition of ordinary men and women – it is quite obvious that the will to achieve progress and development is unequal. It is not expressed everywhere. It must even still be released from its age-old wrappings in many countries. However, all human beings wish to improve their condition. The essence of cultural diversity surely resides in a society's capacity to achieve a forward-looking synthesis between modernity and tradition, between wealth and effort, between exploitation of and respect for nature, between group membership and individual freedom and between material and spiritual progress. Cultural diversity is surely nothing more than a society's capacity to draw on its innermost resources to invent a better future. Cultural preference surely amounts ultimately to assertion of a society's right to explore new and specific avenues that end with the warmth of human solidarity in response to tragedy in the human condition.

² The European Union's Audiovisual Media Services Directive, ... "Television without Frontiers", provides for quotas for "European works" to which co-production may be assimilated in some circumstances.

PowerPoint Presentations

Expert Reports on Preferential Treatment for Developing Countries (Article 16 of the Convention)



Convention on the Protection and the Promotion
of the Diversity of Cultural Expressions

Article 16 :

Preferential treatment
for developing countries

Implementation guidelines

Case study: Tunisia

Bilel Aboudi



Article 16 is not...

- Preferential treatment for developing countries as established in international trade law (Special and differential treatment), that is enabling developing countries deviation from the general rule in trade agreements for liberalizing trade of services or goods either at the multilateral level (WTO agreements : GATS and GATT ,through GSP's) or regional/bilateral levels.
- Limited in time, and does not include a transitional period by which all preferences are eroded at a certain period as in trade agreements.
- An adjustment tool for developing countries, in terms of their graduation to become “ developed” countries.

Empirical Evidence

- Minimum impact of trade preferential treatment mechanism in developing exchanges for selected Tunisian cultural products. (case with EU agreement).
- High impact for cultural sector dynamics (capacity building and exchanges) through cultural cooperation mechanisms with EU (Regional) or France (Bilateral).

Article 16 is...

- A novelty in cultural sector through the use of development as a criterion of categorisation between parties of the same convention.
- A “Greasing”/catalyst process for international cooperation arrangements in the Convention benefiting developing countries, as referred to in : art.1 par.(i), art.2 (principle 4), Cooperation for development (art.14), Collaborative arrangements (art.15), International cooperation in situations of serious threat to cultural expressions (art. 17).
- A development-oriented mechanism toward the operational axes of the Convention (based on CDPL) → need to search of performance indicators within the axes of interest .
- An opportunity for structural change in current cultural sector practices including : cultural policies, cultural management and international cultural cooperation instruments (bilateral and multilateral levels) → need for the search of improvements and new instruments.



It is a cultural sector mechanism



Tools for the mechanism

- Explicit references for preferential treatment in Cultural agreements,
- Increase in cultural co-production agreements (all sectors included),
- Review of Florence agreement and Nairobi protocol at the UNESCO level,
- Introduction of Cultural Diversity Programming Lens* in other development agencies (UNDP, UNCTAD, WIPO...),
- Creation of a monitoring committee at the UNESCO level. (Evaluation and Assistance)

* : *A new Development analysis tool based on the axes of cultural diversity*

Report on Article 16 of the UNESCO Convention

Key findings

E. Bourcieu

What is Preferential Treatment (PT) in the meaning of the Convention ?

- **Interpretation in the light of the principles** (more balanced exchanges) **and relevant cooperation provisions of the Convention**
- **Combining two result-oriented objectives:**
Effectively improve the balance of cultural exchanges between developed and developing countries...
...while preserving the ability of all partners to develop and implement policies for cultural diversity (**domestic policy space**)

Preferential Treatment in the meaning of the Convention is not about...

- ...multilateral trade liberalisation
- ...one-size-fits-all solutions which do not address the reality and specificities of the partners' relation
- ...a single set of measures in a single framework (e.g. trade commitments)
- ...stand alone measures independent from domestic policies of partners and cooperation frameworks between them

Preferential Treatment in the meaning of the Convention is about...

