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## Diversity of Cultural Expressions

2.IGC

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

**Second Ordinary Session  
Paris, UNESCO Headquarters  
8–12 December 2008**

**Item 8 of the provisional agenda:** Reports of the Experts on preferential treatment (Article 16 of the Convention)

In accordance with paragraph 5 of Decision 1.IGC 5B, the Annex to this document presents the experts' reports on Article 16 ("Preferential treatment for developing countries").

Decision required: paragraph 11.

1. The Conference of Parties, in Resolution 1.CP 6 adopted at its first session requested the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter referred to as “the Committee”) to draft the operational guidelines referred to in subparagraph (c) of Article 22.4 and subparagraph (b) of Article 23.6 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter referred to as “the Convention”), giving particular attention to, *inter alia*, the provisions of articles 7, 8 and 11 to 17 of the Convention, and to submit the results of its work to the second ordinary session of the Conference of Parties for consideration and approval.
2. As provided for in paragraph 5 of Decision 1.IGC 5B adopted by the Committee at its first ordinary session in Ottawa, the factual documents prepared by the experts were to be submitted to it for consideration at its second session in December 2008.
3. In accordance with Decision 1.IGC 7 adopted by the Committee at its first ordinary session, the Chairperson presented an interim report at the Committee’s first extraordinary session (24-27 June 2008) concerning the selection of experts and the terms of reference for the work requested (working document CE/08/1.EXT.IGC/7).
4. Following the withdrawal of Mr Eugene Mthethwa (South Africa) in July 2008, the Secretariat, in consultation with the Chairperson, called again upon the Parties to the Convention, via their Permanent Delegations to UNESCO, to provide names of acknowledged experts in the field of preferential treatment in their respective countries and regions before 1 August 2008.
5. By 1 August 2008, three Parties to the Convention had replied to this call.
6. The Chairperson held a meeting with the Secretariat on 4 August 2008 to select experts on the basis of the proposals put forward by the Parties. The selection was based on the same criteria as those used for the initial selection, namely a background and experience in the fields of both trade and culture, and nationals or residents of countries at different stages of economic development.
7. After consulting the members of the Bureau, the Chairperson recommended the appointment of two experts, Professor Mandla Makhanya (South Africa) and Professor Madhukar Sinha (India), thus taking the number of experts to seven instead of the six specified in Decision 1.IGC.5B.
8. On 1 October 2008, Mr Pierre Sauvé (Canada) notified the Secretariat that he was withdrawing. Given the time available, it was not possible to replace him.
9. It was also agreed at the Committee’s first extraordinary session that a second expert co-coordinator from a developing country, would be chosen among the experts already on the panel and would be invited to the Committee’s second ordinary session to present the reports jointly with the coordinator, Mr Pierre Defraigne (Belgium). Consequently, Ms Vera Helena Thorstensen (Brazil) was appointed by the Chairperson to attend this session as co-coordinator.
10. In accordance with Decision 1.EXT.IGC 7, prior to completion of the reports requested, the Secretariat organized a working session at UNESCO Headquarters on 11 and 12 September 2008 for the experts, the coordinator and the Secretariat. For reasons beyond their control, the experts from Canada and the European Union were unable to attend the meeting. The meeting minutes were sent to all the experts.
11. The Committee may wish to adopt the following decision:

**DRAFT DECISION 2.IGC 8**

*The Committee,*

1. *Having examined document CE/08/2.IGC/8 and its Annex,*
2. *Recalling Resolution 1.CP 6 of the Conference of Parties and Decision 1.IGC 5B and 1.EXT.IGC 7 of the Committee,*
3. *Decides that the examination of the draft operational guidelines relating to preferential treatment will be included in the agenda of its next session.*

# **ANNEX**

## **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 Note

This document presents six reports on preferential treatment for developing countries in the light of Article 16 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions prepared by six qualified experts, with proven expertise in the field of culture and trade, representative of different perspectives related to preferential treatment and coming from countries in different stages of economic development:

- Mr **Bilel Aboudi**, Deputy Director, International Cooperation and Cultural Industries Development, Ministry of Culture and Heritage Safeguard, **Tunisia**
- Mr **Edouard Bourcieu**, Directorate General Trade, European Commission, **European Community**
- Prof **Mandlenkosi Stanley Makhanya**, Pro-Vice-Chancellor, University of South Africa, **South Africa**
- Dr **Keith Nurse**, Director of the Shridath Ramphal Centre for International Trade Law, Policy and Services, University of the West Indies, **Barbados**
- Prof. **Madhukar Sinha**, Center for WTO Studies, New Delhi, **India**
- Ms **Vera Helena Thorstensen**, Economic Advisor to the Mission of Brazil in Geneva, WTO negotiations on trade policy issues, **Brazil**.

With a view to ensuring proper co-ordination throughout the process of the reports' preparation, two project coordinators were designated: Mr Pierre Defraigne, Executive Director of the Madariaga-College of Europe Foundation and former Deputy Director-General for Trade at the European Commission (2002-2005) and Ms Vera Helena Thorstensen, Economic Advisor to the Mission of Brazil in Geneva. They were assisted by Ms Evangelia Psychogiopoulou, assistant coordinator, Research Fellow at the Hellenic Foundation for European and Foreign Policy.

In accordance with the terms of reference for the reports (Document CE/08/1.EXT.IGC/7), the experts were to prepare a factual document, comprising: a) a definition of the notion of preferential treatment from the standpoint of the Convention; b) a general examination of the regulatory framework concerning preferential treatment, including the legal and institutional frameworks as well as existing preferential treatment mechanisms at national, bilateral, regional and international levels, concerning the mobility of persons and the circulation of goods and services; c) an exhaustive and factual case study of the country/group of countries under review, exploring existing bilateral, regional and international agreements and application mechanisms that make provision for preferential treatment, and covering different cultural fields; d) conclusions and recommendations regarding the application of preferential treatment to developing countries in the area of culture.

Therefore, in order to guarantee consistency and facilitate their examination by the Committee, the expert reports follow a harmonised structure, based on a uniform approach and methodology. The reports are divided into five common sections, each addressing different and complementary aspects of preferential treatment for culture.

Section A (**Introduction**) introduces the analysis, positioning Article 16 of the Convention in the international legal framework and discussing its relevance for the protection and promotion of the diversity of cultural expressions as well as for development cooperation. In Section B (**Concept of preferential treatment**) the experts present their views on how preferential treatment should be perceived from the standpoint of the Convention and analyse, where necessary, the differences between their understanding of the concept of preferential treatment within the meaning of the Convention and the definitions of preferential treatment used in other fora.

In Section C (**Legal and institutional framework concerning preferential treatment granted by/to the country/group of countries under study**) the experts inquire into the structures put in place for the provision of preferential treatment to developing countries, their origins, the main

objectives pursued and the principal actors involved in the process. They also examine the scope and extent of the preferential treatment granted and the form of preferential treatment measures. Analysis covers preferential treatment concerning the circulation of cultural goods and services and the mobility of artists and other cultural professionals and practitioners, taking into account both the commercial and non-commercial sectors.

Focus then shifts in Section D (**Analysis of existing agreements and preferential treatment mechanisms**) to an examination of existing agreements and practices regarding preferential treatment in the field of culture in the form of a case-study. Analysis builds on the selection of specific preferential treatment schemes, whether at the bilateral, regional or international levels, which, depending on availability of data, are studied in a thorough and detailed manner. Efforts are deployed to address different cultural fields and support analysis with qualitative and quantitative data.

In the final section E (**Conclusions and recommendations**), the experts draw conclusions on the basis of their findings and formulate a set of recommendations regarding the application of preferential treatment for developing countries in the light of Art. 16 of the Convention.

The reports offer a diverse of perspectives on preferential treatment for developing countries. While Section B presents a certain level of convergence of the authors' views on the concept of preferential treatment, Sections C and D, in particular, attest to the variety of the preferential treatment mechanisms used or needed in the cultural field, and reflect the authors' rich diversity of points of views and opinions. Thus, the reports represent a rich source for the Committee's debate and should serve as a sound basis for the Committee's deliberations on this item.

All reports are available in English and French. It is to be noted that the Annexes to the reports are presented only in the language in which they have been submitted to the Secretariat by the experts.

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

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

*Prepared by:*

**BILEL ABOUDI**

Deputy Director, International Cooperation and Cultural Industries  
Development, Ministry of Culture and Heritage Safeguard, Tunisia

This report has been prepared in October 2008 by Bilel Aboudi at the request of UNESCO Secretariat for the second session of the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions. The author is responsible for the choice and the presentation of the facts contained in this Report and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization.

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## Executive Summary

1. In reference to the decision of the Intergovernmental Committee of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereafter UNESCO Convention (2005)) for the elaboration of article 16 “**Preferential treatment for developing countries**” implementation guidelines, mainly for facilitating access of cultural goods and services, as well as artists and cultural professionals, this report is intended to provide *factual* information related to the concept of preferential treatment as expressed in article 16 and assessment for its applicability through the case study of Tunisia as a developing country, a Party to the convention since 2007.
2. The analysis methodology adopts a progressive approach, probing into the issue of preferential treatment implementation under the UNESCO convention 2005. First, an assessment of the relationship between the UNESCO convention (2005) and development scope, through the axes of the Cultural Diversity Programming Lens (CPDL) is performed. Secondly, the analysis of the concept of preferential treatment and its respective operational characteristics is made from two perspectives: the economic development perspective and the cultural development perspective. Thirdly, on the basis of issues raised and related to the conceptual and operational assessment of preferential treatment from different perspectives, a factual analysis of the case of Tunisia, as a developing country, is performed in two stages. The first stage consists of recognising the legal and institutional framework of preferential treatment provided to Tunisian cultural goods, services and artists and cultural professionals. The second stage attempts to assess the impact of existing preferential treatment mechanisms on Tunisian cultural exchanges through a trade agreement (EU association agreement) and a bilateral cultural cooperation agreement (with France). Accordingly, this methodology enabled the elaboration of the following recommendations:

### 3. **Recommendation 1: Elaboration of a definition for preferential treatment**

**The definition of ‘preferential treatment’ should be based upon a semantic approach and not necessarily on other sector definitions, such as the trade sector. In a cultural development approach, preferential treatment would denote *any explicit cultural policy objective, measures or mechanisms expressed by a developed country, which is targeting capacity building for the cultural sector of developing countries, and the access of their goods, services and artists and cultural professionals to its cultural sphere (market or activities).***

**Rationale:** In the case of this convention, preferential treatment plays a catalytic role for international cultural cooperation related to development objectives. In the case of trade, preferential treatment is a deviation from common obligations in international trade agreements. The fundamental priority of this mechanism is cultural development.

### 4. **Recommendation 2: Mechanism activation framework**

**The preferential treatment mechanism necessitates the identification of a favourable framework to ensure efficiency. This includes the elaboration of related criteria, such as eligibility, based on existing lists at WTO or UNCTAD for developed and developing**

countries. It also requires the establishment of rules of origin, which take into consideration different categories of cultural goods and services; definitions for artists and professionals; implementation of a graduation criteria based on a 'development approach' and not an 'adjustment approach'; and the connection of cultural policy objectives with criteria of conditionality, including convention principles such as the principle of *equal dignity and respect for all cultures*. Mechanism performance indicators are based upon the Cultural Diversity Programming Lens (CDPL) axes of interest.

**Rationale:** The specific nature of cultural goods and services and the cooperative spirit of article 16, demand the establishment of non-conflict raising criteria. Moreover, development-oriented performance indicators are derived from the Cultural Diversity Programming Lens, which enhances the integration of cultural policies within development programmes.

#### 5. **Recommendation 3: Mechanism tools**

One of the major mechanism tools is the review of the Florence Agreement and the related Nairobi protocol with a view to upgrading them to incorporate technological changes and new cultural products. Other tools include the elaboration of cultural and co-production agreements with explicit reference to capacity building and measures for temporary access to goods, services and artists and cultural operators.

**Rationale:** Cultural agreements appear to be a major tool in the execution of this mechanism. The review of existing multilateral agreements (i.e. the Florence agreement) and the elaboration of efficient cultural cooperation agreements with sector-specific agreements (i.e. co-production), establishes a new trend in international cultural cooperation and hence interaction with other international spheres, such as trade spheres.

#### 6. **Recommendation 4: Mechanism reinforcing activities**

Additional activities are required to accelerate the implementation of the preferential treatment mechanism. These include: the insertion of preferential treatment into developed countries' cultural policies; the inclusion of cultural industry development into developing countries' cultural policies; the promotion of CDPL in development project models at UNDP, WIPO or any other UN agency; and a review of cultural cooperation-related instruments at UNESCO.

**Rationale:** The implementation of the mechanism demands a structural and gradual change in practices related to cultural cooperation and cultural policies. Advocacy is essential to promote these changes at the multilateral level, through the review of cultural cooperation instruments and the adoption of cultural diversity development analysis tools.

#### 7. **Recommendation 5: Mechanism monitoring institutions**

A technical expert committee should be created, to be responsible for mechanism monitoring and implementation.

**Rationale:** From a results-oriented approach, the monitoring process is essential in order to determine the fine-tuning and implementation of the mechanism. It must ensure the efficient and successful execution of all related activities, in harmony with the other Convention

mechanisms. Assistance to member parties will be required because of the innovative nature of this approach in the cultural sphere.

## A. Introduction

8. In reference to the decision of the Intergovernmental Committee of the UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions (hereafter UNESCO Convention (2005)) for the elaboration of the article 16 implementation guidelines (preferential treatment for developing countries), this report is intended to provide factual information related to the concept of preferential treatment as expressed in article 16, and its applicability through assessment of the case study of Tunisia as a developing country, a member party to the Convention since 2007.
9. 'Preferential treatment' to developing countries as applied in international trade exchanges is known as 'special and differential treatment'.<sup>1</sup> Article 16 invokes a relationship with trade exchanges of cultural goods and services and also the mobility of artists and cultural professionals, raising the issue of categorizing developing and developed countries within this Convention.
10. In addition to trade-related issues, the integration of culture in development, with a particular focus on cultural industries and improvement of the participation of developing countries in international cultural trade, already figures on the agenda of other UN agencies, such as UNCTAD, UNDP and WIPO. Current international interest in these areas represents an opportunity for connecting article 16 mechanisms with current international efforts and relating them to the objectives of the Convention.
11. In fact, within the UNESCO Convention (2005), article 16 transforms development into a criterion of categorization among member parties, and implies the establishment of a differential status for developing countries vis-à-vis binding rights and obligations.
12. References to the category of 'developing countries' in the text of the Convention are presented in international cooperation-related articles or paragraphs:<sup>2</sup> International cooperation and solidarity (art.1(par.(i)),art.2 (principle 4), Cooperation for development (art.14), Collaborative arrangements (art.15), and International cooperation in situations of serious threat to cultural expressions (art.17). In consequence, with regard to measures or activities related to international cooperation mechanisms in the Convention, preferential treatment for developing countries is positioned as a strengthening mechanism, which endeavours to enhance participation.
13. The Universal Declaration on Cultural Diversity (UNESCO, 2001) included an action plan for the implementation of its principles towards the promotion of cultural diversity, encompassing the diversity of cultural expressions. The UNESCO Convention (2005) is among the proposed tools for its implementation. Accordingly, following an initiative of the UNESCO Bangkok bureau, an analysis framework for the concept of 'cultural diversity' in executed projects was defined, entitled 'Cultural Diversity Programming Lens' (hereafter CDPL). This aims to 'evaluate whether programmes, policies, proposals and practices promote and safeguard cultural diversity and therefore enhance work efficiency'.<sup>3</sup> This tool consists of 'a check-list or a list of criteria<sup>4</sup> and questions supplemented by indicators and other means of verification'.<sup>5</sup>

<sup>1</sup> See WTO-Doha Agenda paragraph 44 at:

[http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm#special](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#special)

<sup>2</sup> See Annex 4: Summary of the relationship of the terms used in article 16 to other convention articles

<sup>3</sup> See Annex 1: Integrating Cultural Diversity in programming (from UNESCO Bangkok)

14. The projection of the UNESCO Convention (2005) through the main axes of the CDPL<sup>6</sup> uses a semantic approach to distribute the Convention's content – mainly articles related to activities (measures) or specific considerations – through the topics expressed in the framework. This is intended to define the operational focus and scope of the Convention in terms of its major themes or subjects of interest. As a result, the classification of the themes expressed in the Convention through their concentration in the axes of the CDPL resulted in the following order of interest or actions:

**Table 1: Classification of topics of interest of the CDPL in the UNESCO Convention (2005)**

Rank	Axis of intervention (topics)	Number of mentioned actions or interest
1	Promotion of cultural industries and cultural goods and services	11
2	Dialogue and cooperation	9
3	International rights and national laws	7
4	Participation of all	3
5	Safeguarding cultural and natural heritage	3
6	Access and inclusion of all	2
7	Linguistic diversity with special focus on the mother tongue	1
8	Promotion of the positive value and benefits of a culturally-diverse society	1
9	Interactions between modern science and traditional knowledge	(no explicit reference is mentioned)
	<b>Specific topic: right for development</b>	
	Preferential treatment of developing countries	

Table 1 highlights the emphasis in the UNESCO Convention (2005) on the three following axes: *Promotion of cultural industries and cultural goods and services*, *Dialogue and Cooperation*, and *International rights and national laws*. The topic of '**Preferential Treatment of Developing Countries**' is a specific characteristic of the Convention. Other topics of the CDPL present in the Convention can be included at the operational level, complementing prior axes of interest.

15. From the cultural diversity perspective, the components of article 16 are well positioned in the three main axes of interest of the Convention, as reflected within the framework of CDPL.
16. The objective of article 16 to '*facilitate cultural exchanges*' relates to the axis of *Dialogue and Cooperation*; the grant of preferential treatment '*through the appropriate institutional and legal framework*' relates to the axis of *International Rights and National Laws*; and the scope consisting of '*artists and other cultural professionals and practitioners, as well as cultural goods and services*' is directly related to the axis of *promoting cultural industries, and cultural goods and services*.

<sup>4</sup> See Annex 2: Cultural Diversity Programming Lens, Topics, references and sub-topics (Questions and indicators)

<sup>5</sup> *Idem*

<sup>6</sup> See Annex 3: Projection of UNESCO Convention (2005) through CDPL (axes of interest)

17. This cultural positioning of article 16 gives rise to the issue of 'preferential treatment' in non-commercial sectors, such as cultural cooperation, public cultural policies and international cultural relations.
18. From a managerial perspective, the cultural diversity analysis exercise would entail the effort of introducing new and specific indicators related to CDPL, and establishing new operational mechanisms and tools in the cultural sector, at local and international levels. Such efforts will induce the development of new tools related *inter alia* to cultural management, cultural policy development, cultural dialogue evaluation, and so forth. These tools will result in the progressive shaping of the cultural sector's specific expertise, and the establishment of normative guidelines in international cultural relations and exchanges, including the relationship between developed and developing countries in this domain.
19. The analysis of the Tunisian case in this report will help to highlight existing possibilities and factual barriers if any, for the preferential treatment in the country's international cultural exchanges with developed countries, and the possible solutions within the Convention. Moreover, Tunisia represents a typical case for a segment of developing countries<sup>7</sup> with similar characteristics, which encourages the adoption of a multi-faceted mechanism of preferential treatment to developing countries.
20. In accordance with the above-stated preliminary analysis, this report adopts an operational approach, so as to contribute to accelerating the elaboration of guidelines for article 16, with two main objectives: *maximizing mutual benefits for developing and developed countries for preferential treatment in the cultural context*, and *enhancing the international implementation of this legal instrument*.
21. Firstly, 'preferential treatment' is analysed from a conceptual standpoint, linking article 16 to current preferential treatment mechanisms in trade exchanges, and probing its applicability in terms of components and scope in the cultural field, within the framework of the UNESCO Convention (2005) objectives and axes. Secondly, an analysis of the regulatory and institutional framework of current 'preferential treatment' granted to Tunisia is undertaken, including mobility of artists and cultural professionals and practitioners, and mechanisms with regard to the circulation of cultural goods and services in the commercial and non-commercial spheres. Thirdly, a *de facto* evaluation of regional and bilateral preferential treatment mechanisms granted to Tunisia is presented, with a view to determining their impact according to cultural sector specific indicators.
22. Finally, an overall evaluation of the preferential treatment issue as presented in the Convention and as currently related to existent practices is made with the objective of elaborating proposals either to improve current mechanisms, and/or to create new ones.