- **a set of coordinated tools from different policy fields** (trade, development policy, cultural cooperation) aiming at effective rebalancing of exchanges of cultural professionals, goods and services between developing and developed countries partners
- **It can only be effective when building on** existing policies and measures in and between partners

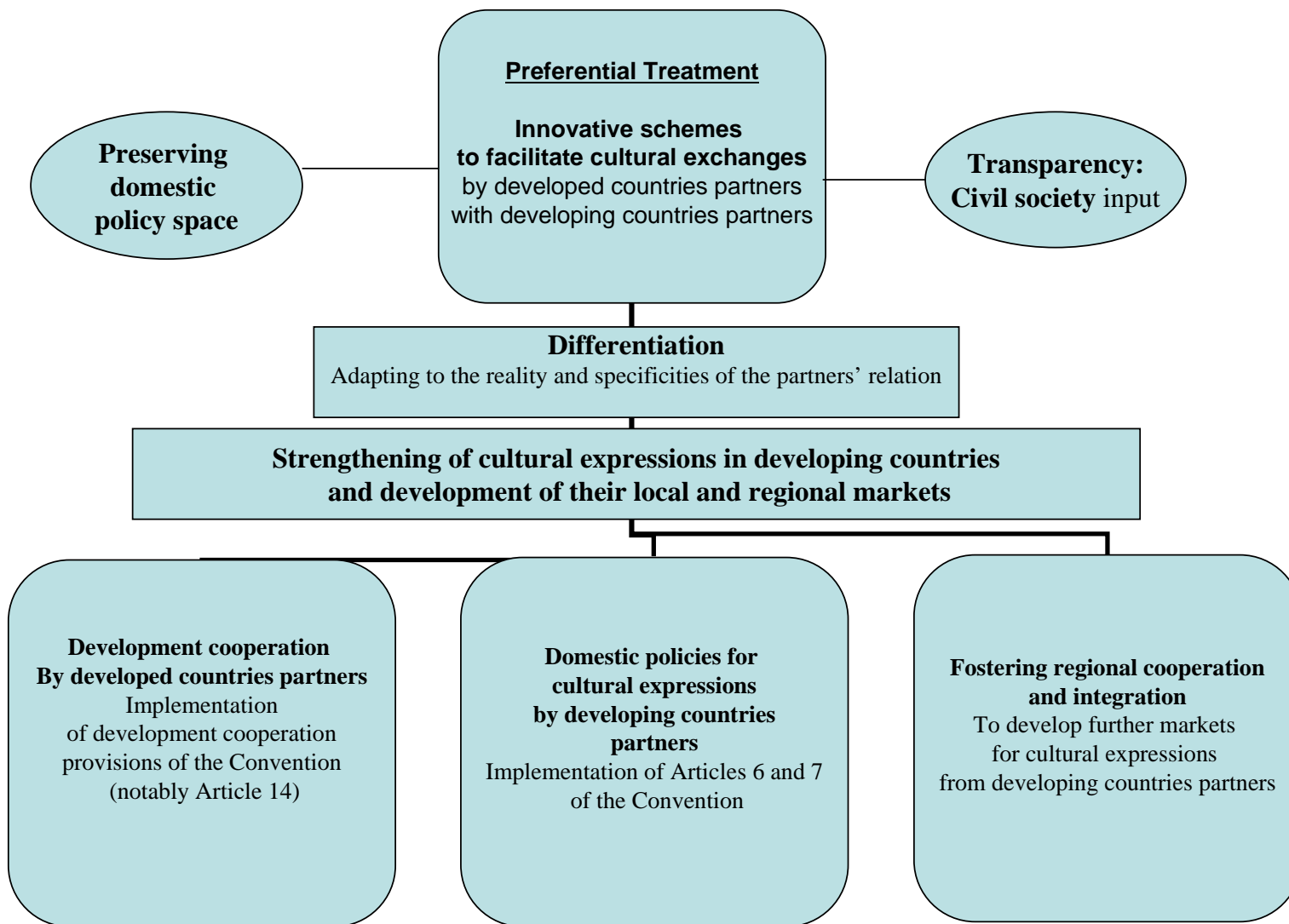
Illustration: the EU-Cariforum Cultural Protocol