## **B. The concept of preferential treatment**

23. Article 16 represents an internal process in relation to international cooperation mechanisms as expressed in the Convention. Moreover, it is related to the CDPL axis of *promoting cultural industries, and cultural goods and services* and the axis of *Dialogue and Cooperation*, including the axis of *International rights and national laws*.

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<sup>7</sup> North Africa, Arab Maghreb Region countries

24. The axis of *promoting cultural industries, and cultural goods and services* recalls the economic nature of the cultural goods and services and raises the commercial characteristic of 'cultural exchanges' as expressed in Article 16. From this standpoint, the concept of 'preferential treatment' is directly related to trade mechanisms, considered as conveyors of economic development.
25. The axis of *Dialogue and cooperation* restrains the economic nature of cultural goods and services through the introduction of the cultural, non-commercial, characteristic of 'cultural exchanges' as 'cultural activities, goods and services'. Within the framework of the intended preferential treatment mechanism this *refers to those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have* (Article 4, point 4). As a result, the concept of 'preferential treatment' positions itself within cultural cooperation mechanisms in relation to cultural development within international and local cultural dynamics.
26. Analysis of the concept of 'preferential treatment' is based upon economic development and cultural development perspectives. The economic development perspective includes 'preferential treatment' as applied in trade agreements and in relation to trade of cultural goods and services, covering aspects related to the development of cultural industries in developing countries. The cultural development perspective includes the identification of cultural international agreements and cultural cooperation practices that implicitly or explicitly endorse a 'preferential treatment' concept toward developing countries in terms of exchanges of cultural goods and services, and also of mobility of artists and cultural operators. Analysis from both perspectives aims to improve levels of applicability and interchangeability within the scope of the Article 16 mechanism.

### **B.1 The economic development perspective**

27. In international trade fora, preferential treatment for developing countries is referred to as '*Special and Differential treatment*'. The perception of developing countries regarding such treatment was expressed in their proposal presented at Doha:

*'Special and Differential treatment was based on the recognition that the developing countries were placed differently in international trade and that these difficulties as well as the imperative of promoting social and economic development required that the developing countries be treated differently in the Multilateral Trading System... One guiding principle for S&D was an acceptance of deviation from the general rule of quid pro quo or reciprocity for the developing countries.'*<sup>8</sup>

As can be observed, the establishment of preferential treatment in the trade sphere is based on the demand of developing countries for *a deviation from the general rule of international trade liberalization agreements at the WTO*. The argument presented is the existence of structural inequalities between developing and developed countries, which are both parties to the same trade agreement.

28. In the context of the UNESCO Convention (2005), preferential treatment is not targeting a deviation from the rules of the Convention; rather it was inserted as *a catalyst tool* for parties to achieve the objectives of the Convention and to reaffirm the link between development and culture, in the context of the protection and promotion of the diversity of cultural expressions.

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<sup>8</sup> WTO document WT/GC/W/442

29. In trade exchanges, international, regional and bilateral trade agreements are based upon the progressive liberalization of market access for goods and services between state parties so as to facilitate and increase trade exchanges. The analysis of cultural goods and services in trade exchanges is based on the following taxonomy of cultural goods and services:

**Table 2**  
**Taxonomy of cultural goods and services**

<b>Software</b>	<b>Hardware</b>	
<p>Goods that embody the creativity of artists .The scope of items falling within this definition is most clear for 'old media', such as books, paintings and statuary. Some 'new media' such as audio and video recordings are treated as goods, but also share some characteristics of services .</p> <p>Trade in cultural software goods tends to be relatively free, with tariff barriers being low or zero in many countries. The principal trade-related issue in this field concerns protection of intellectual property rights.</p>	<p>The 'tools of the trade' for the creation , reproduction and dissemination of cultural software. Examples include some items that are largely or exclusively used by cultural industries (e.g. artists' supplies and musical instruments) and others that are used by other industries or consumers (e.g. unrecorded media, paper, computers, television sets, and printing presses).</p> <p>This is the least controversial area of cultural trade, although many countries continue to impose tariffs on trade in these goods.</p>	<b>Goods</b>
<p>Cultural performances – music, dance ,theatre, etc. – can be divided into two general categories. Live performances are ephemeral, and can generally be traded across borders only if either the audience or the performers travel. Performances that are recorded and/or broadcast are much more easily traded .</p> <p>As a general rule, it is the reproducible performances that account for the greater share of both trade and controversy.</p>	<p>The most important ancillary services for cultural trade are those related to the dissemination of cultural software. These include bookstores, libraries, museums , motion picture projection, radio and television transmission, and so forth .</p> <p>These are among the most sensitive cultural sectors, with many countries establishing – and wishing to retain – restrictions on the ownership or operation of such facilities by foreign providers.</p>	<b>Services</b>

Source: *Treatment of Cultural Goods and Services In International Trade Agreements*, Van Grastek, 2001

### ***Preferential treatment Mechanism: Description and Principles***

#### **Description**

30. Preferential treatment takes place through measures, at the level of the developed country, enabling mutual and asymmetrical liberalization for modes of market access with the developing country, either for goods through the reduction of customs trade tariffs and non-tariff trade barriers, or for services through the adoption of new regulatory and legal measures facilitating access of services through different modes (mode (1) Cross-border, mode (2) Consumption abroad, mode (3) Commercial presence, and mode (4) Presence of natural persons), with non-reciprocity of implementation, and including a transitional period.
31. At multilateral trade agreements, represented by the WTO, preferential treatment to developing countries is expressed through several provisions enabling deviation from common obligations:



- For GATT, through the application of the enabling clause (of 1979), as executed through Generalised System of Preferences schemes (GSP schemes), and enabling non-reciprocal tariff reduction or unilateral preferences through regional or bilateral trade agreements.
- And for GATS, introducing transitional periods and technical assistance, and mainly the exemption from the Most-Favoured Nation Clause, whenever an economic integration agreement is implemented with developing countries (Article V of GATS).

## **Principles and applicability in the UNESCO Convention (2005)**

32. From current practice in international trade relations, the preferential treatment mechanisms for developing countries consist of the following operational principles:
- *Eligibility* (who can benefit from the preferential treatment)
  - *Reciprocity* (in terms of reaching the same levels of tariffs on both sides)
  - *Graduation* (the point until when preferential treatment is available)
  - *Rules of origin* (how to determine the national origin of products (goods or services), or natural persons as to benefit from the preferential treatment)
  - *Conditionality* (prerequisites or other needed conditions to benefit from the treatment mechanism).

These criteria are also interconnected in terms of their scope. For example, defining the eligibility criteria will interfere with the graduation criteria because the latter include an evaluation based on the initially defined eligibility criteria. This interconnection calls for the adoption of measurable criteria to determine the rate of change.

### ***Eligibility***

33. The eligibility criteria used in trade spheres are based upon classifications for developing countries adopted by international agencies at the WTO and UNCTAD. For the case of the UNESCO Convention (2005), the classifications for developing and developed countries, can be based on already existent resources, where the criteria of classification are based on economic indicators or a country's self-declaration.
34. In addition, the eligibility criteria for preferential treatment in this Convention can also include other criteria. For example, measures related to article 8 in the Convention aimed at situations of serious threat to cultural expressions (art.17) can be included in the eligibility criteria and even prioritized.
35. It must be noted that the eligibility criteria must not be complex, and should be based on transparent and objective indicators, so as to guarantee equal treatment for all possible participants and decrease possible sources of conflict and misapplication.<sup>9</sup>

### ***Reciprocity principle***

36. In reference to the enabling clause as expressed in the GATT 1979 declaration, developing countries were given the right to not grant reciprocal commitments to developing countries, in relation to their preferential treatment.
37. Moreover, from the perspective of cultural industries development, the access of cultural goods and services to the developing country is related to the existing level of local cultural industries and their capacity for producing and disseminating cultural expressions. At the nascent stage, the application of non-reciprocity in this context is coherent with the objective of developing local cultural production.

### ***Graduation principle***

38. As is the case in the trade sphere, the graduation principle means that preference given to a developing country will be eroded when it reaches a certain level of economic development. In fact, developing countries consider that due to this graduation principle, as practiced in the WTO or through GSP schemes, preferential treatment has shifted

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<sup>9</sup> In relation to current rising issues of eligibility criteria for SDT at WTO, see *Special and Differential Treatment of Developing Countries in the World Trade Organization*, Peter Kleen and Sheila Page, 2005

from being a '*development tool*' to becoming an '*adjustment tool*',<sup>10</sup> raising issues of adjustment costs, whenever the preference system is at end. Moreover, the criteria used for graduation are based on economic indicators and create a more intense environment of trade negotiations, linked to the problematic classification of 'developed' and 'developing countries'.<sup>11</sup>

39. For the UNESCO Convention (2005), development is proposed as a criterion of eligibility for this mechanism. Therefore the graduation principle can be implemented on gradual scopes of preferences, where there is a minimum granted preference based on specific needs of the concerned developing country (for example, poverty reduction in rural areas through crafts and traditional knowledge product development,<sup>12</sup> or situations of serious threat to cultural expressions (art.17)). The graduation level for this Convention need to evolve in terms of the new needs of developing countries, and incorporate a country-by-country or issue-by-issue approach, so as not to become a source of conflict between parties to the Convention.

### **Rules of origin**

40. As defined in the economic context, Rules of origin (ROO) are the mechanism by which circulating goods or services from country to country are conferred an economic nationality. The process of defining the origins of certain goods is inserted in free trade agreements and GSP schemes, in order to determine whether the products of the recipient country products are eligible for the established preferential treatment in the donor country, referred to as 'preferential origin'.
41. The modalities and criteria used to determine the rules of origin are based on several data, among them the composition of the product and its transformation cycle (value added). In relation to currently used rules of origin in FTAs, these are influenced by EU FTAs and the NAFTA agreement.<sup>13</sup> To determine the origins of cultural goods and be able to benefit from preferential treatment, the analysis of the criteria depends on the nature of the cultural goods or services
42. **For hardware cultural goods**, the current applied criteria are based upon: the existence of the whole production process in the beneficiary country, or substantial transformation criteria (change in tariff position in HS (Harmonized system) nomenclature, percentage of the value added resulting from transformation, and the use of a specific process during the transformation).
43. **For software cultural goods**, which are directly related to the definition of cultural goods in the UNESCO Convention (2005), such as movies or music recordings, the determination of origin can be directly related to **the nationality of the copyright owner of the cultural product**. For example, the copyright in a Tunisian book is owned by a Tunisian author. Moreover, a certificate of copyright ownership from the collective management organization in the beneficiary country can be introduced. Emphasis on copyright ownership can induce a better level of registration for cultural productions of the developing country. In cases of co-produced cultural products, the nationality of the product can be determined in specific co-production agreements that may include direct access on both markets, without any need for a mechanism of rules of origin.

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<sup>10</sup> See Global issue paper, No.18: *Special and differential treatment for developing countries*, Thomas Fritz, Heinrich Boll Foundation.

<sup>11</sup> *Supra note 10*

<sup>12</sup> See PRODECOM Project at (<http://www.chbeauxarts-prodecom.org/label/etudelabel.htm>)

<sup>13</sup> See introductory note on Rules of Origin / Trade in north Africa / 21<sup>st</sup> meeting of the intergovernmental Committee of Experts/ Rabat/Morocco 4-6 April 2006 (UNECA)

44. **For hardware cultural services**, which represent distributing units of the value chain of the cultural sector, mode of access is based upon investment. Definitions of rules of origin for certain investments are included in bilateral investment agreements (i.e. nationality of the investor, capital percentage of the company, headquarters place etc.) and can be used for preferential treatment of this mode.
45. **For software cultural services**, which include cross-border cultural performances, assigned rules of origin can also be based on **copyright ownership, the percentage of performers which are nationals of the benefiting country, and the nationality of the cultural company**. Concerning broadcasting of such cultural performances, these are based on a mutual agreement between the broadcaster and the owner of the performance, which may not require any rules of origin.
46. Other possibilities for creating a flow of certain cultural goods between countries include **the adoption of a specific label that benefits from a preferential treatment**. The project PRODECOM<sup>14</sup> in the crafts and heritage domain has suggested the elaboration of a label entitled '*Development related Cultural Products*'<sup>15</sup> which would benefit crafts resulting from a development-oriented activity in a developing country, from preferential treatment in terms of market access and better consumer awareness. Such ideas can be introduced in this context as cultural expressions directly related to development.
47. Concerning the access of artists and cultural professionals and practitioners, mutual qualifications and status recognition mechanisms and nationality criteria can be implemented between developed and developing countries to establish the framework for rules of origin.

### **Conditionality**

48. Conditionality is applied in trade preferential treatment mechanisms to allow other non-trade criteria to gain access to the treatment (for example environment protection criteria). In relation to the UNESCO Convention (2005), conditionality criteria can be linked to the guidelines in article 2, namely the following principles:

**Principle of respect for human rights and fundamental freedoms**: where the benefiting country shows its enforcement for this principle and its adherence to international instruments.

**Principle of equal dignity and respect for all cultures**: This principle is related to the **cultural content to be facilitated in the preferential exchange mechanism**, where it must be bound to this principle and in harmony with intercultural dialogue and tolerance values.

**Principle of sustainable development**: The exchanged cultural products, services and artists, cultural professionals and practitioners are situated within a development/culture sector-oriented policy. This would encourage the insertion of sustainable development into cultural policies.

49. The economic characteristics necessary to ensure the trade flow of cultural goods and services are related to the supply-side capacity of the developing country (in terms of production volume of cultural goods and services) and also to exogenous factors, such as: *the economic sizes of the supplying country and the consuming country, the differences or similarities of both countries' languages, the existence of past colonial relations, and the level of consumer addiction to a typical cultural good*.<sup>16</sup> Moreover, the

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<sup>14</sup> Supra note 12

<sup>15</sup> Original name: 'Produits Culturels de Développement'

<sup>16</sup> Bilateral Trade of Cultural Goods, A.Disdier, S.H.T. Tai, L. Fontagné, T. Mayer, *CEPII, No. 2007 – 20, November* (at <http://www.cepii.fr/anglaisgraph/workpap/summaries/2007/wp07-20.htm>)

quality of the cultural goods and services and the qualifications of artists and cultural operators, including technical know-how, represent structural prerequisites for better supply in cultural trade. The development of supply-side capacity for cultural products and services is crucial in order to benefit from any existing preferential treatment.

## B.2 The cultural development perspective

50. The cultural development perspective is related to the analysis of measures and practices in cultural policies and cultural international agreements that can be identified as examples of preferential treatment toward developing countries.
51. At the multilateral level, the efforts of UNESCO to facilitate cultural exchanges – basically the flow of cultural goods – were initiated in 1950 with the adoption of the Florence agreement, intended to reduce customs tariffs for the free international flow of cultural goods. This agreement was later reinforced by the 1976 Nairobi Protocol, which added a new list of cultural goods that could benefit from the implemented mechanisms. Moreover, it should be noted that article VI, paragraph (b) of the Nairobi Protocol emphasized the encouragement of the flow of cultural '*objects and materials*' produced in developing countries. Article VII, paragraph 10, of the same protocol implemented a safeguard measure for developing countries, allowing them to suspend or limit their obligations in the protocol according to perceived threats to their nascent domestic industries (including cultural industries). The Florence agreement and its Nairobi protocol were notified by UNESCO to the GATT agreement.
52. Although trade in goods mechanisms were used to encourage exchange of cultural goods, the UNESCO effort incorporates such exchanges while working towards international cultural development. As a result, the Florence and Nairobi agreements can be recognized as existing mechanisms for multilateral application of preferential treatment in cultural international relations. On the other hand, the current scope of both agreements comprises only cultural goods, and has not evolved to take into account technological changes or new modes of supply of cultural products and services<sup>17</sup> (i.e. magazines and newspapers via internet). The revision of both agreements in conjunction with the implementation of article 16 is essential to ensuring their integration within the mechanism of preferential treatment.
53. Temporary access to cultural goods, services and artists and operators, and the existence of financial resources allocated for the encouragement of artist mobility or developing a country's cultural sector (for example, preferential prices for advertising in public media, quotas for developing countries films), can be recognized as examples of preferential treatment within the framework of cultural cooperation agreements.
54. In fact, the insertion of a developing country's cultural sector needs into the cultural policy of another developed country is a *de facto* expression of preferential treatment in terms of cultural cooperation. However, a further analysis of the application of preferential treatment in cultural agreements and donor countries' cultural policies would raise the following issues:
  - ***Which criteria should be used to determine the existence of preferential treatment towards a developing country compared to other cultural agreements with other countries?***
  - ***In cases where current cultural cooperation programmes and activities of a developed country toward another developing country are recognized as***

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<sup>17</sup> 'UNESCO's current main priorities in communication, information and culture', by Abdul Waheed Khan, Assistant Director-General for Communication and Information, UNESCO, Distripress Council Meeting, Paris, March 12, 2007.

*examples of preferential treatment, would this result in a rise in demand for identical treatment from other developing countries that do not enjoy such programmes or activities? (as applying MFN clause in cultural agreements)*

- *If, under article 16, developed countries were obliged to create programmes and activities for cultural development in developing countries, would such obligations undermine the sovereignty of countries to establish their cultural policies as expressed under article 5 (1)?*
- *Does article 5 (2) of the UNESCO Convention (2005) imply the re-evaluation of existent cultural agreements from the perspective of consistency of preferential treatment for developing countries?*
- *Can the elaboration of multiple cultural agreements with preferential treatment clauses lead to the rise of new regional entities based on cultural integration (culturally integrated regions)? (In analogy with economically integrated regions)?*

55. The above issues demonstrate the importance of international cultural agreements to the application of preferential treatment within the scope of cultural development. The reinforcement of effective cultural agreements, based on the objectives of article 16 – and in return, their impact on the formulation of cultural policies in the concerned countries – is another possible way to strengthen the international impact of the UNESCO Convention (2005).
56. The insertion of measures into cultural agreements related to the development of cultural industries, the provision of ‘movement funds’ for artist mobility and visa facilitation, and the temporary access of cultural goods and services for cultural purposes, can utilize the preferential treatment criteria as represented in the principles of section B.1: the economic development perspective.
57. Moreover, the cultural development perspective can endorse the CDPL approach for development-culture links, relying on qualitative and quantitative indicators for each axis to monitor the performance of the preferential treatment mechanism (i.e. the number of ratified culture-related international instruments, number of cultural agreements, number of co-production agreements, GNP percentage of cultural industries, etc).

### **C. The legal and institutional framework concerning preferential treatment granted to Tunisia**

58. This section analyses the regulatory and institutional framework of preferential treatment granted to Tunisia at the bilateral, regional and international levels with developed countries. The analysis will include the identification and description of the legal and institutional framework, if any, for the scope of preferential treatment in article 16, the circulation of cultural goods and services, and the mobility of artists and cultural operators. In addition, current Tunisian efforts to develop cultural industries and external market access are presented within the framework of the Tunisian trade policy. The scope of analysis includes both the commercial and non-commercial spheres, covering cultural agreements, and any other agreements in harmony with the objectives of preferential treatment in the context of the Convention.
59. As far as trade-related preferential treatment with developing countries is concerned, Tunisia benefits from preferential treatment at the international level within the WTO, at

the regional level with the EU<sup>18</sup> and in the EFTA Area, and at the bilateral level with two countries members of the UNESCO Convention (2005): Canada and New Zealand. The existence of other non-trade issues related to preferential treatment within the scope of article 16 will be also addressed.