- **Measures improving cultural exchanges...**
 - **Adapted** to the specificity of the partnership (e.g. inclusion of « mas performers », who are specific to Caribbean countries)
 - **Covering** cultural goods (e.g. cinema equipment), services and professionals
 - **Consisting primarily of non-trade measures:** audio-visual co-productions provisions; entry and temporary stay of artists and cultural professionals/practitioners
 - **Combined with limited trade commitments:** access of entertainment services providers to the EU market
 - **Combined with technical assistance and training measures**
- **...In synergy with other relevant frameworks, such as:**
 - EC and EU Member States **development cooperation measures** targeting capacity-building in cultural expressions
 - Intra-ACP **regional cooperation**
 - **Domestic cultural policies** in Cariforum countries
- **...while preserving policy space of all partners...**
 - None of the measures facilitating exchanges affect the capacity for partners to develop and implement domestic policies for cultural diversity
 - The Protocol includes **dialogue on policies** and best practices in the area of culture and audio-visual

Recommendations

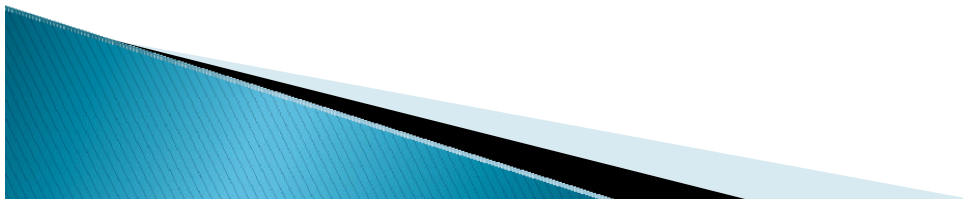
- **Building on the strengthening of cultural expressions and the development of their markets in developing countries:**
 - Through domestic policies of developing countries partners (Implementation of articles 6 and 7 of the Convention);
 - Through development cooperation policies of developed countries partners (Implementation of Article 14 of the Convention)
 - Through regional cooperation and/or integration amongst developing countries, in order to reach regional markets for cultural expressions
- **Implementing innovative measures to effectively facilitate cultural exchanges from developing to developed countries partners,** exploring new combinations of trade and non-trade approaches to PT, based on:
 - **Differentiation:** effective PT requires a case by case approach, taking into account the reality and specificities of the partners' relation
 - **Transparency:** working closely with civil society, on both sides of the partnership, is fundamental in order to better target the measures and enhance their effectiveness.

Preferential Treatment as a holistic approach:



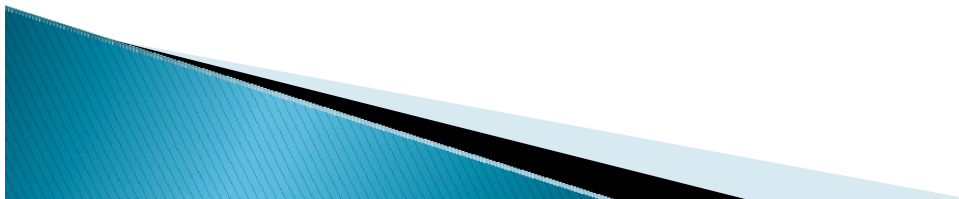
PREFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES:

- ▶ the case of South Africa
- ▶ Article 16 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions as an instrument for promoting the diversity of cultural expressions within developing countries.
 - ▶ Prof Mandla Makhanya
 - ▶ South Africa



Article 16 is not ...