### **C.1 Multilateral level:**

60. Tunisia has been a member of the WTO since its foundation in 1995, and is a signatory to the GATT, GATS, TRIPS and TBT agreements, but not to pluri-lateral agreements. As a developing country, it has the right to benefit from the existing 155 provisions of preferential treatment in WTO agreements, concerning the following categories:<sup>19</sup>
- provisions aimed at increasing trade opportunities
  - provisions aimed at safeguarding the interests of developing countries
  - flexibility of commitments
  - transitional periods
  - technical assistance.
61. The WTO agreements, as ratified by Tunisia in 1995, form the regulatory framework for these preferential provisions. Responsibility for implementation of such preferences lies within the specialized bodies of the WTO, including negotiation sessions. In Tunisia, the Ministry of Trade and Handicrafts ensures liaison with WTO through national committees, where all public, private and para-public (i.e. professional) unions are represented.
62. Irrespective of whether all these provisions are used or not, the most effective for the scope of this study remains the Enabling Clause of 1979, as integrated within the GATT agreement. Despite its current limitations and obstacles,<sup>20</sup> it enables Tunisia to benefit from General System of Preferences schemes, as established through UNCTAD.<sup>21</sup>
63. The Ministry of Trade and Handicrafts and the Ministry of Finance (General Direction of Customs) are responsible for the coordination of these GSP schemes with donor countries. Execution takes place at the bilateral level (discussed later in this section).
64. Within the framework of its cultural trade policy, Tunisia has taken MFN exemptions in GATS for the co-production of films (bilateral, governmental framework agreements on the co-production of films – existing or future) in order to promote cultural links between the countries concerned. Moreover, it has no commitments in any field related to cultural services.
65. Tunisia has positioned its cultural industries from the standpoint of economic development objectives, which include export and investment development (such as FDIs), and job creation opportunities. The cultural industries development programme was incorporated within the 10th social and economic development plan (2002–2006) and continues into the 11th plan (2007–2011). Sectors were identified and prioritized according to their expected potential for exports, foreign investment and labour attraction:
- The film industry (all chain components included)

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<sup>18</sup> Since Jan. 2008, a free-trade zone is in force between EU and Tunisia for trade in goods (after 12 years as a transition period). For the purpose of this study, the previous preferential treatment mechanism is presented for analysis.

<sup>19</sup> See WTO document: WT/COMTD/W/77

<sup>20</sup> Supra note 7

<sup>21</sup> See UNCTAD GSP Schemes and manuals (at [www.unctad.org](http://www.unctad.org))

- The publishing industry (with focus on book publishing)
- Cultural heritage development (integration in cultural tourism and local development projects)

66. Interest in integrating cultural industries within Tunisian trade policy objectives began in 1994, with the inclusion of cultural industries in the Investment Incentives Code (IIC) to promote national and foreign investment in these sectors (**Box 1: List of cultural industries in the IIC**).

**Box 1: List of cultural industries in the Investment Incentives Code (IIC) of Tunisia**

- Audiovisual, cinematographic and theatrical production
- Films projection (cultural and social characteristic)
- Preservation and development of historical and archaeological monuments
- Museums
- Libraries
- Graphic arts
- Music and dance
- Fine arts
- Video recording and photography
- Arts exhibition spaces
- Cultural centres
- Cultural fairs
- Theatre companies
- Book publishing

67. The IIC grants fiscal (i.e. tax exemptions) and financial incentives (i.e. direct subsidies) to cultural industries. These incentives are applied according to the nature of investment ranging from being 'resident' (general regime) to 'non-resident' enterprise, direct or portfolio aspects, and in relation to 'wholly exporting' activities (free zone regime). This regime of investment incentives is being notified to WTO within the framework of Agreement on Subsidies and Countervailing Measures.
68. In addition, cultural industries are eligible to benefit from existent mechanisms for export promotion through the *fund for the promotion of exports* (Fonds de promotion des exportations, *FOPRODEX*), the *fund for the access of export markets* (Fonds d'accès aux marchés d'exportation, *FAMEX3*), and the *Guarantee fund for international commerce*. The utilization rate of these mechanisms by cultural enterprises remains low, mainly due to low supply or limited awareness among cultural enterprises of the existence of these opportunities.
69. Tunisian trade policy has also encouraged investment in cultural industries (goods or services), through the replacement of activity authorization certificates with simple declaration of activity exercise through the signature of a book of clauses (cahier des charges). Currently, with the new law for investment facilitation in 2008, the minimum capital requirement has reached as low as 1000 TND (eq. US\$833). The foreign investment requirements for a company capital share higher than 50% still fall under the auspices of the High Investment Commission (commission supérieur des investissements) for authorization.
70. Moreover, several measures have been introduced aimed at increasing the economic dynamic of the cultural sector:



- The integration of cultural industries in national upgrade programmes of the service sector (National Council of Services Activities).
  - The inclusion of capacity building in cultural cooperation agreements.
  - The decrease of import tariffs related to equipment for cultural production.
  - The implementation of specific sector financial mechanisms (i.e. guarantee funds for cultural industries, with the OIF)
  - The facilitation of commercial exploitation of cultural sites, with contractual clauses related to cultural heritage development.
71. From an economic perspective, Tunisian cultural sector activities, as expressed in the IIC, represent a high level of market access in terms of investment. Moreover, the sector benefits from public subsidies supporting local cultural production.
72. With regard to mobility of artists, cultural professionals and practitioners, this is in direct relation to mode 4 of market access in GATS, whereby Tunisia is seeking more binding commitments for overall services at the multilateral or regional level.
73. According to a WTO trade policy review report, even in the absence of a specific regime in developing countries for movement of natural persons means, existing structural obstacles still hinder Tunisia's capacity to export services under normal conditions. This is largely due to the visa mechanisms applied for all types of professionals and the absence of transparent criteria. Moreover, mutual qualification recognition mechanisms for professionals should be reviewed, so as to accelerate the possibility of encouraging the movement of natural persons. There is no preferential treatment for mobility of artists, or cultural professionals and practitioners for Tunisia at the multilateral level.
74. The institutions responsible for the execution of cultural sector trade policy include the following actors:

Public sector:

- Ministry of Culture and Heritage Safeguarding (policy priorities and objectives)
- Ministry of Trade and Handicrafts (liaison with WTO and trade negotiations)
- Ministry of Finance (customs, and guarantee fund management)
- Ministry of Development and International Cooperation (foreign investment and bilateral/regional investment agreements, development plan)
- Ministry of Industry, Energy and SMEs (Agency for the Promotion of Industry, incentives provision)
- Ministry of Tourism (coordination for development of cultural tourism).

Para-public sector (NGOs):

- Union of Tunisian publishers
- Syndicate of Movie producers

Other processes: National consultations on several sectors (publishing, music, theatre)

## **C.2 Regional level**

75. At the regional level, Tunisia has an association agreement with EU and a free trade Agreement with EFTA.

### **Preferential treatment within the EU association agreement**

76. Within the context of the Barcelona Declaration (1995) objectives,<sup>22</sup> namely: 'to turn the Mediterranean into a common area of peace, stability and prosperity through the reinforcement of *political dialogue and security, an economic and financial partnership and a social, cultural and human partnership*', Tunisia has concluded an association agreement with the EU. The agreement entered into force in 1998, with the objective of creating a free trade area for goods between the parties by 2008. The agreement contains articles concerning cultural cooperation (article 74), discussed later in this section.

### **Trade-related mechanisms**

77. From a trade perspective, the agreement's objective is to reach reciprocal liberalization of trade of goods<sup>23</sup> by 2008. In order to reach these objectives, the agreement has established the gradual liberalization of goods tariffs over a period of 10 years, starting in 1998. During a transitional period, Tunisia has benefited from a preferential treatment mechanism that enabled the progressive dismantling of customs tariffs for imports from the EU,<sup>24</sup> without reciprocity requirements.

78. Tunisia agreed to proceed with a gradual decrease in customs tariffs for four different lists of products. The classification of goods in these lists was based on the percentage of Tunisian total imports from the EU as of 1994. (List 1: 12% of volume, list 2: 28% of volume, list 3: 30% of volume and list 4: 29% of volume). Cultural goods (hardware and software goods) in the association agreement benefit from low and/or absent customs tariffs for market access (i.e. films are 0% tariff).

79. The regulatory framework for the preferential treatment mechanism is based upon:

- The association agreement
- The decisions of the Association Council
- The action plans adopted by the EU for Tunisia (as programmes for Euromed partners).

80. The monitoring of these mechanisms is performed by the Association Committee in cooperation with other specialized committees, such as the Customs Cooperation Committee (article 40 of the association agreement).

81. Although the association agreement included trade in services, the sections related to services had only GATS-related levels of liberalization, with a *future meeting* clause for further liberalization of services. Since 2003, the EU has begun negotiations for the liberalization of trade in services with EUROMED countries, including Tunisia. Other services were included (financial services, telecommunication and information technology) and a cooperation approach was adopted as to approximate standards and legal framework between both parties in these sectors. Neither cultural services, nor mobility of artists and cultural operators were included in the agreement.

### **Non-trade-related mechanisms**

82. The association agreement with the EU included cultural cooperation clauses (title IV/ social and cultural cooperation / Chapter V cultural cooperation article 74). Point (c) stipulates that: '*cultural cooperation programmes already under way in the Community or in one or more of its Member States may be extended to Tunisia.*'

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<sup>22</sup> See: <http://europa.eu/scadplus/leg/en/lvb/r15001.htm>

<sup>23</sup> *Idem*

<sup>24</sup> See Annex 5 for trade statistics Tunisia-EU

In cultural terms, the possibility of extension of participation is favourable for Tunisia in terms of cultural cooperation, which increases opportunities for temporary access for its goods, services and artists, and cultural operators to the EU cultural sector.

83. The neighbouring action plan for Tunisia (2007–2010),<sup>25</sup> included in its cultural cooperation section the following activities, as stated in points 75 (**improve cultural cooperation**) and 76 (**create an environment conducive to cooperation and the movement of cultural and audiovisual products and services**):

- *increase the circulation of cultural production*
- *develop the capacity of the Tunisian cultural industry to integrate into EU distribution circuits.*

These two points illustrate a primary shift in cultural cooperation between Tunisia and EU toward the enhancement of Tunisian cultural industries. It is an example of new trends in cultural cooperation agreement focusing on capacity building objectives. The cultural cooperation mechanism with the EU is mainly based on regional programmes, including bilateral cooperation with EU member parties.

84. The cultural cooperation programmes executed on a regional basis include all Mediterranean partners. Participation in these programmes is based upon predefined criteria for each project proposal, and characterized by the presence of a network of actors as project stakeholders (EU and Non-EU Mediterranean countries). The European community has established the following regional programmes for cultural cooperation.

85. **Euromed Heritage:**<sup>26</sup> dedicated to projects related to heritage development in the Mediterranean region. This programme consists of several phases with evolving objectives. The last phase of the programme is *Euromed Heritage* with the objective of *facilitating the appropriation of cultural heritage by populations themselves and to favour the access to education and knowledge of cultural heritage*. Previous phases I (1998–2002), II (2002–2007) and III (2004–2008) focused on the following objectives: the creation of heritage inventories and the facilitation of networking between museums and other cultural institutions, and the increase of Mediterranean countries' capacities in managing and developing their cultural heritage with a special focus on intangible heritage. The projects consisted of partners from southern and northern Mediterranean actors and institutions in the domain of heritage, targeting common history (i.e. Islamic civilisation, Byzantine, etc).

86. **Euromed Audiovisual:**<sup>27</sup> This programme was launched in 1997 and aims to:

- promote cooperation between audiovisual operators from both shores of the Mediterranean
- stimulate technology transfer and transfer of expertise through professional training
- foster the broadcasting of cinematographic works from the Mediterranean partners and the European Union
- promote the enhancement of audiovisual heritage pertaining to the Euro-Mediterranean area
- Facilitate investments and jobs and wealth creation in the audiovisual sector.

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<sup>25</sup> Original text in French, see (<http://www.deltun.ec.europa.eu>)

<sup>26</sup> <http://www.euromedheritage.net/>

<sup>27</sup> <http://www.euromedaudiovisual.net/>

It includes other sub-programmes on specific themes related to training, development, promotion, and distribution and exhibition.

The Euromed Audiovisual programme is currently in phase II, which began in 2006. Since its launch in 1998, it has contributed to the establishment of a network for exchange and distribution of films from southern Mediterranean countries (including Tunisia) to northern Mediterranean countries (EU countries) (i.e. Med Screen). In addition, it has targeted capacity building in the audiovisual sector through training workshops and technical exchange programmes.

87. **Euromed Youth:** The objective of this programme is to promote the mobility of young people and understanding between peoples through three types of actions: Youth Exchanges, Voluntary Services and Support Measures. The programme is currently in phase III, which is expected to end by December 2008. The programme also facilitated the creation of **Euromed Young Artists Network**<sup>28</sup> with a view to promoting artists and cultural professionals through exchange activities for young artists from Euromed countries.
88. In addition to these regional programmes based upon the Euromed association agreement, other cooperation tools are in place and based on EU-NGO partnerships.
89. For example, artist mobility programmes in the Mediterranean region (including Tunisia) are funded by the European cultural foundation (ECF) through *The Roberto Cimetta Fund*<sup>29</sup>. This fund awards individual travel grants for mobility that targets networking in Mediterranean countries. The programme complements the European cultural mobility programme 'Step beyond'<sup>30</sup> which is open for European artists.
90. The EU regional cultural programmes and other extra-regional cultural programmes represent a preferential treatment mechanism, in the sense that they are adopted within the framework of the European cultural policy, and are not based on reciprocal treatment from beneficiary countries (Tunisia). Moreover, the programmes enable the allocation of specific European funds, enabling southern Mediterranean countries (developing countries) to benefit from activities for: *facilitating artist and cultural professional mobility, increasing capacity-building projects, enhancing distribution and exhibition of cultural products and services (mainly audiovisual) and integrating heritage in local development plans.*
91. It must be noted that the EU has currently established a new work plan for 2008 for all other non-EU countries forming part of the media sector cooperation, entitled 'Media International'<sup>31</sup> and intends to prepare a future 3-year programme called 'Media Mundus'. This is composed of three activities: *continuous training, promotion of cinematographic works and cinema networks.* It is based on four cross-cutting priorities: *improving networking and exchange between professionals, improving access to foreign markets, facilitating and increasing co-productions, and international circulation of films.*
92. The eligibility criteria<sup>32</sup> include a geographical balance of participants from the following regions: *North America (United States + Canada), Central America, South America, the MEDA area (Mediterranean), South Asia and South-East Asia, North-East Asia and the rest of the world.* Moreover, quantitative restrictions were introduced: the European

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<sup>28</sup> <http://www.emyan.org>

<sup>29</sup> <http://www.cimettafund.org>

<sup>30</sup> <http://www.eurocult.org/we-support-cultural-cooperation/programmes/mobility/apply-step-beyond/>

<sup>31</sup> [http://ec.europa.eu/information\\_society/media/prep\\_action/index\\_en.htm](http://ec.europa.eu/information_society/media/prep_action/index_en.htm)

<sup>32</sup> Document: 2008 Work Programme - Implementation of the Preparatory Action - 'MEDIA International' in *supra* note 28

market share of the participating country for cinematographic works must not exceed 10%. Besides, the programme introduced the notion of 'reciprocity', whereby a mutual benefit between the European Union and the participating third country is determined. For example, in the cinema networks, both parties commit to distributing similar proportions of each party's corresponding cinematographic works in their network programming. Tunisia currently has one project in the cinema networks activity for this new programme, but not on the basis of preferential treatment in a cultural cooperation framework.

93. The *Media Mundus* programme represents a hybrid combination between economic and cultural perspectives. Although the selection criteria of the programme did not include any specific provisions for participating developing countries, the programme represents a pilot example of a cultural cooperation programme combining economic and cultural criteria and objectives.

### **Preferential treatment within the EFTA trade agreement**

94. In December 2004, Tunisia signed a free trade agreement with EFTA countries that included annexes of bilateral agreements on agricultural trade. The agreement covers non-agricultural products with a progressive dismantling of customs between Tunisia and member parties, enabling Tunisia to gradually decrease customs of covered products. The rules of origin incorporated in the treatment included the Euro-med rules of origin, creating a possible cumulation model (bilateral or diagonal cumulation).<sup>33</sup>
95. The regulatory framework for this form of preferential trade is based upon agreement clauses and joint committee decisions. The institutional framework comprises a joint committee. The follow-up to implementation is performed by the authorities concerned.
96. Concerning cultural goods, or services and mobility of artists, cultural professionals and practitioners, these are not explicitly included within the agreement, which focuses on goods circulation. As in the case of the Tunisia-EU Agreement, cultural goods are included in lists of dismantling, which are already at low rates.
97. On the non-trade side, there are no current instruments for cooperation related to culture signed with EFTA as a regional group.

### **C.3 Bilateral level**

#### **C.3.1 Preferential treatment through GSP<sup>34</sup> schemes**

98. Concerning preferential treatment provided to Tunisia at the bilateral level by developed countries currently member to the UNESCO Convention (2005), there are two GSP schemes: those of Canada and New Zealand.
99. These GSP schemes are established on a unilateral basis, whereby donor countries define the coverage of products which Tunisia can benefit from on a non-reciprocal basis, either from total or partial reduction of customs duties.

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<sup>33</sup> See EFFTA bulletin 2-2006 / 'What is cumulation?' by Arthur Mueller

<sup>34</sup> The choice of the GSP schemes for Tunisia is based on data availability from the donor country, and as represented by the UNCTAD (at [http://www.unctad.org/en/docs/itcdtsbmisc62rev2\\_en.pdf](http://www.unctad.org/en/docs/itcdtsbmisc62rev2_en.pdf) (Generalized System of Preferences, List of beneficiaries, 2006)

100. The regulatory framework for these schemes consists of: the GATT enabling clause, the donor country's customs and trade regulations covering rules of origin, product coverage, country lists, eligibility and conditionality clauses. Moreover, GSP schemes are monitored by UNCTAD, which can set guidelines. Due to their unilateral character, the schemes provided can change at any given time, whenever trade policy objectives and priorities of the donor country change.
101. Analysis of these bilateral schemes with regard to the relevance of preferential treatment of cultural goods is based upon identification of selected goods, and tracing any additional measures that can be related to a cultural good, as demonstrated in the GSP scheme.
102. *Canada-GSP scheme*: The current Canadian GSP, as presented in the UNCTAD manual, includes several entries for cultural products (books and films), granting customs tariffs reduction or total exemptions. Moreover, a special section in the handbook guide for Canada's scheme addresses handicrafts<sup>35</sup> with duty-free preferential treatment, if several conditions are met, such as: originality, community representation, hand-made, not mass-produced.
103. *New-Zealand-GSP scheme*: as presented in the UNCTAD handbook, the scheme applies a specific framework<sup>36</sup> for handicrafts, emphasizing the use of natural materials and includes details of handmade characteristics.
104. Preferential treatment mechanisms granted to Tunisia at the multilateral, regional and bilateral levels have common characteristics in terms of:
- The use of similar institutions for monitoring purposes, based on customs regulation
  - The low customs tariffs or no tariffs for hardware/software cultural products.
105. The two GSP-schemes of Canada and New Zealand share specific eligibility criteria for handicrafts, encouraging authentic products directly related to cultural expressions. The provision of special emphasis in both GSP schemes for authentic traditional works represents good practice in terms of a framework of preferential treatment mechanism for cultural goods.
106. Cultural services (hardware or software) were not addressed in any of these preferential mechanisms, in addition to mobility of artists, cultural professionals and practitioners.

### ***C.3.2 Preferential treatment through cultural cooperation***

107. The analysis of preferential treatment through cultural cooperation stands as another *de facto* access channel for cultural goods and services, and artists and cultural professionals in cultural interaction between developing and developed countries.
108. Within this framework, preferential treatment can be perceived through several criteria, among them: *the absence of reciprocity demands between signatory parties* (in terms of quantitative or qualitative reciprocity), *the allocation of specific financial support from developed countries toward common activities with developing countries* (for example, artist residency programmes, mobility grants, training), *and the absence of access quotas for cultural activities*. Moreover, a cultural cooperation agreement may include a preferential treatment approach to a designated developing country, if the donor country

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<sup>35</sup> See Annex 6 (Handicrafts in Canada GSP (GPT))

<sup>36</sup> See Annex 7 (Special regime for Handicraft Products, in New Zealand GSP)

provides a high level of support or participation compared to other cultural cooperation activities with other third countries (developing or developed). Such assessment may call for the use of comparative data and indicators related to cultural cooperation.

109. The access modalities of cultural goods and services, and of artists and cultural professionals, within the framework of cultural cooperation, range from temporary access to certain activities (i.e. live performance, fairs and exhibitions), to permanent access to certain goods (i.e. co-produced movies and audiovisual works).
110. In the Tunisian case, the execution of cultural cooperation programmes are based either on a cultural cooperation agreement (generally included in Educational, Scientific and Cultural cooperation agreements) with pluri-annual cultural programmes, which include specific agenda for artist and cultural professional exchange modalities (such as artistic residency, research exchange, technical training, etc.), or on existing diplomatic relations, where activities are programmed for special occasions or celebrations.
111. Current bilateral cultural cooperation exists with developed country members of the Convention, such as: France, Belgium, Italy, Spain, Germany, Canada, Switzerland, the United Kingdom, Austria, Norway and Sweden. The following are examples of supporting activities:
- The participation of artists and performance groups in Tunisian festivals, with possible financial support from donor countries
  - Equipment donations for cultural entities (i.e. film training schools, theatres, public libraries)
  - Financial support for heritage development projects
  - Bursaries for artists in residence, and/or for cultural professionals in training sessions (libraries, cultural centres)
  - Expertise exchange in cultural domains (arts, heritage, training).