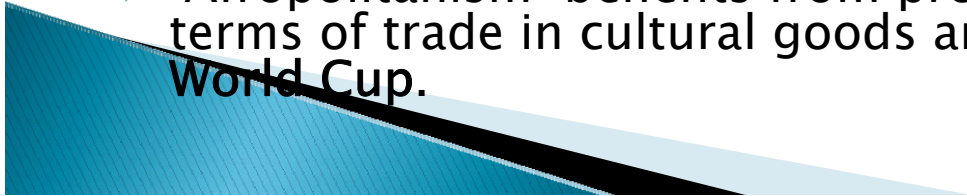
- ▶ Preferential treatment that deviates from the general trade law.
- ▶ A tool for liberalising trade of service or goods at the multilateral, bilateral or regional level.
- ▶ Limited by time periods/sunset clauses.
- ▶ Is not a tool to enable developing countries to graduate to being a “developed country”.



Preferential treatment in Article 16 is ...

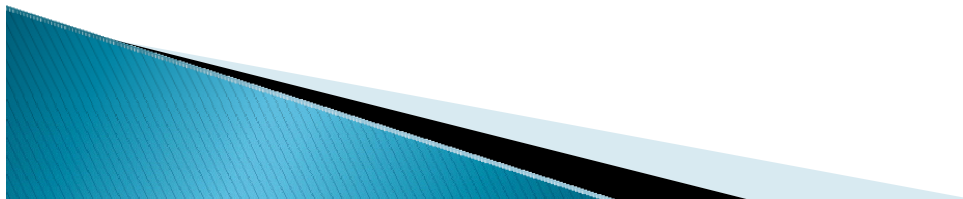
- ▶ A tool for sustainable development based on respect and reciprocity between the developing and developed world.
 - ▶ Restorative for countries that were long exposed to colonial rule.
 - ▶ A means by which South Africa can promote cultural diversity and cultural production.
 - ▶ A tool to enable South Africa participate in more balanced exchanges.
 - ▶ Contingent on 'eligibility' and 'reciprocity' among clusters of nations, including SADC, a range of other African states, India and Brazil, as well as developed nations.
 - ▶ To be read in conjunction with Article 14 which provides developed countries to lobby for a portion of ODA contributions for the cultural sector.
- 

Empirical evidence

- ▶ Establishment of African regional bodies in respect of trade in cultural goods and services and the development of cultural industries.
 - ▶ Various cultural coalitions and cultural organisations now articulate with commercial and political ones as 'African Renaissance' for the African continent and NEPAD its economic custodian.
 - ▶ The Department of Arts and Culture's business plans for 2007–2010 allocates 12.74% of its budget to 'Cultural Development and International Co-operation'.
 - ▶ The SADC Permanent Secretaries Culture Forum, established in 2006, for the marketing of cultural goods within the SADC region.
 - ▶ Free-trade agreements within SADC, the European Union and the African, Caribbean and Pacific allow for preferential access for certain products among the contracting countries.
 - ▶ 'Afropolitanism' benefits from preferential treatment in terms of trade in cultural goods and services via the 2010 World Cup.
- 

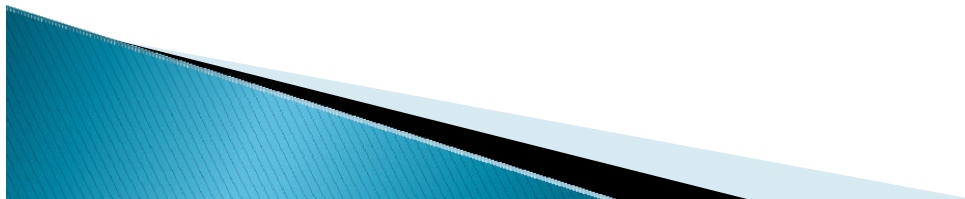
Tools for the mechanism

- ▶ A few preferential treatment agreements in respect of cultural goods and services are already in operation in bilateral or multilateral treaties signed by South Africa.
- ▶ Preferential treatment and the expansion of trade in cultural goods and services will require that mechanisms are put in place to monitor the implementation agreements.



Tools for the mechanism

- ▶ The necessity that research accompanies policy-making. This research agenda is dependent upon collaboration with UNESCO and other developing countries.
- ▶ Perhaps the most important South African legislation in regard to cultural diversity in international contexts is the *Intergovernmental Relations Framework Act 13 of 2005*. It can compel government to cooperate on cultural matters.