The execution of these activities is based upon:

- cooperation agreements between similar cultural organizations (i.e. national libraries)
  - Cultural centres (i.e. France, Italy, Germany, Spain)
  - Embassies
  - Civil society representatives (funding common projects for cultural associations in both countries).
112. Moreover, domain-specific cooperation agreements can be established, resulting in mutual access to cultural products and/or temporary mobility of artists and cultural professionals for common projects. Co-production agreements (for cinematographic or audiovisual works) are the current visible mechanisms.
113. In the case of Tunisia, co-production agreements exist with the following developed countries: France, Belgium, Italy, Spain and Canada (Quebec). The execution of these agreements is based either on special cultural agencies or through the cultural ministries in both countries, mainly at the level of the developed country, so as to verify the eligibility of the co-produced film/TV movie for national distribution, with possible dissemination in regional networks (i.e. EU region).
114. Accordingly, from the viewpoint of non-trade preferential treatment mechanisms, the EU action plan with Tunisia represented a preliminary example of an implemented preferential treatment with a cultural cooperation scope. In fact, with the current EPA agreement (CARIFORUM-EU agreement), further negotiations are expected between Tunisia and the EU, in order to introduce a new cultural cooperation protocol,

introducing new developments in international cultural cooperation related to the UNESCO Convention (2005).

115. The allocation of resources for sustaining artist mobility between the southern Mediterranean countries and the EU is another example of preferential treatment in a cultural policy targeting developing countries such as Tunisia. In addition, analysis of the Media Mundus programme (audiovisual cooperation) demonstrated a new approach to co-production agreements, without explicit preferential treatment for participating developing countries, and the introduction of quantitative eligibility criteria (market share) – a new example of a hybrid combination.



**D- Analysis of existing agreements and preferential treatment mechanisms**  
***Assessment of preferential treatment mechanisms***  
***in Tunisian cultural exchanges***

116. With the objective of exploring the relevance of current preferential treatment mechanisms in facilitating cultural exchanges between developed and developing countries, this section tries to illustrate, with existing tools of analysis, the impact of preferential treatment on Tunisian cultural exchanges in terms of the ability of cultural goods, services, artists, and cultural professionals and practitioners to access the cultural spheres of selected developed countries. Trade and cultural perspectives are analysed, using relevant quantitative and qualitative data.
117. Concerning methodology, it must be noted that specific performance indicators related to the diversity of cultural expressions and cultural policy assessment efforts are still at the research stage.<sup>37</sup> For example, the indicator that determines the level of diversity of cultural expressions in a given scope includes other sub-indicators,<sup>38</sup> such as: *variety*, *balance* and *disparity*. Moreover, a creativity index is essential for evaluating cultural creativity dynamics.<sup>39</sup> These are challenging and innovative issues that can be addressed by setting up assessment indicators related to the diversity of cultural expressions, including the preferential treatment mechanism. In addition, currently existing models for statistics of cultural industries involve divergent tendencies, notably related to the definition of cultural and non-cultural products or services.<sup>40</sup>
118. As a result, the impact assessment will rely on existing quantitative and qualitative data, with an emphasis on examples leading to higher visibility for preferential treatment impact or provision, for example, labour intensive goods (i.e. authentic handicrafts), tangible goods (i.e. books), co-produced films and cooperation cultural activities.
119. The analysis is based on the EU-Tunisian association agreement encompassing both scopes, namely trade in goods and cultural cooperation, and on the bilateral cultural cooperation between Tunisia and France, a major partner in Tunisian cultural cooperation.

***D.1 Analysis of the regional EU-Tunisia association agreement***

120. Figure 1<sup>41</sup> represents a selection of Tunisian aggregated exports of cultural goods towards selected EU countries (France, Belgium, Germany, Italy, Spain and the United Kingdom).
121. The increase in export revenues for the selected cultural goods (printed matter and handmade goods) is not directly related to the impact of preferential treatment. The EU has applied low tariffs for these products on a steady basis since the entry into force of the EU agreement. Irregularities in fluctuations are exogenous to the applied tariff.
122. Cultural goods comprising printed matter (books, magazines and other) are directly affected by Tunisian publishing and printing sector dynamics. Since the elimination of license requirements for activity exercise in 2001 and the emphasis on new

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<sup>37</sup> See Canada meeting September 2007 / statistics for cultural diversity.

<sup>38</sup> 'Measuring cultural diversity: a review of existing definitions', Heritiana RANAIVOSON, 2007 (in supra note 37)

<sup>39</sup> *Supra note 37*

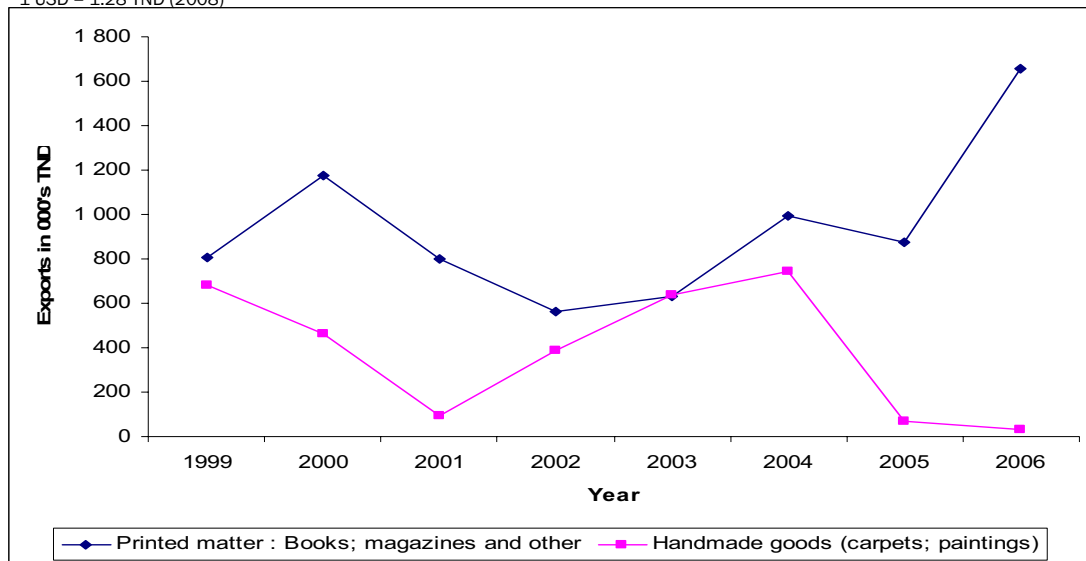
<sup>40</sup> See 'Creative Economy Report 2008', UNCTAD, 2008

<sup>41</sup> This graph is formulated using available data from the National Institute of Statistics, see Annex 8 for detailed tables.

technological infrastructure, this sector has seen steady growth with the introduction of high technologies and increase in labour skills, notably at the production stage.  
**Figure 1: Selected Tunisian cultural goods exports to EU countries\***

\* France, Belgium, Germany, Italy, Spain, and United Kingdom

TND: Tunisian Dinar,  
1 USD = 1.28 TND (2008)



123. Revenues from the export of handmade goods are positively linked to tourism market growth in terms of: quality of tourists, rate of expenditure, fluctuations in visits (i.e. 2001 period) and the existence of competitors (i.e. Turkey, Morocco and Egypt). EU tariffs applied to these goods are at low rates and are therefore not significant determinants of export revenue (unless altered upwards). In this case, the preferential treatment significantly impacts the flow of cultural goods, as a matter of supply-side dynamics.

**Table 3: Tunisian Films access to EU (since 1996)**

Film Title	Film Producing country	Production year	Admissions EUR 27 (since 1996)
Ors el-dhib La tendresse du loup (FR)	TN	2006	536
Bab'Aziz (AR) Bab'Aziz le prince qui contemplait son âme (FR)	FR / DE / GB / TN	2005	16,430
Le prince (AR)	TN / FR	2004	4190
Bedwin Hacker (AR)	FR / MA / TN	2003	918
Satin rouge (FR) Red Satin (EN)	FR / TN	2002	198,670
El Kotbia (AR)	TN / FR	2002	(N.A)
Poupées d'argile (FR)	TN / FR	2002	3996
Khorma, enfant du cimetière (FR) Khorma, le crieur de nouvelles (FR)	FR / TN / BE	2002	1639
La saison des hommes (FR) The Season of Men (EN)	TN / FR	2000	124,813
Les siestes grenadine (FR)	TN / BE	1999	5510
Ghodoua Nahrek (AR) Demain, je brûle (FR)	TN	1998	718
Bent familia (AR) Tunisiennes (FR)	TN	1997	30,514
Redeyef 54 (TR)	TN	1997	309
Un été à La Goulette (FR)	TN / FR / BE	1995	281,522
Saint el Qusur (AR) Les silences du palais (FR)	TN / FR	1994	46,766
Le collier perdu de la colombe (FR) Tawk al hamama al mafkoud (AR)	TN / FR / IT	1991	45
Asfour stah (AR) Halfaouine, l'enfant des terrasses (FR)	TN / FR / DE	1990	180

Source: LUMIERE Database (European Audiovisual Observatory)

124. Other examples of cultural goods accessing the EU market are audiovisual works, particularly films. An analysis of access of Tunisian films to the EU market (Table 3) shows that among the fifteen tracked films, shown in EU countries, there are eleven co-

produced with EU countries (73% of the total number of films), the respective audience numbers reaching 684,679, representing 96% of the overall audience. These numbers show the importance of the co-production modality for ensuring access of Tunisian films to the EU audiovisual market, thereby reaching a significant number of spectators.

125. The annual rate of film production (feature films) in Tunisia, with public funding is six films/year. This rate represents a nascent stage in the film industry, in terms of production. On the other hand, fifteen foreign feature films/year are shot in Tunisia in collaboration with local film companies. Current policy focuses on the export of filmmaking services (studios and post-production services), representing an indirect capacity-building mechanism.

## ***D.2 Analysis of bilateral Cultural cooperation agreement (with France)***

126. From the cultural exchange perspective, Tunisia participates in several cultural products and services in European-based events, which include the mobility of Tunisian artists and cultural professionals or trainees. In the absence of impact assessment indicators, Table 4 represents a typology of supported Tunisian cultural activities through bilateral cultural cooperation with France.

**Table 4:  
Typology of supported Tunisian cultural activities<sup>42</sup>  
through bilateral cultural cooperation with France  
(2004–2007)**

		Number of programmed activities per type of support (inward and outward access)			
		Projects, training, expertise exchange, and equipment or acquisition support <sup>43</sup>	Festivals, fairs, and exhibitions participation and/or logistic support	Local cultural production support	Artistic co- production (other than film and audio-visual)
Domain of interest	Heritage preservation and development	2			
	Fine arts	1	1		2
	Film and visual arts	1	2		
	Theatre and other performing arts	2	2		
	Music and dance	1	3		1
	Books, publishing, public libraries, literature and translation	5	2	1	
	Cultural sector training (policy and management)	2			
<b>Total</b>	<b>14</b>	<b>10</b>	<b>1</b>	<b>3</b>	

*Data source for activities: Ministry of Culture and Heritage Safeguard (Tunisia)*

<sup>42</sup> The cultural activities used for this distribution are for indicative purposes. The grouping of support modalities or domains of interest is based on objective similarities between the activities and the intervention scope of the Tunisian Ministry of Culture and Heritage Safeguarding. Activities range from an event-related activity to a comprehensive project scheme.

<sup>43</sup> Including bursaries for project-related training or specific themes for capacity-building purposes (i.e. cultural management).

127. The analysis distribution of examples for bilateral cultural activities in Tunisian-French cultural cooperation demonstrates the high emphasis on capacity building activities (fourteen activities in projects, training, expertise exchange, and equipment or acquisition support), followed by access facilitation of Tunisian cultural expressions to targeted French fairs and exhibitions, including the inward flow through participation in Tunisian festivals (ten activities in festivals, fairs, and exhibitions participation and/or logistic support). Bursaries and mobility for artists or cultural professionals are granted through an activity-based scheme. At this bilateral level, there is no specific support for encouraging the mobility of artists and cultural professionals *per se*.
128. An overall analysis of the impact of current preferential treatment on access of Tunisian cultural goods, services and artists and cultural professionals, through the EU association agreement (trade and cultural cooperation), and through examples of activities supported in bilateral cultural cooperation with France showed that:
- In relation to the country's supply side, preferential treatment of trade in goods is mature and has no effective impact on current cultural exchanges.
  - Sector-specific co-production agreements – mainly film co-production agreements – incorporate preferential treatment objectives to facilitate access to the donor country's cultural sphere.
  - Bilateral cooperation based on capacity-building activities and participation support modalities is essential for sustaining a dynamic cultural sector in the developing country, leading to improvements in its supply side and increases in impact of the preferential treatment mechanism based on support to cultural activities.

## E: Recommendations

129. On the basis of analysis of article 16 'Preferential Treatment for Developing countries', using developmental, trade and cultural diversity approaches, and in reference to factual analysis of the Tunisian case as a developing country member of the UNESCO Convention (2005), the following recommendations are intended to:
- clarify the perception and interaction of preferential treatment within the context of the Convention
  - emphasize the linkage between development and culture
  - build upon available instruments within UNESCO organizations or other international spheres in order to convene an effective application for this article.
130. **Recommendation 1: elaboration of a definition for preferential treatment**
- In opposition to the trade sphere, the mechanism is determined as a catalytic tool for the attainment of Convention objectives and not as a means of deviation from Convention obligations.
  - The trade sphere definition is a complementary component of the mechanism but not sufficient in of itself, as it focuses mainly on trade in goods. Its application to trade in services through service liberalization (including mode 4 for mobility of artists and cultural professionals) will emphasize the presence of international trade law in cultural exchanges.

- A cultural sphere definition enables emphasis of the relationship between culture and development, and encourages new approaches in the cultural sector. As a result, the use of a semantic definition of preferential treatment as expressed in article 16 would consider that: ***any explicit cultural policy objective, or measures, or mechanisms expressed by a developed country, targeting capacity building for the cultural sector of developing countries, and the access of their goods, services and artists and cultural professionals to its cultural sphere (market or activities) is a preferential treatment.***
- The key terms definitions must consider the structural and the activation relationship of article 16 with other articles: Article 1 (c), Article 2, Article 6, Article 12, Article 14, Article 15 and Article 17.

### 131. **Recommendation 2: Mechanism activation framework**

For efficiency reasons, the activation framework of the mechanism should be based upon:

- The use of simple criteria for eligibility (based on international references for developing countries).
- The definition of rules of origin in harmony with the specific characteristics of cultural goods or services, or artists' and cultural professional's definitions.
- The use of graduation criteria based on a 'development approach' and not an 'adjustment approach', supporting the economic and cultural needs of a developing country.
- The elaboration of conditionality criteria targeting the reinforcement of the relationship between policy and Convention objectives.
- The establishment of performance criteria related to cultural policy in both developing and developed countries, including CDPL-related qualitative and quantitative indicators.

### 132. **Recommendation 3: Mechanism tools**

*Taking into account the specific economic characteristics of the cultural sector and the importance of the supply side for developing countries, trade-related tools can include initiatives such as:*

- Labelling specific goods as 'cultural goods for development' and facilitating their circulation.
- Inclusion of specific criteria in GSP schemes concerning cultural goods (i.e. authentic traditional works).
- Outward trade policies to encourage investment in developing countries for cultural production (i.e. investment guarantee funds, bilateral investment development agreements).

*Cultural sector-related tools can include:*

- Review of the Florence agreement and its Nairobi protocol in order to sustain the contribution of these international instruments to the facilitation of access of cultural goods (taking into consideration technological and cultural production development).
- Cultural policies, measures, incentives (including special funds) in developed countries targeting capacity building and acceleration of cultural interaction (activities and exchanges), with emphasis on mobility of artists and cultural professionals in both directions.
- Adapting current intra-member parties' cultural agreements to the objectives of the Convention and preferential treatment inclusion (with the possibility of creation of regional cultural agreements)
- Emphasis on specific domain cultural co-production agreements, such as film/ audiovisual coproduction agreements.
- Creation of evaluation reports for preferential treatment implementation and execution through bilateral, regional cultural agreements.

133. **Recommendation 4: Mechanism reinforcing activities**

These should be implemented:

- At the national level in developed member countries, in terms of adoption of cultural policies in harmony with Convention objectives and explicit affirmation of preferential treatment for developing countries.
- At the national level in developing countries, in terms of inclusion of the cultural sector in development plans, and the adoption of a development-oriented approach in its governance.
- At the international level, through promotion of the concept of preferential treatment in WIPO development agenda, UNCTAD, UNDP, or any other UN agency interested in development of cultural industries, mainly based on a CDPL framework.
- At the UNESCO level, through reviewing instruments related to cultural cooperation between developed and developing countries.

134. **Recommendation 5: Mechanism monitoring institutions**

As performance indicators and special quantitative and qualitative data are essential components for evaluating the impact of the mechanism, a technical expert committee can be created to evaluate the implementation of preferential treatment, and provide consultation and advice for member countries, with the elaboration of reports concerning mechanism efficiency in relation to the UNESCO Convention (2005) objectives.