Preferential Treatment

(Article 16)

in the UNESCO Convention on the Protection
and Promotion of the Diversity of Cultural
Expressions (2005)

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Trade in Cultural Goods from the Developing World

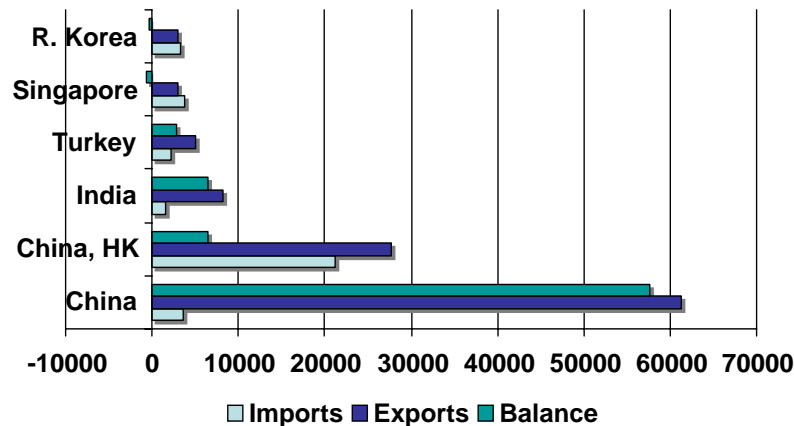
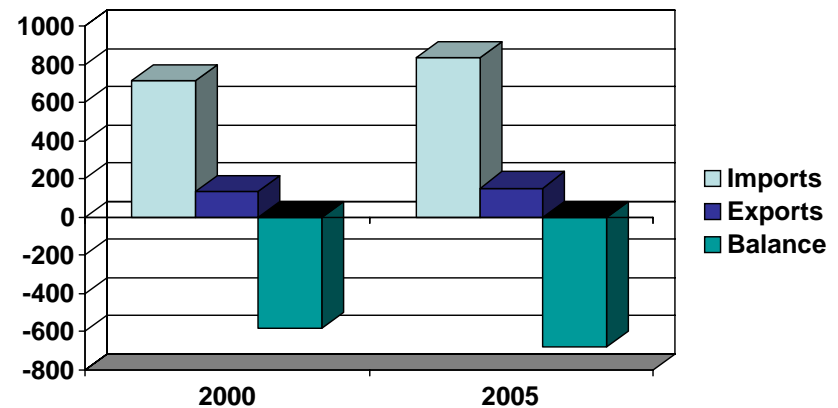


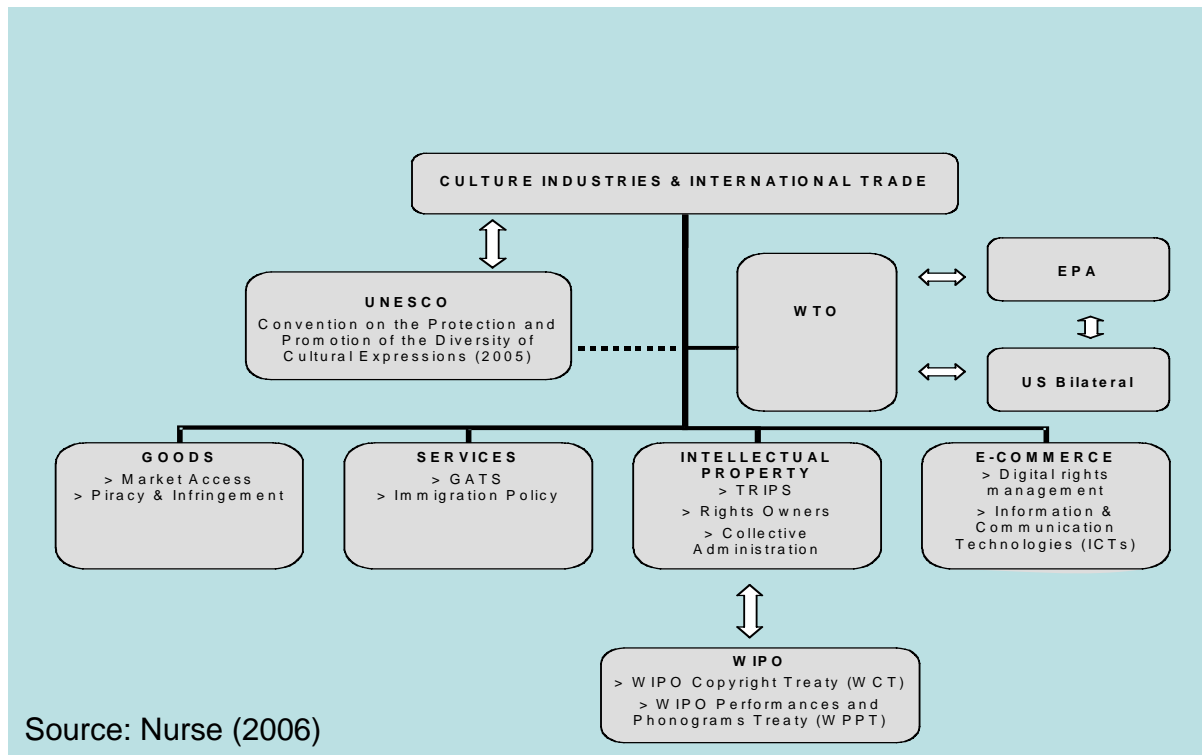
Figure 1:
Top Developing Countries: Balance of Trade
in Creative Goods, 2005 (US\$mn)
Source: UNCTAD 2008

Figure 2:
Small Island Developing States: Creative Goods,
Imports & Exports, 2000 & 2005 (US\$mn) Source: UNCTAD 2008



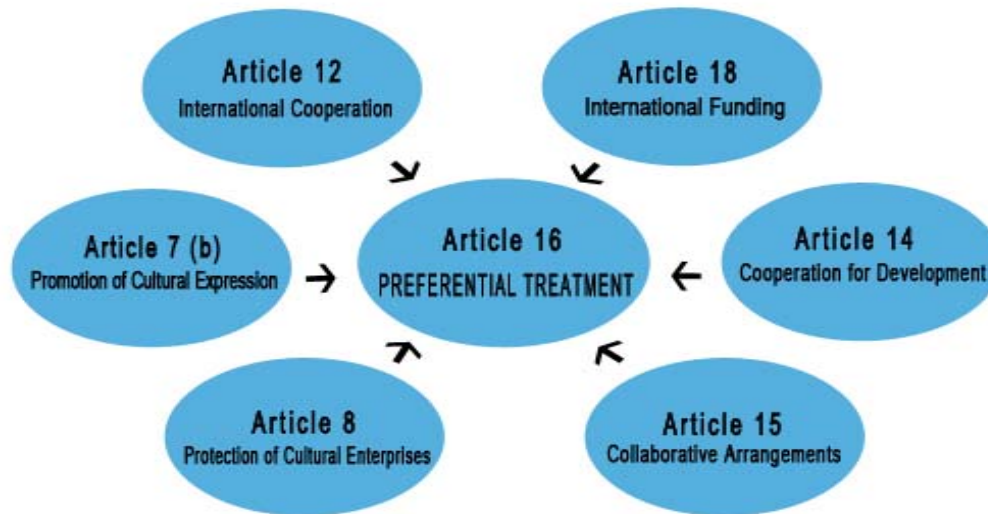
Developing countries, particularly SIDS, have a negative balance on cultural goods trade, with a few exceptions such as China, India and Turkey. Data on services and royalties income, if available, would improve the trade picture of some countries like those in the Caribbean.

International Trade Policy Context for Cultural Industries



The UNESCO Convention operates in a dynamic international trade policy context with competing and complimentary approaches to incorporating culture in multilateral and regional trade agreements (e.g. CARIFORUM-EU Economic Partnership Agreement). The Convention takes into account the obligations of signatories to other international agreements (Art. 20)

The UNESCO Convention and Article 16 on Preferential Treatment



Article 16 is one of a number of articles in the Convention that seeks to facilitate the growth and export of the cultural industries from developing countries. From this standpoint while Article 16 is of key strategic value, it should not be viewed as a standalone objective.