## **Annexes**

**Annex 1** : Integrating Cultural Diversity in programming

**Annex 2** : Cultural Diversity Programming Lens, Topics, references and sub-topics ( Questions and Indicators)

**Annex 3** : Projection of UNESCO Convention 2005 through CDPL ( axes of interest )

**Annex 4** : Summary of the relationship of the terms used in article 16 to other convention articles

**Annex 5** : Trade statistics Tunisia-EU

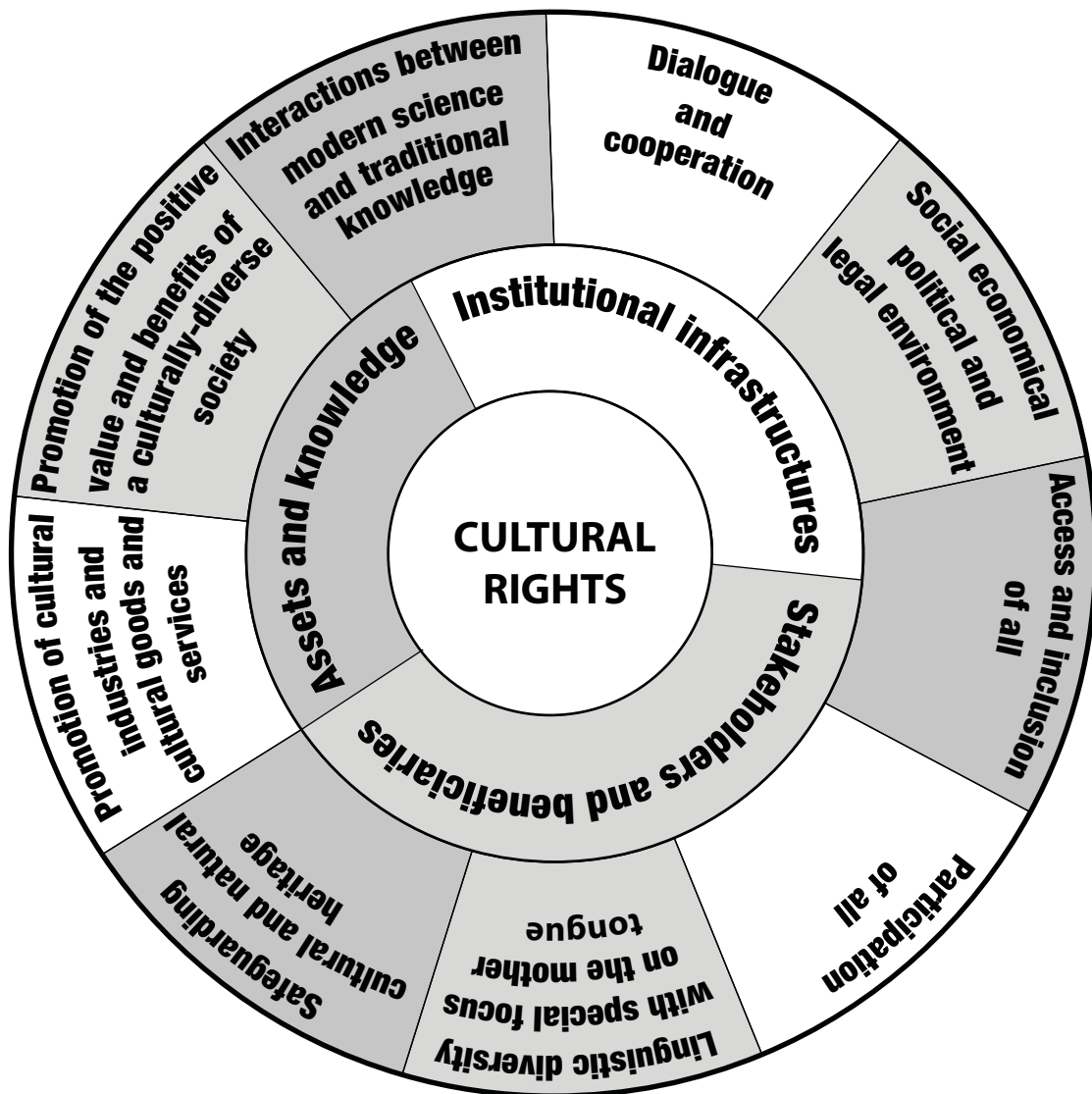
**Annex 6** : Handicrafts in Canada GSP (GPT)

**Annex 7** : Special regime for Handicraft Products in New Zealand GSP

**Annex 8** : Statistical data for selected Tunisian cultural goods ( export to selected EU countries)



# *Integrating Cultural Diversity in Programming*





## What is Cultural Diversity?

*“Cultural diversity refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used”.*

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

## What is a cultural diversity programming lens?

- A lens enables people to see. The purpose of a cultural diversity lens is to **raise awareness** and open minds to new ways of thinking. The lens thereby opens the way to new solutions and activities.
- It is a supplementary tool which can be used in complement of other means to evaluate whether programmes, policies, proposals and practices promote and safeguard cultural diversity and therefore enhance work efficiency.
- It is a check-list or a list of criteria and questions supplemented by **indicators** and other means of verification.
- It can be used at all stages of a programme: planning, implementation, monitoring and evaluating. For example, the lens can be used to plan a project, and then re-used (with adaptations, if necessary) during the monitoring stage to compare the plans with the outcomes.
- It is a tool that can be used for all programmes and activities, not simply for the ones related to Culture.
- It allows programme officers and policy-makers to make **informed decisions**.
- It is ideally created in a participatory manner by those who use it. There is no perfect lens. Each programme can develop its own lens.
- This framework has been developed by UNESCO Bangkok and derived from the Universal Declaration on Cultural Diversity. It reflects one interpretation of the Declaration and can be adapted to the users' needs and context.

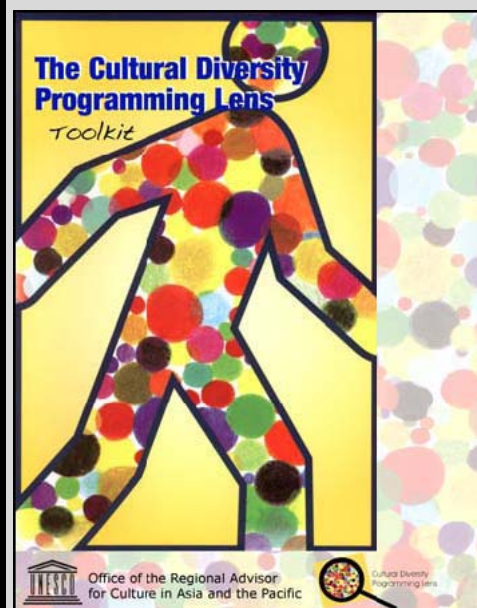
## Reference

- UNESCO Declaration on Cultural Diversity (2001)
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)

For more information:

The Cultural Diversity Programming Lens Toolkit, UNESCO Bangkok (2006)

<http://www.unescobkk.org/culture/lens>





## Cultural Diversity Programming Lens: General Framework



Main question: *How is the programme (including project proposals, policies, laws and practices) respecting and safeguarding cultural diversity in general and the principles of the Universal Declaration on Cultural Diversity in particular?*

Main topics	Reference	Key questions	Sub-topics
1. International rights and national laws	UDCD: 4,5,6,7,8,9  MLA: 2, 4, 12, 13, 15, 16, 18	Does the programme take into consideration existing national laws and priorities as well as internationally-agreed human rights related to culture?	<p>Ratification and implementation of international instruments promoting:</p> <ul style="list-style-type: none"> <li>• Right not to be discriminated on the basis of race, colour, sex, language, religion, political or other opinion, ethnicity (including indigenous and minority groups), national or social origin, property, birth or other status, HIV/AIDS status, and disabilities<sup>1</sup></li> <li>• Freedom of expression, thought, religion, media pluralism, and multilingualism</li> <li>• Right to quality education and to choose the kind of education for your children</li> <li>• Right to participate freely in the cultural life of the community</li> </ul> <p>Existence and enforcement of national laws and policies on:</p> <ul style="list-style-type: none"> <li>• Culture</li> <li>• Intellectual property rights (e.g. copyright, patents, trademarks)</li> <li>• Socially-marginalized and minority groups</li> <li>• Mobility, specifically artists' mobility</li> <li>• Creating conditions conducive to the production and dissemination of diversified cultural goods and services</li> </ul>
2. Access and inclusion of all	UDCD: 2, 6, 8, 9  MLA: 3, 10, 16, 17	<p>How will the programme increase (or decrease) opportunities for access of persons and/or groups from diverse cultural backgrounds to the programme itself and to resources, services, and means of expression and dissemination?</p> <p>How will the programme increase (or decrease) benefits for inclusion of persons and/or groups from diverse cultural backgrounds in society and/or in the programme itself?</p>	<ul style="list-style-type: none"> <li>• Physical, economical, legal and social accessibility to the programme itself</li> <li>• Improvement of access to education; domestic and international markets; art, scientific and technological knowledge</li> <li>• Inclusion of persons or groups from diverse cultural backgrounds: ethnicity, religion, social group, sex, age, etc. (with special focus on obstacles to this inclusion)</li> <li>• Content of materials linguistically and culturally-appropriate for all target groups</li> <li>• Programme materials and methods adapted to various levels of literacy (including using drawings and/or audio in the programme)</li> </ul>
3. Participation of all	UDCD: 2  MLA: 3, 19	How will the programme increase (or decrease) opportunities for participation of persons and/or groups from diverse cultural backgrounds in all phases of the programme and in society as a whole?	<ul style="list-style-type: none"> <li>• Participation of stakeholders and interest groups from diverse backgrounds – especially the primary beneficiaries – in all phases of the programme: research, needs assessment, design, implementation, monitoring, and evaluation phase: <ol style="list-style-type: none"> <li>1. Host communities, all government levels, public and private sectors, civil society, research institutions, and domestic and international experts</li> <li>2. Ethnicity, religion, social group, sex, age, etc. (with special focus on obstacles to this participation)</li> </ol> </li> <li>• Programme focus includes participation aimed at sustainability, empowerment, and capacity-building</li> </ul>

<sup>1</sup> Examples are taken from the *Universal Declaration of Human Rights* (UDHR, December 1948). See also definitions.

4. Linguistic diversity with special focus on the Mother tongue	UDCD: 5, 6 MLA: 5, 6, 10	How will the programme increase (or decrease) linguistic diversity?  How will the programme increase (or decrease) access to resources and services in people's mother tongue?	<ul style="list-style-type: none"> <li>• Expression in the greatest number of languages</li> <li>• Cultural creation in the greatest number of languages</li> <li>• Dissemination of programme outputs and information in the greatest number of languages</li> <li>• Content and materials for both formal and informal education and relevant information are created or translated in mother tongue</li> <li>• Programme documents in languages understood by all stakeholders</li> </ul>
5. Safeguarding cultural and natural heritage	UDCD: 7 MLA: 5, 13, 14	How will the programme encourage (or discourage) safeguarding tangible and intangible cultural and natural heritage?	<ul style="list-style-type: none"> <li>• Programme activities include:             <ol style="list-style-type: none"> <li>1. Identification, documentation, archiving (including display) of tangible and intangible assets</li> <li>2. Preservation, conservation, and protection</li> <li>3. Restoration and revitalization</li> </ol> </li> <li>• Use of performing arts and other cultural expressions for educational purposes in and out of the community</li> <li>• Monitoring mechanisms on the use of cultural and natural resources through the programme</li> </ul>
6. Promotion of cultural industries and cultural goods and services	UDCD: 8, 9, 10 MLA: 12, 15, 16, 17	How will the programme support (or hinder) the development of cultural industries?	<ul style="list-style-type: none"> <li>• Use of crafts, performing arts, and other art forms as income-generating activities</li> <li>• Improvement of the production, dissemination, and exchange of diversified cultural products and services</li> <li>• Programmes fostering creativity and diversity through recognition and protection of artists and authors' rights and cultural works</li> <li>• Support in the emergence and consolidation of cultural industries and markets</li> </ul>
7. Promotion of the positive value and benefits of a culturally-diverse society	UDCD: 1, 12 MLA: 2, 7, 18	How will the programme recognize, affirm, and promote the positive value and benefits of a culturally-diverse society?	<ul style="list-style-type: none"> <li>• Project activities include: awareness-raising, advocacy, and research</li> <li>• Educational and informational components to strengthen appreciation and respect of cultural diversity</li> </ul>
8. Interactions between modern science and traditional knowledge	UDCD: 7 MLA: 3, 8, 14	How will the programme increase (or decrease) the opportunities to foster exchange and synergies between modern science and local knowledge?	<ul style="list-style-type: none"> <li>• Incorporation of traditional and modern pedagogies, methods, and knowledge</li> <li>• Exchanges and cooperation between traditional and modern experts and practitioners</li> <li>• Protection of traditional knowledge</li> </ul>
9. Dialogue and cooperation	UDCD: 7, 10, 11, 12 MLA: 2, 3, 9, 10, 11, 17, 19	How will the programme reinforce (or hinder) cooperation at local, national, and international level and increase (or decrease) opportunities for exchange and dialogue?	<ul style="list-style-type: none"> <li>• Promotion of intergenerational and intercultural dialogue</li> <li>• Development of links between marginalized groups and technical experts, public and private sectors, civil society, research institutions, organizations and businesses</li> <li>• Cooperation and exchanges in the development of necessary infrastructures and skills (ex. technological/technical transfer)</li> <li>• Measures to counter the digital divide</li> </ul>
10. Others			

UDCD = UNESCO Universal Declaration on Cultural Diversity, Paris, 2 November 2001.

MLA = Main Lines of an Action Plan for the Implementation of the UNESCO Universal Declaration on Cultural Diversity

## Annex 3

### Projection of the convention on the Protection and the Promotion of the Diversity of Cultural Expressions through the axes of The “ Cultural Diversity Programming Lens”

Theme	Reference	Topics
1. International rights and national laws	Art.1, Art.2, Art.5, Art.6, Art.20	Art.1 : « (h) to reaffirm the sovereign rights of States to maintain,... measures that they deem appropriate for the protection and promotion.. » Art.2 : « 1. Principle of respect for human rights and fundamental freedoms» Art.2 : « 2. Principle of sovereignty» Art.5 : « The Parties,... reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation... » Art.6 : « (a) regulatory measures aimed at protecting and promoting diversity of cultural expressions; » Art.6 : « (f) measures aimed at establishing and supporting public institutions, as appropriate;» Art.20 : « Relationship to other treaties: mutual supportiveness, complementarity and non-subordination»
2. Access and inclusion of all	Art.2, Art.7	Art.2 : « 7. Principle of equitable access» Art.7 : « (b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.»
3. Participation of all	Art.6 , Art.7, Art.11	Art.6 : « (e) measures aimed at encouraging non-profit organizations, ... to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services » Art.7 : « (a) to create, produce, disseminate, distribute and have access to their own cultural expressions,..., including persons belonging to minorities and indigenous peoples; » Art.11 : « ... Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention»
4. Linguistic diversity with special focus on the Mother tongue	Art.6	Art.6 : " (b) ..... including provisions relating to the language used for such activities, goods and services»
5. Safeguarding cultural and natural heritage	Art.2, Art.10, Art.13	Art.2 : « 6. Principle of sustainable development» Art.10 : « (c) ... These measures should be implemented in a manner which does not have a negative impact on traditional forms of production» Art.13 : « Integration of culture in sustainable development»
6. Promotion of cultural industries and cultural goods and services	Art.1, Art.2, Art.6, Art.10, Art.14	Art.1 : « (f) reaffirm the importance of the link between culture and development... » Art.1 : « (g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning;.. » Art.2 : « 5. Principle of the complementarity of economic and cultural aspects of development» Art.6 : « (b) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services, ... distribution and enjoyment ... » Art.6 : « (c) measures aimed at providing domestic independent cultural industries and activities in the informal sector...distribution of cultural activities, goods and services » Art.6 : « (d) measures aimed at providing public financial assistance» Art.6 : « (e) ... and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities;» Art.6 : « (g) les mesures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions;» Art.6 : « (h) measures aimed at enhancing diversity of the media, including through public service broadcasting. » Art.10 : « (c) endeavour to encourage creativity and strengthen production capacities...in the field of cultural industries. » Art.14 : « (a) the strengthening of the cultural industries in developing countries:... »
7. Promotion of the positive value and benefits of a culturally-diverse society	Art.2	Art.2 : « 3. Principle of equal dignity of and respect for all cultures»

8. Interactions between modern science and traditional knowledge		
9. Dialogue and cooperation	Art.1, Art.2, Art.12, Art.17, Art.14, Art.18	<p>Art 1 : « (c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace;»</p> <p>Art.1 : « (d) to foster interculturality.. »</p> <p>Art.1 : « (i) to strengthen international cooperation and solidarity... »</p> <p>Art.2 : « 4. Principle of international solidarity and cooperation »</p> <p>Art.2 : « 8. Principle of openness and balance»</p> <p>Art.12 : « Promotion of international cooperation»</p> <p>Art.17 : « International cooperation in situations of serious threat to cultural expressions »</p> <p>Art.14 : « Cooperation for development»</p> <p>Art.18 : « International Fund for Cultural Diversity»</p>
10. Others : <b>Right for Developmeent</b>	Art.16	Art.16 : « Preferential treatment for developing countries»

**Annex 4 :**

**Summary of the relationship of the terms used in article 16 to other convention articles**

Used term	Articles using the same term	Existent definitions in the convention
<i>Developed countries</i>	<p><b>Article 14 – Cooperation for development</b>            (iv) adopting, where possible, appropriate measures <u>in developed countries</u> with a view to facilitating access to their territory for the cultural activities, goods and services of developing countries;</p>	<i>N.A.</i>
<i>Cultural exchanges</i>	<p><b>Article 1 – Objectives</b>            (c) to encourage dialogue among cultures with a view to ensuring wider and balanced <u>cultural exchanges</u> in the world in favour of intercultural respect and a culture of peace;</p> <p><b>Article 12 – Promotion of international cooperation</b>            Parties shall endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions, taking particular account of the situations referred to in Articles 8 and 17, notably in order to:</p> <p>(b) enhance public sector strategic and management capacities in cultural public sector institutions, through professional and international <u>cultural exchanges</u> and sharing of best practices;</p>	
<i>Preferential treatment</i>	N.A.	
<i>Developing countries</i>	<p><b>Article 1 – Objectives</b>            (f) to reaffirm the importance of the link between culture and development for all countries, particularly for <u>developing countries</u>, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link;            (i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of <u>developing countries</u> in order to protect and promote the diversity of cultural expressions.</p> <p><b>Article 2 – Guiding principles</b>  <b>4. Principle of international solidarity and cooperation</b>            International cooperation and solidarity should be aimed at enabling countries, especially <u>developing countries</u>, to create and strengthen their means of cultural expression, including their cultural industries, whether nascent or established, at the local, national and international levels.</p>	

	<p><b>Article 14 – Cooperation for development</b>          Parties shall endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of <i>developing countries</i>, in order to foster the emergence of a dynamic cultural sector by, <i>inter alia</i>, the following means:          (a) the strengthening of the cultural industries <u>in developing countries</u> through          (i) creating and strengthening cultural production and distribution capacities <u>in developing countries</u>;          iv) adopting, where possible, appropriate measures in developed countries with a view to facilitating access to their territory for the cultural activities, goods and services <u>of developing countries</u>;          vi) encouraging appropriate collaboration between developed and <u>developing countries</u> in the areas, <i>inter alia</i>, of music and film;          b) capacity-building through the exchange of information, experience and expertise, <i>as well as the training of human resources in developing countries</i>, in the public and private sector relating to, <i>inter alia</i>, strategic and management capacities, policy development and implementation, promotion and distribution of cultural expressions, small-, medium- and micro-enterprise development, the use of technology, and skills development and transfer;</p> <p><b>Article 15 – Collaborative arrangements</b>          Parties shall encourage the development of partnerships, between and within the public and private sectors and non-profit organizations, in order to cooperate <u>with developing countries</u> in the enhancement of their capacities in the protection and promotion of the diversity of cultural expressions. These innovative partnerships shall, according to the practical needs of developing countries, emphasize the further development of infrastructure, human resources and policies, as well as the exchange of cultural activities, goods and services.</p> <p><b>Article 17 – International cooperation in situations of serious threat to cultural expressions</b>          Parties shall cooperate in providing assistance to each other, and, in particular to <u>developing countries</u>, in situations referred to under Article 8.</p>	
<b>artists</b>	<p><b>Article 6 – Rights of parties at the national level</b>          2. <i>Such measures may include the following:</i>          e) measures aimed at encouraging non-profit organizations, as well as public and private institutions and <u>artists</u> and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities;</p>	
<b>Cultural professionals</b>	<p><b>Article 6 – Rights of parties at the national level</b>          2. <i>Such measures may include the following:</i></p>	

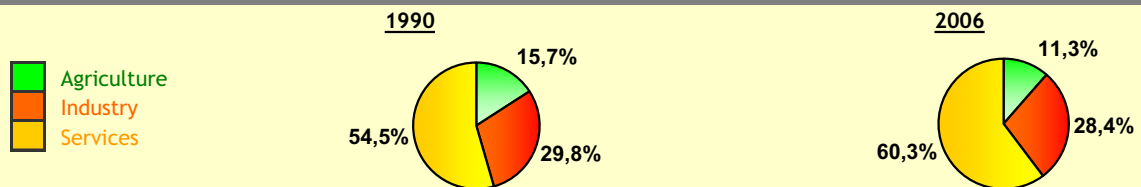
	<p>e) measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists and other <u>cultural professionals</u>, to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities;</p>	
<p><b><i>Cultural practitioners</i></b></p>		
<p><b><i>Cultural goods and services</i></b></p>	<p><b><i>Article 14 – Cooperation for development</i></b>          (iv) adopting, where possible, appropriate measures in developed countries with a view to facilitating access to their territory for the <u>cultural activities, goods and services</u> of developing countries;</p>	<p><b>Article 4 – Definitions</b>  <b><i>4. Cultural activities, goods and services</i></b>          “Cultural activities, goods and services” refers to those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services.</p>



## TUNISIA

Population		10 Mio inhabitants			
Area		164 (1000qkm)		%	
Gross domestic product	2007	25 Bn euros	Exports-to-GDP ratio:	43,9	
GDP per capita	2007	2 364 Euros			
(IMF, World Economic Outlook)					
Real GDP (% growth)			2004	2005	2006
Inflation rate (%)			2007		
Current account balance (% of GDP)			2004	2005	2006
			2007		

### GDP BY SECTOR



Source: World Bank (WDI)

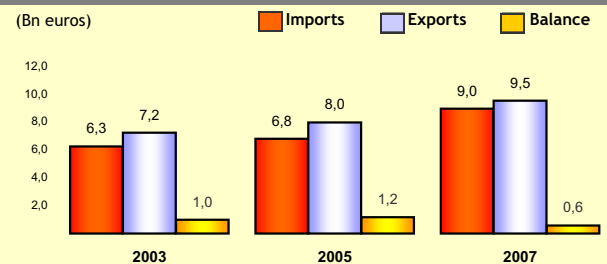
### TUNISIA MERCHANDISE TRADE WITH THE WORLD