Article 16 on Preferential Treatment and WTO Compatibility and the EPA

- The WTO allows for preferential treatment in the following ways:
 - (i) GATT XXIV - regional integration through FTAs and customs unions and hence permits the granting of such preferences;
 - (ii) GATS II:2 - allows a WTO member to maintain a measure inconsistent with the MFN obligation and meets the conditions of the Annex on Article II Exemptions (e.g. co-production agreements in AV; and
 - (iii) GATS V which deals with economic integration as it relates to services.
- The EPA is WTO compatible and is of specific relevance in that it utilizes the UNESCO Convention as a starting point and thus is the first attempt to operationalize Preferential Treatment in the cultural sector. In broad terms the EPA facilitates:
 - Reciprocal market access commitments in entertainment services;
 - Cultural exchanges, collaboration and technical assistance through the *Protocol on Cultural Cooperation*

What Article 16 is about

Article 16 calls upon developed nations that are signatories to the Convention to grant preferential treatment to artists and other cultural professionals and practitioners as well as to facilitate the exchange of cultural goods and services from developing nations.

- the UNESCO Convention is a cultural cooperation agreement largely premised on “best endeavour” language and thus Article 16 does not generate firm commitments that are legally binding as in reciprocal trade agreements (e.g. EPA).
- Article 16 of the UNESCO Convention has the potential to convey some of the key benefits to developing countries that the EPA affords to CARIFORUM countries:
 - Exchanges, training, collaborations and technical assistance
 - Temporary movement of natural persons (i.e. artists and other cultural professionals and practitioners)
 - Audiovisual services (e.g. co-productions)

What Article 16 is not about

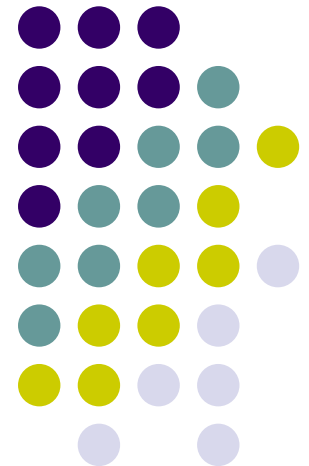
- The benefits of Article 16 are largely restricted to the areas of cultural cooperation (e.g. training, collaborations, exchanges, etc) as well as the temporary movement of natural persons but it is not extended to commercial trade in services.
- It is highly unlikely that the EU would be prepared to multilateralize preferences in the audiovisual sector under the EPA Cultural Protocol to countries outside the ACP grouping. The content regulations and the funding requirements may prove to be too burdensome.
- Article 16 and the Convention as a whole does not address the burgeoning trade in intellectual property and copyright as the focus is only on goods and services, particularly Mode IV movement of natural persons.
- Article 16 should not be viewed purely in international trade law terms and could include a recommendation for the establishment of an institution to implement preferential treatment through the promotion of “fair trade” in culture.

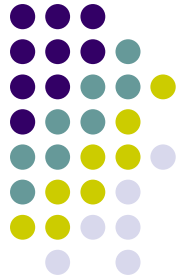
Convention on the Protection and Promotion of the Diversity of Cultural Expressions

Preferential treatment for developing
countries

Madhukar Sinha

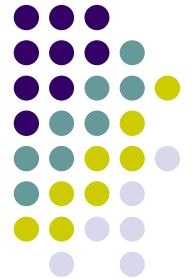
India





What the Article is

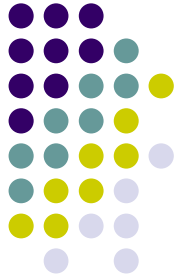
- A unique opportunity to ensure promotion and protection of cultural diversity by providing sustenance to cultural expressions
- A guideline to evolve access regimes for cultural expressions even outside trade context
- A chance for developed countries to contribute to maintaining cultural diversity by volunteering to give preferential treatment to developing countries in this field
- A focus on artists, cultural professionals and practitioners as flag bearers of diverse cultural expressions