Source: IMF (Direction of Trade Statistics)

\* excl intra EU Trade

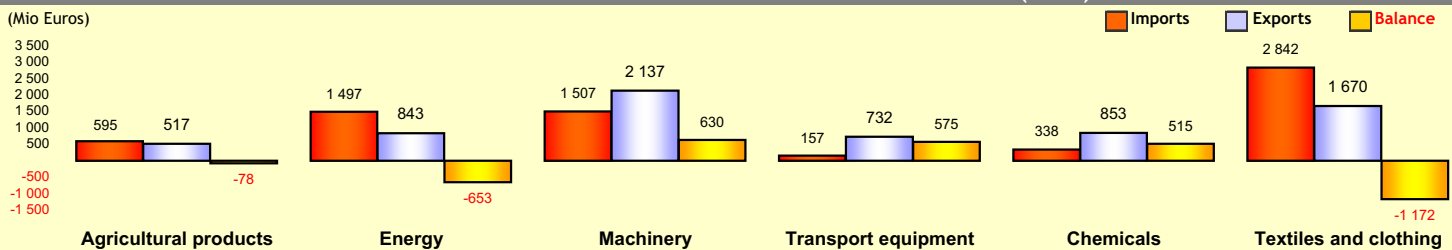
### EU27 MERCHANDISE TRADE WITH TUNISIA



Source: Eurostat, statistical regime 4

% OF THE WORLD *	2003	2005	2007	% OF EU TOTAL	2003	2005	2007
Imports	0,19	0,16	0,18	Imports	0,67	0,58	0,63
Exports	0,15	0,14	0,14	Exports	0,83	0,76	0,77

### EU27 MERCHANDISE TRADE WITH TUNISIA BY PRODUCT (2007)



Source: Eurostat, statistical regime 4

**Annex 6 : Handicrafts in CANADA GSP (GPT)**

xii

**6. HANDICRAFT PRODUCTS****(a) General**

Canada grants duty-free entry for handicraft products classified under Tariff Item 9987.00.00 of the Canadian Customs Tariff. This treatment is granted on condition that the products concerned:

- (i) Qualify for GPT treatment;
- (ii) Are listed in the schedule of handicraft goods;
- (iii) Meet the definition laid down for that purpose; and
- (iv) Are covered by special documentary evidence

The following handicraft goods, originating in a country entitled to the benefits of the General Preferential Tariff, having forms or decorations that are traditionally used by the indigenous people or representing any national, territorial or religious symbols of the geographical region where produced, having acquired their essential characteristics by the handiwork of individual craftsmen using tools held by hand or tools not powered by machines other than those powered by hand or foot, being non-utilitarian and not copies or imitations of handicraft goods of any country other than the country in which they originate, and not produced in large quantities by sophisticated tools or by moulding:

- Puppets, musical instruments (other than guitars, viols, harpsichords or copies of antique instruments), gourds and calabashes, incense burners, retablos, fans, screens, lacquer ware, hand-carved picture frames, hand-carved figurines of animals, and religious symbols and statuettes, composed wholly or in chief part by value of wood, if not more than their primary shape is attained by mechanically powered tools or machines;
- Ornaments, mirrors and figurines, composed wholly or in chief part by value of bread dough; hookahs, nargiles, candelabra and incense burners, composed wholly or in chief part by value of clay;
- Figurines, fans, hats, musical instruments, toys, sitkas, greeting cards and wall hangings, composed wholly or in chief part by weight of vegetable fibres or vegetable materials other than linen, cotton or corn husks;
- Figurines, masks, baskets and artistic cut-outs, composed wholly or in chief part by value of paper or papier maché;
- Puppets, bellows, pouffes, bottle cases, and wine or water bottles and jugs, composed wholly or in chief part by value of hide or of leather that has not been finished beyond tanning other than by individual craftsmen;
- Figurines, costume jewellery, beads, belts, hair pins, buttons, lamp bases and key holders, composed wholly or in chief part by value of coconut shell;
- Musical instruments, chimes, combs, fans, costume jewellery, beads, belts, hair pins, wall and table decorations, buttons, lamp bases and key holders, composed wholly or in chief part by value of mother of pearl, horn, shell including tortoiseshell, or coral;
- Hookahs, nargiles, musical instruments, bells, gongs, incense burners, masks, adzes, mattocks, finger and keyhole plates, door handles and locks, hinges and latches, samovars, kukris and machetes, composed wholly or in chief part by value of base metals,

if not more than their primary shape is attained by mechanically powered tools or machines;

- Bracelets, nargiles and hookahs, composed wholly or in chief part by value of glass;
- Fabrics decorated with crewel embroidery, hand-woven semi-finished wall hangings on backstrap looms, reverse hand-sewn appliqué wall hangings, and dhurries, composed wholly or in chief part by weight of wool or cotton;
- Lanterns, composed wholly or in chief part by value of stone.

Under this arrangement, the Governor in Council may amend the list of goods in this tariff item. Goods may be classified under this tariff item on production of a certificate in duplicate in the prescribed form with the information required to be provided with the form, and signed by a representative of the Government of the country of origin or any other authorized person in the country of origin recognized by the Minister of National Revenue as competent for that purpose.

The following articles products are not accepted as handicrafts:

- (i) Utilitarian goods with no distinguishing form or decoration;
- (ii) Copies, imitations, by whatever means, of traditional, decorative, artistic or indigenous products of any country other than the country of production; or
- (iii) Products which were produced in large quantities by sophisticated tools or by moulding

The use of tools in the manufacture of handicraft products is admitted as long as the tools are held in the hand, or are not powered by machine other than those powered by hand or foot power. Products made from wood or from certain base metals as listed in the schedule are accepted as handmade if not more than their primary shape is attained by mechanically powered tools or machines. In the case of leather products listed in the schedule, the leather cannot be finished beyond tanning other than by individual craftsmen.

#### **(b) Documentary evidence**

A claim for duty-free entry of handicraft products is to be supported by a special Certificate of Handicraft Goods.<sup>5</sup> In addition, it would be useful for importers to have on hand a GSP Certificate of Origin Form A or an Exporter's Statement of Origin required for GPT qualification; the products that do not qualify for entry as handicraft products may be eligible for entry at GPT rates of duty. It is therefore recommended that exporters of handicraft articles complete both a special Certificate of Handicraft Goods and a GSP Certificate of Origin Form A or an Exporter's Statement of Origin.

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<sup>5</sup> The Certificate of Handicraft Goods does not exist as an already printed form, and the Certificate produced for this purpose must have the same layout and contain verbatim the same information as that shown in Annex IV. The certifying authorities can be a governmental body of the beneficiary country or any other body approved by the Government of that country and recognized by the Minister of National Revenue for that purpose.

Source : <http://www.unctad.org/en/docs/itcdtsbmisc48> en.

## SPECIAL REGIME FOR HANDICRAFT PRODUCTS

### Approved Handicraft Goods

All articles of:

Abaca fibre, bamboo, banana fibre, bark, berries, bone, cameo-shell, cane, clay, coconut (fibres, leaf bud, leaves, sheath, shell), copper and copper alloys, coral, handwoven cordage, hibiscus fibre, horn, ivory, lava, mother of pearl, natural gums, natural resins, palm leaves, pandanas, pine-needles, pine-shells, quills, raffia, rattan, reeds, sakiki leaves, seeds, shell, sisal, straw, stone, tapa, teeth, tin and tin alloys, tortoise-shell (including, in the case of jewellery, tortoise-shell with metal inlay), tusks, twince, or combinations thereof.

Articles of natural wood, viz:

Bowls, canoes, decorative carvings, dishes, dolls, drums, fans, figurines, furniture, gongs, masks, model houses, picture frames, table articles, trays, walking stocks, weapons.

Articles of leather, viz:

Hand-tooled and hand-embroidered apparel, hand-tooled and silver inlaid hand-made saddlery and harness.

Articles of silk, wool, cotton, linen, jute and other vegetable fibres not already specified under paragraph 1 above, viz:

Handwoven textiles, fabrics, hand-printed (block, screen or batik printed), weighing less than 186 g/m<sup>2</sup> and not containing hand-made fibres; table linen of the foregoing hand-printed fabrics, jute belts.

Plastic-covered bamboo baskets.

**Note:** Products must be wholly or principally by weight of the approved materials. However, other materials are permitted if they are of a minor nature and do not contribute towards or detract from the essential nature of the goods (eg filling of wood-wool).

### Definition of Handicraft

The concession applies to goods which the Collector is satisfied are made:

- (a) by hand;
- (b) by tools held in the hand;
- (c) by machines powered by foot or hand; or
- (d) by any combination of the foregoing processes.

However, goods that have been "hand crafted" within the definition above from machine-made or processed materials of basic form, that is to say, materials in a form not predetermined by its intended ultimate end-use (eg a rectangular sided block of stone, a billet of wood, a rectangular sheet of copper) will not normally be excluded from being "handicrafts".

Goods are not precluded from being regarded as "handicrafts" by reason of their use in the manufacture of:

- (a) mechanically powered tools, provided they are held in the hand (eg electric drill) – this does not cover a situation where the article being produced is held in the hand and worked on a machine tool fitted to bench, stand or other support; or
- (b) machines not held in the hand, provided they are hand or foot powered (eg treadle operated sewing machines and potters' wheels); or
- (c) machine-made materials and components of a minor nature that are incidental to the assembly or normal operation of those goods (eg sewing threads, plain buttons, plain fasteners, nails, screws, plain hinges, paint or dyes).

Goods made up by hand, in whole or part from machine-made components, would not normally qualify as "handicrafts".

Goods held by hand against a cutting or grinding tool driven by a bench power-driven machine whereby artistic or decorative effects are produced will not be regarded as "handicrafts".

**Annex 8 : Statistical data for selected Tunisian cultural goods ( export to selected EU countries)**

**Printed matter : Books, magazines and other**

**Export By product in value (Tunisian Dinars)**

Product description and code : **4911 - Autres imprimes y compris les images les gravures et les photographies :**

Country	1999	2000	2001	2002	2003	2004	2005	2006
Belgium	256607	536572	309242	107058	65928	149746	19620	42308
France	15549	195206	79887	107939	181027	182989	344761	1284193
Germany	-	994	78	40	384	2467	1760	774
Italy	121	184	50	364	2275	29	730	156
Spain	-	-	78	70	13987	54882	16780	48
United Kingdom	336	-	-	15	352	2182	6626	1090
<b>Total</b>	<b>272613</b>	<b>732956</b>	<b>389335</b>	<b>215486</b>	<b>263953</b>	<b>392295</b>	<b>390277</b>	<b>1328569</b>

**Export By product in value (Tunisian Dinars)**

Product description and code : **4902 - Journaux et publications periodiques imprimes meme illustres ou contenant de la publicite :**

Country	1999	2000	2001	2002	2003	2004	2005	2006
France	321930	246626	277695	122223	194876	267822	238862	267127
Italie	-	-	21764	-	-	-	-	-
<b>total</b>	<b>321930</b>	<b>246626</b>	<b>299459</b>	<b>122223</b>	<b>194876</b>	<b>267822</b>	<b>238862</b>	<b>267127</b>

**Export By product in value (Tunisian Dinars)**

Product description and code : **4901 - Livres brochures et imprimes similaires meme sur feuillets isolés :**

Country	1999	2000	2001	2002	2003	2004	2005	2006
Belgium	-	-	-	27260	4218	617	10326	-
France	183748	163318	83043	171861	147684	313014	229688	58083
Germany	16905	8621	-	-	-	20102	200	-
Italy	-	21174	26611	18088	-	1562	4946	-
Spain	-	-	-	4005	20881	502	-	-
United Kingdom	12482	4746	-	1025	804	584	-	-
<b>Total</b>	<b>213135</b>	<b>197859</b>	<b>109654</b>	<b>222239</b>	<b>173587</b>	<b>336381</b>	<b>245160</b>	<b>58083</b>

**Handmade goods (carpets, paintings)**

**Export By product in value (Tunisian Dinars)**

Product description and code : **5805 - Tapisseries tissees a la main et tapisseries a l'aiguille ,meme confectionnees:**

Country	1999	2000	2001	2002	2003	2004	2005	2006
Belgium	-	-	-	76	-	-	2671	793
France	637400	319142	4435	198	2242	2741	2440	8114
Germany	1413	32019	314	1222	-	1541	2425	14973
Italy	266	189	-	1284	-	-	-	2244
Spain	200	-	-	-	-	-	-	-
United Kingdom	-	-	2113	590	-	-	-	-
<b>Total</b>	<b>639279</b>	<b>351350</b>	<b>6862</b>	<b>3370</b>	<b>2242</b>	<b>4282</b>	<b>7536</b>	<b>26124</b>

**Export By product in value (Tunisian Dinars)**

Product description and code : **9701 - Tableaux, peintures et dessins, faits entierement a la main ,a l'exclusion des dessins du n° 4906 et des articles manufactures decorees a la main; collages et tableaux similaires:**

Country	1999	2000	2001	2002	2003	2004	2005	2006
Belgium	-	-	-	-	-	-	-	1620
France	41037	112795	87022	385527	633566	740223	-	-
Germany	150	-	2150	-	367	865	-	-
Italy	-	-	-	-	131	65	-	650
United Kingdom	-	-	-	-	-	46	63606	-
<b>Total</b>	<b>41187</b>	<b>112795</b>	<b>89172</b>	<b>385527</b>	<b>634064</b>	<b>741199</b>	<b>63606</b>	<b>2270</b>

**Aggregated table for Tunisian Exports  
for selected cultural goods in 1000's Tunisian Dinars**

	1999	2000	2001	2002	2003	2004	2005	2006
Printed matter : Books, magazines and other ( codes : 4901,4902,4911)	808	1 177	798	560	632	996	874	1 654
Handmade goods (carpets, paintings) (codes : 5805, 9701)	680	464	96	389	636	745	71	28

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

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

*Prepared by:*

**EDOUARD BOURCIEU**

*Directorate General Trade European Commission*

This report has been prepared in October 2008 at the request of UNESCO Secretariat for the second session of the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions. The author is responsible for the choice and the presentation of the facts contained in this Report and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization.

## **Executive Summary**

Preferential treatment in the meaning of the 2005 UNESCO Convention is a wider and more complex concept that in its strict understanding under the WTO agreements and the trade domain in general.

In the context of the Convention, and in particular its Article 16, preferential treatment aims to achieve the twofold objective of improving cultural exchanges with developing countries, by facilitating the access of their cultural activities, goods, services and professionals to the territory of developed countries, while protecting and promoting the cultural diversity of all the partners in the agreement.

In order to be effective, preferential treatment relies on certain condition to be met. Preferential treatment cannot therefore be achieved by trade liberalisation or through one-size-fits-all solutions only. Effective preferential treatment relies on innovative cooperation schemes with developing countries adapted to their specific situation.

The chosen case-study of the EU-Cariforum Cultural Protocol, concluded at the end of 2007, aims to highlight the implementation of this concept of preferential treatment by the Parties to the negotiation, and the various conditions which are necessary to meet in order to strengthen its effectiveness.

As a new approach revisiting the relationship between culture, trade and cooperation, this Protocol demonstrates the relevance of innovative cooperation schemes for the facilitation of cultural exchanges between partners, in particular from developing towards developed partners, and the overall objectives of the Convention to ensure wider and more balanced exchanges.

Preferential treatment, insofar as it aims to address the challenge of effectively improving cultural exchanges, in particular South-North, while protecting and promoting cultural diversity, requires a holistic approach and the search not only for coordination and coherence between diverse instruments and frameworks, in particular development aid and trade instruments, but also active synergies between them, so that they can unleash all their potential when implemented together.



## **A. Introduction**

A key problematic in cultural exchanges is how to facilitate cultural exchanges and effectively improve the access of foreign cultural goods and services to each other's territory, while maintaining the capacity to develop and implement public policies for cultural diversity. An additional challenge in this problematic stems from the fact that some of those public policies are often based on discrimination (e.g. on the basis of a shared language or historic links). The World Trade Organisation (WTO) framework alone appears unable to adequately address this problematic as the twofold objective consisting in improving exchanges while promoting cultural diversity is better achieved through cooperation frameworks than trade liberalisation.

This report contains 4 sections and an Appendix with selected documents referred to in the report.

In the first section (B), the report will examine the concept of preferential treatment, both within the framework of the 2005 UNESCO Convention and that of the WTO and EU trade policy, in order to highlight the fundamental differences in the meaning and scope of preferential treatment.

In the second and third sections (C and D), the report will analyse the chosen case study, i.e. the EU-CARIFORUM Cultural Protocol, with the objective of highlighting its contribution to the implementation of the preferential treatment as defined in the UNESCO Convention.

The last section (E) will concentrate on a set of conclusions and recommendations, derived from the analysis of the case study, which are meant to underline the relationships between a specific mechanism granting preferential treatment and other measures and frameworks of public policies, and the necessity to bring all these elements in coherence in order to achieve tangible effects and thus give all its potential to preferential treatment.

## **B. The concept of preferential treatment**

### **1) The concept of preferential treatment within the 2005 Convention**

The concept of preferential treatment referred to in article 16 of the 2005 Convention must be interpreted in the light of other relevant provisions of the Convention. This includes in particular the following provisions:

- Preamble: reference, with respect to globalization, to "risks of imbalances between rich and poor countries"
- Article 1 (c): "with a view to ensuring wider and balanced cultural exchanges in the world"
- Article 2.4 principle of international solidarity and cooperation and 2.7 principle of equitable access
- Article 14 (a) ii "facilitating wider access to the global market and international distribution networks for their cultural activities, goods and services" and iv "adopting, where possible, appropriate measures in developed countries with a view to facilitating access to their territory for the cultural activities, goods and services of developing countries".

In light of these cross-references, it appears that the notion of preferential treatment referred to in Article 16:

- Is wider and more complex than a narrow "trade understanding".
- Is clearly directed towards achieving greater balance in cultural exchanges.

- Can be achieved through a variety of policies and measures, both in developed and developing countries.
- Should also contribute to sustainable development and fight against poverty.

Preferential treatment relies on cooperation frameworks, and in particular on innovative cooperation schemes, to effectively facilitate cultural exchanges and contribute to implement the overall objective of the Convention of wider and more balanced exchanges. It requires addressing in a coherent manner cooperation measures, development aid and trading agreements, in a spirit of complementarity and mutual supportiveness, pursuant to Article 20 of the Convention.

Finally, the preconditions for any preferential treatment to deliver in terms of effective contribution to the rebalancing of cultural exchanges should also be mentioned:

- There must be local cultural industries in developing countries: this means that whatever form of preferential treatment is granted, it should not preclude the development of domestic policies and measures geared towards the strengthening of local cultural industries (a preferential treatment granted upon renouncement to any form of domestic policies would not only be ineffective but counter productive for the diversity of cultural expressions);
- There must be links between the cultural actors in developing and in developed countries. Without such links (in particular, co-productions), any preferential treatment would fail to deliver exchanges in goods and services. Such links can only be triggered by cooperation and not by trade liberalisation.

## **2) The concept of preferential treatment in WTO rules and EU trade policy**

### **2.1. WTO rules governing preferential treatment**

The WTO Agreements contain special provisions which give developing countries special rights and which give developed countries the possibility to treat developing countries more favourably than other WTO Members.

These provisions are referred to as “special and differential treatment” provisions and include:

- longer time periods for implementing Agreements and commitments,
- measures to increase trading opportunities for these countries,
- provisions requiring all WTO members to safeguard the trade interests of developing countries,
- support to help developing countries build the infrastructure for WTO work, handle disputes, and implement technical standards, and
- provisions related to Least-Developed country (LDC) Members.

The granting of preferential treatment to developing countries, which implies granting more favourable conditions to trade with some WTO members than to other WTO members, departs from the WTO guiding principle of non-discrimination defined in particular in Article I of GATT and Article II of GATS. It is however permitted to grant such preferential treatment under specific conditions which are spelled out in three sets of rules:

- Article XXIV of GATT provides for the formation and operation of customs unions and free-trade areas covering trade in goods. It requires in particular the elimination of duties

and other restrictions of commerce on "substantially all trade" between the parties of the agreement.