What the Article is not

- Solely a trade instrument
- An enforceable directive towards preferential treatment based on coercion
- An attempt to undermine trade treaties and commitments made by countries therein

Issues in Cultural Exchanges and Case Studies



- General observations
 - Facilitation of movement of cultural persons and products necessary for easy exchange
 - Reciprocity in cultural exchanges on equal terms needed to develop possible markets for cultural products from developing countries
 - Sharing of expertise and experiences in cultural arena to promote and protect diversity of expressions

Issues in Cultural Exchanges and Case Studies



- Case study of the Film industry in India
 - Despite perceived strengths of large domestic markets and little reliance on exports, is susceptible to ignoring minority voices
 - Considerable help to sustenance of minority voices if given preferential treatment
 - Threat from Hollywood growing
 - Access to public funding under co-production agreements would enhance cultural exchange
- Case study of Yoga
 - Great potential as a way of healthy living since reduces dependence on curative medicinal applications
 - Vulnerability to misappropriation because Western models of Intellectual Property are not able to protect traditional knowledge and traditional cultural expressions
 - Preferential treatment in movement of professionals and practitioners would allow authenticity to practice and prevent incorrect application



Conclusions and Recommendations

- Preferential treatment
 - a framework for Co-operation not competition
 - to look beyond purely trade concepts of 'Special and differential treatment' and 'General System of Preferences'
 - to focus on artists, cultural professionals and practitioners in addition to cultural goods and services
- New paradigm on cultural exchanges needs to address
 - visa access
 - double taxation avoidance
 - sharing of experiences and expertise to help preservation of cultural diversity
 - intellectual property protection and enforcement thereof
 - protection against misappropriation of traditional knowledge and traditional cultural expressions



Conclusions and Recommendations

- Contours of preferential treatment may include but not be limited to:
 - Removing criterion of 'Economic Needs Test'
 - Special visa regimes for artists, cultural professionals and practitioners
 - More specialised institutions in Developed countries to prevent misappropriation of traditional knowledge and traditional cultural expressions from developing countries
 - Providing easy and inexpensive access to justice system for Intellectual Property rightsowners from developing countries in enforcing their rights against any infringement in developed countries



Convention on the Protection and the Promotion of the Diversity of Cultural Expressions

Article 16 :

**Preferential treatment
for developing countries**



What Article 16 is:

- A provision aimed at facilitating cultural exchanges (including trade);
- A new rule for cultural purposes in the international arena;
- A legal basis to allow developed countries (DC) to grant preferences to developing countries (DgC) in the cultural field with regard to:

Goods

Services

People



What Article 16 is not:

- An international norm to be used in isolation from other international instruments
- A mechanism on trade to be used independently of the WTO



Options for implementation of Article 16:

- Negotiation of cultural PT exploring all available:
 - . trade options (not limited to them)
 - . cooperation options
- Critical points: eligibility, reciprocity, graduation, rules of origin, conditionality



Two preferential treatment mechanisms to be explored:

- 1- WTO – compatible preferential mechanisms under multilateral rules:
 - Goods: GSP, DFQF (for LDC)
 - Services: schedules, MFN exceptions (co-production, co-distribution)
 - . Special priority to LDCs (waiver)
 - . People: mode 4 (artists, professionals)



Two preferential treatment mechanisms to be explored:

- 2- Preferential mechanisms under bilateral or regional agreements
 - Goods: elimination of tariffs
 - Services: elimination of barriers

 - Areas not covered by WTO: cooperation and partnership (co-production, artists' mobility)



Specific proposals:

- Bring discussion of implementation of Article 16 to WTO Committee on Trade and Development with the objective to raise awareness of DgC about objectives of 2005 Convention
- Negotiation of a waiver for cultural goods and services in the WTO
- Develop a central distribution agency to provide free access to music and films produced by DgC