- Article V of GATS governs the conclusion of free trade agreements in the area of trade in services, for both developed and developing countries.
- The Enabling Clause officially called the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", was adopted under GATT in 1979 and enables developed members to give differential and more favourable treatment to developing countries. The Enabling Clause is the WTO legal basis for the Generalized System of Preferences (GSP). Under the GSP, developed countries offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating in developing countries. Preference-giving countries unilaterally determine which countries and which products are included in their schemes. The Enabling Clause is also the legal basis for regional arrangements among developing countries and for the Global System of Trade Preferences (GSTP), under which a number of developing countries exchange trade concessions among themselves.
- Other non-generalized preferential schemes, for example non-reciprocal preferential agreements involving developing and developed countries, require Members to seek a waiver from WTO rules. Such waivers require the approval of three quarters of WTO Members. Examples of such agreements which are currently in force include the US — Caribbean Basin Economic Recovery Act (CBERA), the CARIBCAN agreement whereby Canada offers duty-free non-reciprocal access to most Caribbean countries, Turkey-Preferential treatment for Bosnia-Herzegovina and the EC-ACP Partnership Agreement.

## **2.2. EU trade policy and preferential treatment to developing countries**

Trade preferences for developing countries have been used by the EU since the early 1960s. The preferential treatment the EU offers varies depending on whether the developing country is entitled to preferences under the generalised system of preferences (GSP) only (to which all developing countries are eligible), to preferences under the Cotonou Agreement (Economic Partnership Agreements (EPAs) as of 2008) or has signed a bilateral or regional free trade agreement (FTA) with the EU (e.g. Chile, Mexico and South Africa and most Mediterranean countries).

### **a. *The EU's GSP***

The GSP is a scheme whereby the EU grants autonomous, non-reciprocal trade preferences to a wide range of Developing Countries (DCs) in order to stimulate their exports to the EU market and hence support their development. The GSP is an autonomous trade instrument and it is implemented by a Council Regulation (GSP Regulation). The scheme has to be compliant with the WTO rules, which require the GSP to be "generalized, non-reciprocal and non-discriminatory". At the same time, WTO jurisprudence has developed to permit a certain degree of discrimination between DCs as long as differential treatment is based on objective and transparent development-related criteria.

The GSP has three sub-regimes of increasing generosity: a standard regime, a regime to incentivise sustainable development and good governance (the "GSP+") and a regime for the Least-Developed Countries), the so called "Everything but Arms" (EBA) initiative.

The European Community was the first to implement a GSP scheme, in 1971. Since then, the GSP has changed considerably, in many respects. In the early days, there were different regulations for different products, and these regulations were adopted on a yearly basis. Nowadays, there is only one GSP regulation, for all products, for all arrangements and for a period of at least 3 years (see also annex on basic GSP mechanisms).

- The General Arrangement
  - Through the general arrangement the EU grants standard preferential treatment to 176 beneficiary Developing Countries and Territories. A few more advanced DCs are excluded (ie Hong Kong China, Korea, Singapore, Taiwan), while preferences for other more advanced emerging economies (Brazil, China, India etc) are effectively modulated through the operation of a "graduation" mechanism (explained below).
  - This arrangement covers 6312 products out of roughly 9700 EU customs tariff lines. The GSP covered products are split into non-sensitive and sensitive products.
  - Non-sensitive products (just over 3200 and representing slightly more than half of the products covered) enjoy duty-free access.
  - Sensitive products (just under 3200 tariff lines, mostly agricultural, textiles, clothing and footwear items) benefit from a tariff reduction of 3.5 percentage points on ad valorem duties compared to the standard most favoured nation (MFN) tariff or a 30 percent reduction in those duties calculated on a specific basis. For textiles and clothing (chapters 50–63 of the Combined Nomenclature), the reduction, however, is 20 percent of the ad valorem MFN duty rate.
  - The GSP does not cover services.
- The Arrangement for sustainable development and good governance (GSP+)
  - This arrangement offers additional preferences as an incentive to vulnerable countries to ratify and effectively implement a broadly defined set of international standards in the fields of human rights, core labour standards, sustainable development and good governance. For this purpose, there are 16 core human and labour rights conventions and 11 environment and good governance conventions identified in the GSP Regulation.
  - Vulnerable countries are those not classified by the World Bank as high income countries and whose GSP exports to the EU show both relatively high product concentration (the 5 most important product sections must represent more than 75% of total GSP imports) and a relatively low volume (less than 1%) in comparison to total GSP imports from all beneficiaries.
  - The GSP+ allows duty-free entry to the EU market for all the 6312 goods covered by the general GSP scheme, irrespective of their sensitivity status under the general arrangement. It also covers a small number of products not in the standard regime.
  - The GSP+ regime currently includes 14 countries: the four ANDEAN Community countries (Bolivia, Colombia, Ecuador, and Peru); seven other Latin American countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama and Venezuela), one from Eastern Europe (Georgia) and two countries from Asia (Sri Lanka and Mongolia).
- The Everything But Arms Initiative (EBA)

The EBA arrangement gives the 50 LDC countries duty free access to the EU for all products, except arms and armaments. There are as well transitional provisions for imports of rice and sugar, which will be fully liberalised by October 2009. Until then transitional and expanding duty free quotas are established.

### ***b. The Cotonou Agreement and the EPAs***

See section C below

### ***c. Bilateral and regional FTAs***

In addition, the EU has a number of bilateral or regional FTAs with developing countries, offering them additional market access on top of the GSP preferences. For instance, trade is an essential component of the Euro-Med Partnership, which ultimately aims to deepen regional integration in the Mediterranean region and to establish a Euro-Mediterranean FTA by 2010. The Mediterranean countries involved in the Euro-Med Partnership (except for Syria) have concluded and currently implement Association Agreements with the EU, which provide for liberalisation of trade in manufactured goods and asymmetric (in favour of the Mediterranean countries) reciprocal preferences in agriculture. Liberalisation of trade in services and investment, including the right of establishment, also form part of the Association Agreements' key objectives.

Bilateral FTAs have been established with Chile, Mexico, and South Africa, which provide for asymmetric liberalisation (in favour of the partner countries) of substantially all trade in manufactured and agricultural goods and in the former two cases progressive and reciprocal elimination of a number of behind the border barriers to trade and investment (intellectual property rights, government procurement, etc). The EU has also introduced Autonomous Trade Measures (ATMs) for the countries of the Western Balkans (Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Kosovo, Serbia and Montenegro), which have been contractualized for most of the countries in Stabilisation and Association Agreements with the EU and for Moldova.<sup>1</sup>

It is worth noting that within the framework of these agreements, audiovisual services, as well as the vast majority of cultural services, are not included in the trade liberalisation commitments of the Parties.

## **3) Synthesis**

There are important differences between the concept of preferential treatment / special and differential treatment within the WTO, and the concept of preferential treatment in Article 16 of the Convention. While special and differential treatment in the WTO has a limited scope in nature, as it is only meant to be an exception to the rules, in order to redress temporarily a given situation, preferential treatment in the meaning of Article 16, and in cultural cooperation in general, necessarily incorporates the notion of lasting and structuring effects on cultural exchanges.

Preferential treatment in the meaning of Article 16 requires the capacity for all partners to the preferential treatment agreement to keep the room for manoeuvre, or policy space, for maintaining and developing further public policies for cultural diversity, which themselves not only help creating the conditions for the existence of cultural goods and services in each territory, but also those for their circulation, within and across territories.

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<sup>1</sup> The ATMs are similar to the EBA in that they provide for duty and quota free access for all products from the beneficiary countries, but with the exception of quotas for baby-beef, some fish products and wine. Live bovine animals, beef, and prepared fish are excluded and there are tariff quotas for sugar.

## **C. The legal and institutional framework concerning preferential treatment granted by the EU: the case of the Cotonou agreement and the Economic Partnership Agreements (EPAs) with African, Caribbean and Pacific countries**

### **1) From Yaoundé to the EPAs**

Relations between the European Union and the African, Caribbean and Pacific States (ACP) have developed as a unique combination of aid, trade and political cooperation.

These special EU-ACP relations date back to the Treaty of Rome (1957) but the first agreement of substance is the Yaoundé Convention, negotiated with 18 ACP countries in 1963: the Associated African States and Madagascar (AASMs). Yaoundé II followed in 1969. Then, after the accession of the United Kingdom to the Community, came the first Lomé Convention, signed in 1975 (with 46 ACP countries), Lomé II in 1979 (58 ACP countries), Lomé III in 1984 (65 ACP countries) and Lomé IV in 1989 (68 ACP countries, extended in 1995 to 70 ACP countries).

Today, the ACP-EU Partnership is governed by the Cotonou Agreement, signed in June 2000 and concluded for a period of 20 years. At present, 78 ACP countries are signatories to the Cotonou Agreement: 48 African states, covering all of sub-Saharan Africa, 15 states in the Caribbean and 15 states in the Pacific. Out of the 50 least developed countries (also covered by the EU's Everything But Arms initiative of February 2001), 41 are ACP countries.

As was the case under Lomé, provisions on economic and trade cooperation are an integral part of the Cotonou Agreement. They are incorporated in Part III of the Agreement, "Cooperation Strategies", together with the provisions on "Development Strategies". A common provision stresses that development strategies and economic and trade cooperation are interlinked and complementary and that efforts undertaken in both areas must be mutually reinforcing.

In order to enhance the contribution of trade to development, the ACP States and the European Community decided in Cotonou to overhaul their previous trade relations. Whereas these had been primarily based, since Lomé I, on non-reciprocal trade preferences granted by the Community to ACP exports, the Community and the ACP countries have agreed to conclude new WTO-compatible trading arrangements, progressively removing barriers to trade and enhancing cooperation in all areas related to trade. This current legal framework for trade is primarily conceived as an instrument for development.

To this end, Economic Partnership Agreements (EPAs) are being negotiated with ACP regions engaged in a regional economic integration process. EPAs are thus intended to consolidate regional integration initiatives within the ACP and to foster the gradual integration of the ACP into the global economy on the basis of an open, transparent and predictable framework for goods and services. EPAs are trade and cooperation agreements at the service of development.

Formal EPA negotiations at the level of all ACP countries started in September 2002. Since October 2003 regional negotiations with the six ACP regions (West Africa, Central Africa, Eastern and Southern Africa, the Southern African Development Community, Caribbean, Pacific) have been launched. EPA negotiations are supported through Trade-Related Assistance providing support for the negotiation process.

In 2008, the unilateral preferences under the Cotonou Agreement were replaced by full or interim EPAs between the EU and individual ACP countries or groups of countries. While there is a comprehensive full EPA agreed with the Caribbean region, with the other ACP regions a series of interim agreements based on new WTO compatible goods trade

arrangements were concluded. The interim agreements provide for asymmetric reciprocal trade liberalisation between the parties (in favour of the ACP countries) over a transitional period up to 15 years and are explicitly drafted to provide the basis for subsequent comprehensive regional EPA agreements. Full or interim EPAs were signed by all but three non-LDC ACPs (Congo (Brazzaville), Gabon and Nigeria).

The first full regional EPA was initialled on 15 December 2007 with Cariforum (i.e. 15 Caribbean countries<sup>2</sup>) and a number of interim agreements were concluded with certain countries or regions in Africa and the Pacific, that serve as a stepping stone for full regional EPAs currently under negotiation. The EU-Cariforum EPA was signed on 15 October 2008.

This agreement represents an important milestone in the EC effort to contribute to better integrate ACP countries in the global economy through preferential access to the EC markets. Rights and obligations are carefully balanced for the Parties and investors with a sustainable development view, in a way that new access to markets is coupled with binding provisions on non-lowering of standards for environmental, social standards and for cultural diversity – in the latter case, through a specific chapter: the Protocol on Culture Cooperation.

## **2) The Protocol on Cultural Cooperation in the EPAs**

- The negotiating mandate for the EPAs: promoting the access of ACP cultural goods and services to the EU while preserving the cultural diversity of the partners.

Directives for the negotiations of Economic Partnership Agreements with ACP countries and regions:

*"The Agreement will provide for a progressive and reciprocal liberalisation of trade in services aiming at assuring a comparable level of market access opportunities, consistent with the relevant WTO rules, in particular Article V of the GATS, taking into account the level of development of the ACP countries concerned. Les Accords prévoient que les services audiovisuels feront l'objet d'un traitement distinct au sein d'accords spécifiques de coopération et de partenariat culturels entre les parties. Ces accords permettront de garantir la possibilité pour l'Union européenne et ses États membres ainsi que pour les ACP de préserver et développer leur capacité à définir et mettre en œuvre leurs politiques culturelles et audiovisuelles pour la préservation de leur diversité culturelle, tout en reconnaissant, préservant et promouvant les valeurs et identités culturelles des ACP, pour favoriser le dialogue interculturel par l'amélioration des possibilités d'accès au marché pour les biens et services culturels de ces pays, en conformité avec les dispositions de l'article 27 de l'Accord de Cotonou" [in French in the original].*

The elaboration of this negotiating mandate preceded the negotiations leading to the adoption of the UNESCO Convention, which means that the UNESCO Convention as such could not be taken into account at the time. However, this mandate is based on the EC Treaty (Article 151.4 in particular<sup>3</sup>) as well as on long standing EC positions regarding the treatment of culture and audio-visual services in trade agreements. In this respect, its general thrust is in line with the subsequent UNESCO Convention guiding principles and objectives. This meant that at the time when the EPAs negotiations started, at the beginning of 2007, the EC was fully ready to ensure the fulfilment of the UNESCO Convention, and in

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<sup>2</sup> i.e. the 14 members of CARICOM (Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts & Nevis, Saint Lucia, St. Vincent & The Grenadines, Suriname, Trinidad & Tobago) and the Dominican Republic.

<sup>3</sup> Article 151 is the provision of the Treaty on culture. Its 4<sup>th</sup> paragraph requires the Community to "take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures".

particular its Article 16. Some aspects of Article 16 which were not explicitly mentioned in the mandate, in particular the issue of circulation of artists and cultural professionals and practitioners, were easily integrated in the discussions.

Audio-visual services, and to a large extent cultural services, are therefore explicitly excluded from the trade chapters of the EPAs agreements, consisting of trade liberalisation commitments on services and establishment, and an *ad hoc* Protocol on Cultural Cooperation (PCC) - which neither duplicates traditional cultural cooperation (e.g. financial support to the partners' industry, dealt with in other agreements with these countries) nor consists of trade liberalisation commitments– is to be appended to each EPA. The content of the PCC may vary from one EPA to another, according to the interests of the ACP partners concerned.

The PCC consists therefore in a new formula for setting the conditions facilitating exchanges of cultural goods and services between the EC and its partners, while protecting and promoting cultural diversity – in line with the UNESCO Convention.

The EU-Cariforum EPA agreement is the first regional EPA to be concluded, and its Protocol on Cultural Cooperation (PCC) is the first implementation of the EPAs negotiating mandate and of the UNESCO Convention, in particular Article 16, in an agreement between the EU and third countries.

#### **D. Analysis of existing agreements and preferential treatment mechanisms: the case of the Protocol on Cultural Cooperation (PCC) within the Economic Partnership Agreement (EPA) between the EU and the CARIFORUM**

##### **1) Principles governing the Protocol on Cultural Cooperation**

###### - The UNESCO Convention: overarching conceptual framework for the Protocol

The UNESCO Convention on cultural diversity - mentioned in the preamble of the Protocol - is the overall umbrella under which the PCC exists and will be implemented. The Convention provides for the definitions and guiding principles for the facilitation of exchanges of cultural goods and services. As it is anchored in the conceptual framework of the Convention, and implements some of its objectives, the Protocol is the first new legal act of implementation of the Convention by the EC in external relations.

The Protocol intends to promote the ratification of the UNESCO Convention, by encouraging signatories to ratify the UNESCO Convention promptly if they have not yet done so, and to ensure its implementation, in particular its Article 20, which requires Parties to take the Convention into account in all their agreements, and its Article 16, which requires Parties to grant preferential treatment to artists and other cultural professionals and practitioners from developing countries.

The Protocol is therefore a tool which can only exist with Partners who abide by the Convention's objectives and guiding principles and undertake to ratify and implement it.

###### - Improving the conditions governing cultural exchanges

The Protocol aims at facilitating exchanges in cultural activities, goods and services, as well as the circulation of artists and other cultural professionals and practitioners, with the view to redress structural imbalances and asymmetrical patterns of cultural exchanges. In this respect, the PCC implements the broader commitment to strengthening international



cooperation in the field of culture as expressed in the Commission Communication of May 2007 on a “European agenda for culture in a globalizing world”<sup>4</sup>. This objective is fulfilled notably by exchanges of best practices, training, preferential treatment for co-productions.

- ....while preserving cultural diversity

The improvement of exchanges is compliant with the objectives of the Convention, as it allows Parties to maintain their capacity to elaborate and implement cultural policies which protect and promote cultural diversity.

The PCC itself contains provisions which aim precisely the objective of protection and promotion of cultural diversity: Articles 2 and 4.2 on the establishment of policy dialogues on cultural diversity, notably on public policies in favour of cultural diversity.

- The Protocol, one element in a wider ensemble

The Protocol has to be read together not only with other provisions of the EPA Agreement, and in particular the market access commitments by 26 EU Member States for entertainment services from CARIFORUM states - governed by the rules of the Services and Investment chapter and the general provisions of the EPA, but also in conjunction with the programmes and actions undertaken by the EU in the field of development policy.

Addressing the challenge of effectively improving cultural exchanges while protecting and promoting cultural diversity requires a holistic approach and the search for not only coherence but active synergies between these diverse instruments and frameworks when implemented together.

In order not only for preferential treatment but also for other public policies measures to unleash all their potential, it is indeed necessary to envisage preferential treatment as one element of a wider strategy of integrating culture in external relations, this requiring to ensure coordination, coherence and synergies between the cooperation framework, in particular in the area of development aid, and the trade framework.

## **2) Specific features: a detailed description of the provisions of the PCC**

### Preamble

The Preamble explains the general context of the Protocol on Cultural Cooperation. It:

- calls on the Parties to promptly ratify and implement the 2005 UNESCO Convention, as well as cooperate within the framework of this implementation, and develop actions in line with its provisions, notably its Article 16;
- highlights the importance of cultural industries and the multi-faceted nature of cultural goods and services that are at the same time tradable but are not comparable to other goods and services due to their cultural and social value;
- refers to the regional integration process supported by the EPA within the overall strategy of promoting equitable growth and the reinforcement of economic, trade and cultural cooperation;
- recalls that the Protocol complements existing and future instruments in the field of development policy, which aim, inter alia, to reinforce the capacities of the Parties' cultural industries;

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<sup>4</sup> COM (2007) 242

- stresses the importance to adapt cultural cooperation modalities to the specificities of the relationship with the partners in the Protocol, and for that purpose to take into account notably the degree of development of cultural industries, the level and structural imbalances of cultural exchanges and the existence of preferential schemes for the promotion of cultural content.

#### Article 1: Scope, objectives and definitions

This provision established the 2005 UNESCO Convention as the overarching framework of reference, for definitions and concepts used in the Protocol.

The main objective of the cooperation to be carried out within the framework of the Protocol is laid down, which is to improve the conditions governing exchanges of cultural activities, goods and services between the Parties, and redress the structural imbalances and asymmetrical patterns of such cultural exchanges, while maintaining the Parties capacity to elaborate and implement cultural policies which protect and promote cultural diversity.

It is also clarified that the provisions on facilitation of exchanges regarding cultural activities, goods and services dealt in the Protocol are complementary to other provisions of the Agreement (e.g. chapters on "Cross border services", "Mode 4" and "Establishment" in the Title "Establishment, Trade in Services and E-commerce"; Chapter "Intellectual property rights" in the Title "Innovation and Intellectual property rights").

Some of these provisions outside of the Protocol are indeed relevant to the cultural sector, and complement the substance of the Protocol (see below, Article 3).

#### Articles 2 to 4: Horizontal provisions

Horizontal provisions cover policy dialogue (Article 2); the important issue of relevance for all sectors, of entry and temporary stay of artists and other cultural professionals and practitioners (Article 3), and technical assistance (Article 4).

Article 2 institutes a policy dialogue, exchanges of information and best practices between the EU and Cariforum States, with the view to develop a common understanding of cultural matters, which is to take place within the mechanisms established by the EPA agreement as well as in all other relevant fora.

Article 3 is one of the key provisions of the Protocol, as it addresses the conditions for entry and temporary stay of artists and cultural professionals and practitioners in the Parties' territories for up to 90 days in any 12-month period.

The provision related to the movement of physical persons in this Article is complementary to those covered under mode 4 in the Title "Establishment, Trade in Services and E-commerce" of the EPA Agreement.

Article 3.1 stresses that it is important to create possibilities for artists, cultural professionals and practitioners to temporary enter the territory of the other Party if they are not supplying services in the meaning of WTO/GATS Article XXVIII (b), which defines the "supply of service" as production, distribution, marketing, sale and delivery of a service. To make sure that all cultural professionals as well as amateurs and semi-professionals engaged in cultural activities are covered by this provision, the terms "artists, cultural professionals and practitioners" are defined broadly in Article 1.

The activities of interest and particular relevance to artists and cultural professionals and practitioners during their temporary could be for example:

- shooting of a film or TV programme in the host country's location (the partner country's professionals would come to shoot for themselves and would not sell the "production service");
- sound recording (using a host country's facilities and expertise);

- using the libraries, museums and other archives to develop the ideas and concepts for a script;
- taking part in conferences, seminars, fairs, etc<sup>5</sup>.
- coming for a study visit;
- coming to find and rent necessary equipment, theatrical properties or costumes, or to recruit artists, technicians etc., either to employ them in their country or to use their services at the location.

Although Article 3 might be read as a trade article at first sight, it is clearly outside of the trade scope. Since there is no service provision between the two Parties for this temporary entry, this is not a trade commitment. This article is about promoting the Parties' territories as shooting locations and providing access to them to partners' shooting crews if they so wish. This is part of facilitating exchanges and promoting the Parties urban and rural landscapes through films, including foreign ones.

Article 3.3 concerns the encouragement of training and increased contacts between artists and cultural professionals and practitioners of the Parties to the Protocol, and includes a non-exhaustive list of specific activities and cultural professionals, including some which are specific to the Cariforum region, i.e. mas performers.

The possibility for Caribbean artists and cultural professionals and practitioners to enter the EU market was one of the key demands from Cariforum States in the negotiations.

Article 3 of the Protocol, combined with the market access commitments made by the EU in the chapter on services of the EPA, intends to answer these demands in an effective manner, while ensuring cultural sustainability for all partners.

While the market access commitments in the services chapter of the EPA grant access for cultural professionals who are providing a service in Europe, in the sense of the WTO/GATS, the Protocol facilitates the entry of those who are not providing a service *per se* but who wish to enter the EU for other cultural activities, including collaborating with European cultural professionals.

In addition to allowing Caribbean firms to invest in entertainment activities in the EU, the EC and its Member States grant legally binding market access for the supply of entertainment services through the temporary entry of natural persons for up to six months. This is categorized as Contractual Service Suppliers (CSS<sup>6</sup>) under the EPA for the following activities:

CPC 9619 Entertainment services (other than audio-visual)

96191 Theatrical producer, singer group, band and orchestra entertainment services

96192 Services provided by authors, composers, sculptors, entertainers and other individual artists

96193 Ancillary theatrical services n.e.c.

96194 Circus, amusement park and similar attraction services

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<sup>5</sup> In the case of fairs, it is important to note that this would cover the visit of the fair, but not the participation to the fair through a stand, which is a marketing service in the sense of the GATS.

<sup>6</sup> Contractual Service Suppliers (CSS) are defined as follows:

Natural persons (individuals) of the EC Party or of the Signatory CARIFORUM States employed by a juridical person (company or firm) of that EC Party or Signatory CARIFORUM State which has no commercial presence in the territory of the other Party and which has concluded a bona fide contract to supply services with a final consumer in the latter Party requiring the presence on a temporary basis of its employees in that Party in order to fulfil the contract to provide services.

96195 Ballroom, discotheque and dance instructor services

96199 Other entertainment services n.e.c.

All EU Member States except Belgium undertook commitments in the entertainment sector for CSS.

Access granted to Caribbean entertainers, artists and other cultural practitioners are without quotas. They may be subject to qualification requirements. The condition to be subject to economic needs tests (ENTs) was accepted in exchange for a full commitment to market opening by the EU without quotas.

This is a first, not only for the EU Member States, but also for developed countries in general. For instance, when the United States signed far-reaching trade agreements with Central America, the Dominican Republic and several Andean countries, none of these FTAs included provisions on temporary entry of service suppliers.

In order to take advantage of market access under the EPA, the following conditions that were agreed by both sides for contractual service suppliers will apply to any natural person (entertainer or artist):

- a) The natural persons (individuals) are engaged in the supply of a service on a temporary basis as employees of a juridical person (firm or company), which has obtained a service contract for a period not exceeding 12 months.
- b) The natural persons entering the other Party should be offering such services as an employee of the juridical person supplying the services for at least the year immediately preceding the date of submission of an application for entry into the other Party. In addition, the natural persons must possess, at the date of submission of an application for entry into the other Party, at least three years professional experience 5 in the sector of activity which is the subject of the contract.
- c) The natural person shall not receive remuneration for the provision of services other than the remuneration paid by the contractual service supplier during its stay in the other Party.
- d) The temporary entry and stay of natural persons within the Party concerned shall be for a cumulative period of not more than six months or, in the case of Luxembourg, 25 weeks, in any twelve month period or for the duration of the contract, whatever is less.
- e) Access accorded under the provisions of this Article relates only to the service activity which is the subject of the contract; it does not confer entitlement to exercise the professional title of the Party where the service is provided.
- f) The number of persons covered by the service contract shall not be larger than necessary to fulfil the contract, as it may be decided by the laws, regulations and requirements of the European Community and the Member State where the service is supplied.

The rationale for market access commitments for cultural professionals is linked to the presence of a clear interest from Cariforum countries in conjunction with a clear and proven situation of imbalance between the EU and the Cariforum partners in terms of capacity building in cultural expressions and cultural exchanges, to the detriment of the Cariforum countries. These market access commitments do not affect negatively cultural diversity, unlike ample and generalised trade commitments in the cultural sector, as they are limited, targeted to a specific relationship with a region and concern exclusively the circulation of physical persons and not the chain of production, distribution and access of cultural industries for which public policies exist In both Parties

The market access commitments on entertainment services and the provisions of the Protocol are subject to the wider objectives of the EPA Agreement and its general provisions, including dispute settlement.

Should artists or cultural professionals or practitioners encounter difficulties with regard to the provisions laid down in the EPA Agreement, they can report to their country, which as a Party, can bring the matter to the dispute resolution body. This procedure is usually absent in traditional cooperation agreements. Placing the Protocol within the general framework of a trade agreement has the advantage of rendering possible to make use of such mechanism.

The Protocol does not apply to measures affecting natural persons seeking employment in the other Party nor does it prevent a Party from applying measures to regulate the entry or temporary stay of natural persons.

Article 4 provides for technical assistance through different measures, inter alia, training, exchange of information, expertise and experiences, and counselling in elaboration of policies and legislation as well as in usage and transfer of technologies and know-how. This support will include cooperation between private companies, non-governmental organisations as well as public-private partnerships.

#### Articles 5 to 9: Sectoral provisions

These provisions address cultural cooperation in specific cultural sectors such as audiovisual cooperation and co-productions as well as cooperation in relation to publications, performing arts and protection of heritage sites.

Article 5 is one of the core provisions of the Protocol, as it grants preferential market access to the EU to audio-visual co-productions made by Parties in virtue of the Protocol, by qualifying these co-productions as "European works" in the sense of the EC Directive on Audiovisual Media Services.

A specific analysis on Article 5.2 regarding the preferential market access granted to audio-visual co-productions in the EU, is contemplated below in this section.

The other provisions of Article 5 on audio-visual concern the encouragement of co-production agreements between the Parties (Article 5.1), the commitment to the use of international and regional standards, in order to ensure compatibility and interoperability of audio-visual technologies (Article 5.3); the facilitation of rental and leasing of technical material and equipment which are necessary to create and record audio-visual works (Article 5.4) and the encouragement of digitalisation of audio-visual archives (Article 5.5).

Article 6 is to be read in connection with the market access commitments in entertainment services referred to above, as it concerns the temporary importation of material and equipment for the purpose of shooting films and TV programmes.

Article 7 concerns cooperation in the area of performing arts, notably through training, participation in auditions and networks, as well as through the development of international theatre technology standards.

Article 8 relates to cooperation in the field of publications and dissemination of information.

Finally, Article 9 concerns cooperation on the protection of sites and historic monuments, whereas such cooperation shall take place through exchanges of expertise and best practices.

#### The preferential treatment for audio-visual co-productions

Article 5.2 grants preferential market access to the EU to audio-visual co-productions made by Parties in virtue of the Protocol, by qualifying these co-productions as "European works" in the sense of the EC Directive on Audiovisual Media Services, and therefore benefiting from the EC broadcasting content requirements of the Directive<sup>7</sup>. This provision is

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<sup>7</sup> Article 4 of the Directive

operational at the date of entry into force of the EPA Agreement, as it is not a best endeavour clause.

Conditions are specified for granting such preferential treatment, which are detailed in Article 5.2.a.

The Audiovisual Media Services Directive (AVMSD) is the third generation of the "Television Without Frontiers" Directive, which was adopted in 1989 and revised in 1997. It constitutes the comprehensive legal framework at EC level which covers all audiovisual media services (including on-demand audiovisual media services).

The Directive reaffirms the pillars of Europe's audiovisual model, which are inter alia cultural diversity, protection of minors, consumer protection and media pluralism. It introduces a new definition of European works in Article 1, which modifies the previous definition contained in Article 6 of the Television without Frontiers Directive of 1997.

This new definition of European works aims at meeting future challenges in cultural cooperation with third countries, notably in relation to the implementation of the UNESCO Convention, which provides a new framework for international cooperation, including the possibility of developing regional co-operations in the field of audiovisual and culture and fostering exchanges with developing countries through preferential treatment granted to cultural goods and services.

The new definition of "European works" offers an incentive for third countries to cooperate with the Community in the audiovisual sector. In doing so, in line with the objectives of Articles 151(4) and 157 of the EC Treaty, it aims to facilitate the overall public objective of promoting cultural diversity and enhancing the competitiveness of audiovisual industries through cooperation with third countries which share common views on cultural diversity in this area.

The former definition of "European works" only included co-productions between a co-producer from an EU Member State and co-producers who are either established in "European third countries with which the Community has concluded agreements relating to the audiovisual sector if those works are mainly made with authors and workers residing in one or more European States", or in third countries with which an EU Member State has concluded a bilateral co-production treaty.

The new definition includes a new form of co-productions: those produced "within the framework of agreements related to the audiovisual sector concluded between the Community and third countries and fulfilling the conditions defined in each of those agreements".

At the time of drafting of this text, there was no such agreement in place. The EPA agreement, and its Protocol on Cultural Cooperation, is the first agreement which qualifies under this definition, and therefore the co-productions covered by Article 5.2 of the Protocol are the first ones which will benefit from the new definition of the Directive.

The full effect of the definition of European works comes from another provision of the Directive, which is Article 4, setting the EC broadcasting content requirements.

The effect of Article 5.2 of the Protocol is that co-productions between the EU and the Cariforum States, under the conditions laid down in Article 5.2.A, will benefit from an improved market access to the EU, by qualifying as "European works" and therefore being subject to the majority proportion broadcasting requirement of Article 4.

This provision aims to enhance cultural diversity, both within the EU (by diversifying the origin of import of audio-visual content) and for Cariforum States (as they will not only benefit from this enhanced access to the EU market but also from associated benefits derived from co-productions such as training and overall strengthening of local capacity in audio-visual).

A mechanism for reciprocity is laid down in Article 5.2.c, which foresees that when and where preferential schemes for the promotion of local or regional content exist in the Cariforum States, co-productions subject to Article 5 will also be able to benefit from such schemes, under the same conditions of Article 5.2.a.

Extending the market access to these co-productions will facilitate the development of cultural industry in developing countries and the mutual access to each other's culture through preferential broadcasting of joint productions.

It is important to note that unlike bilateral co-production treaties, the provision on co-productions in the Protocol does not grant automatic access to financial schemes existing for co-productions in the EU Member States. The provision of Article 5.2 only intervenes at the level of broadcasting, and not downstream at the phase of development or production of the co-productions.

### **3) Description of the decision-making process leading to the adoption of the PCC**

- Identification by both partners in the negotiation of culture as an area of common interest
  - ⇒ Cariforum countries came with the request for addressing cultural industries very early in the process.
- Participatory decision-making process: consultations of civil society
  - ⇒ Regular consultations as well as 2 *ad hoc* civil society dialogue meetings, in 2007 and 2008, have been undertaken by the EU<sup>8</sup>.

### **4) Impact assessment**

A general impact study (ex-ante) has been drawn for the EPAs in the six ACP regions:  
[http://ec.europa.eu/trade/whatwedo/trade\\_analysis/st\\_acp\\_epa\\_en.htm](http://ec.europa.eu/trade/whatwedo/trade_analysis/st_acp_epa_en.htm)

An impact assessment of the EPAs and of the PCC ex-post is not available, as the Protocol is not yet into force, let alone implemented. Therefore, there is no possibility of making impact assessment in relation to the effect of the implementation of the protocol on cultural exchanges.

However, the impact of the conclusion of the Protocol in December 2007 can already be measured in terms of the level of interest it has triggered. It is also expected to have a positive impact on the ratification and implementation of the Convention, as Parties commit to it in the Protocol. In this sense, the PCC can be considered as a booster for the ratification and the implementation of the Convention.

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<sup>8</sup> <http://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11194> ; <http://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11238>

## **E. Conclusions and recommendations**

### **1) Discussion of the extent to which the protocol on cultural cooperation offers a practical example of application of Article 16 of the Convention**

- **An innovative approach between traditional cultural cooperation and trade liberalisation: granting real advantages while keeping policy space in the field of culture**

The Protocol consists of cooperation through concrete means which have the effect of improving cultural exchanges between Europe and the countries concerned while preserving the capacity to develop cultural policies. With the limited exception of the market access commitments on cultural professionals, the Protocol does not include measures of trade liberalisation.

This preferential treatment scheme meets the objectives of the UNESCO Convention, insofar as it contributes to facilitate cultural exchanges while preserving the cultural diversity of the partners.

- **The right mix of reciprocity and asymmetry**

Development and regional integration have been at the centre of the EPA negotiations, with reciprocal but asymmetrical commitments.

#### Asymmetry

The asymmetrical feature of the EPAs agreements makes these agreements the adequate framework for the EC to test modalities of preferential treatment in the area of culture, in line with Article 16 of the Convention. Although the wording of the provisions of the Protocol illustrates a shared endeavour, the preamble (last recital) and Article 1.2. provide for the general objective that the EC will be offering more than it asks ACP countries to offer – as exchanges of cultural goods and services between the EC and the Cariforum countries are clearly and largely to the detriment of the latter. This pursues the general objective of redressing imbalances in cultural exchanges between the EU and the Cariforum States, which are to the detriment of the latter, and thus foster more balanced exchanges between them.

This is fully in line with the UNESCO Convention, which requires taking account of the imbalances between rich and poor countries (recital 19 of the Preamble and Article 1.i)

#### **Examples:**

- Market access commitments (some CARIFORUM countries did not undertake trade liberalisation commitments for contractual service suppliers coming from the EU);
- Article 3 on the facilitation of entry and temporary stay of artists and other cultural professionals and practitioners;
- Co-productions criteria of Article 5.2. The criteria will be adapted for different partner countries and asymmetries will be taken into account.



### Reciprocity

In a perspective of cultural cooperation and with the view to increase citizens' access to a greater diversity of cultural expressions world wide, it is important to address the issue of reciprocity as well, so as the flow of exchanges is not unidirectional.

In a perspective of development cooperation, it is also important to consider reciprocity in a medium and long term approach, and build-in some mechanisms for reciprocity.

### Flexibility

Trade commitments which jeopardize for ever the capacity of a partner to develop and implement specific cultural policy measures have been, in the case of the EU-Cariforum Protocol, and should be avoided, in order to fulfil the objective of the Convention insofar as protection and promotion of cultural diversity is concerned. The development of meaningful policies to support the development of cultural expressions adapted to the needs of the respective industries of the partners require flexibility to adapt measures over time.

#### **– The rationale for differentiation**

Not a "one-size-fits-all" approach. Each Protocol is to be adapted to the specificities of each individual negotiation and partnership - the objective being for the EC to respond adequately to the specific needs and patterns of cultural exchanges with the partners under consideration and contribute to more balanced exchanges. Adaptations will take into account the criteria laid down in the last paragraph of the Preamble of the Protocol, which sets the principle of differentiation:

*"Stressing the importance of facilitating cultural cooperation between the Parties and for that purpose to take into account, on a case by case basis, inter alia, the degree of development of their cultural industries, the level and structural imbalances of cultural exchanges and the existence of preferential schemes for the promotion of local and regional cultural content"*

This principle is also firmly anchored in relation to preferential treatment for co-productions, as the definition of the specific conditions for the promotion of the co-produced audiovisual works will depend on each agreement (see AVMS Directive, Article 1).

This Protocol will be proposed for the other EPAs regions (i.e. the 4 African regions and the Pacific region), and will be adapted each time according to the interest of the partners. Differentiation will therefore apply to some extent, from one EPA Protocol to another. EPA negotiations are underway.

As far as the other ongoing and future EC bilateral trade agreements are concerned, differentiation is even more relevant, as situations will greatly vary from one partner to another.

## **2) Link with other development cooperation instruments**

The 2005 UNESCO Convention requires that the external relations of the EU are geared towards capacity building and development of viable cultural industries in developing countries, with the overall objective of promoting more balanced exchanges of cultural goods and services between the North and the South, and within the South.

The measures established by the Protocol are complemented and supported by development policy instruments managed in other frameworks which already provide funding mechanisms and other forms of cooperation in the area of culture. The Protocol and these

other instruments are mutually supportive. The Protocol does not duplicate or replace such other instruments, neither at Community level nor at Member States level.

The EC and its Member States have a strong mandate to support culture in ACP countries under Article 27 of the Cotonou Partnership Agreement, which creates a comprehensive framework for cultural cooperation that ranges from the mainstreaming of culture in development activities to the promotion of intercultural dialogue, the preservation of cultural heritage, support to cultural industries and improved access to European markets for ACP cultural goods and services.

On the basis of this mandate, culture is increasingly integrated into the political dialogue with ACP partners. Accordingly, the EC has supported two meetings of ACP cultural ministers which took place in 2003 and 2006. These meetings led to the adoption of the Dakar Plan of Action in 2003 and the Santo Domingo Resolution in 2006. The EC has also supported with EUR 1 million the organization of the first ACP Festival in October 2006 in the Dominican Republic. The programme of this festival included music and dance performances, a visual art exhibition and film screenings as well as professional meetings among cultural operators.

In terms of cultural actions, since the mid-1980s the European Commission has financed a broad range of programmes, projects and events related to ACP culture in ACP and EU countries. Overall, the Commission has supported approximately 650 actions and committed a total budget of EUR 148 million. Under the 9<sup>th</sup> EDF, support to culture is estimated to be worth about EUR 39 million. These actions fall into a number of categories<sup>9</sup>:

– The Commission plays an important role in providing regular support to African arts events and festivals with a regional and international dimension. This includes the FESPACO film festival in Ouagadougou, the DAK'ART contemporary arts fair in Dakar, the African Photography Encounters in Bamako, the African Dance Festival in Antananarivo, etc. This is an important contribution to the visibility of African arts and to promoting encounters and exchanges between African artists. It also supports the regional Pacific Arts Festival.

– The Commission finances support programmes to cultural initiatives. These programmes primarily aim at strengthening the innovative and organisational capacity of cultural actors – typically artists, private operators, museums, local authorities, etc. Such programmes exist in five African countries - Benin, Burkina Faso, Ghana, Mali and Senegal while a regional cooperation programmes links countries in West Africa. They contribute to a lively and creative cultural sector and its longer-term development.

– Since 2000 but funded under previous EDF<sup>10</sup>, the Commission also supports a variety of other cultural projects, such as the creation or renovation of museums and arts schools. For example, the EC co-financed the creation of Aruba's National Museum, which will display archaeological artifacts and contemporary works of art as well as the rehabilitation of Kenya's and Mali's National Museums. It also co-financed the "Ecole des sables" near Dakar, which specialises in traditional and contemporary African dances. Again, the emphasis is both on preserving the heritage and supporting the living dimension of culture.

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<sup>9</sup> The Commission also supports national projects aimed at the conservation and exploitation of the cultural heritage. Such projects were e.g. the rehabilitation of coastal castles in Ghana and its integration in the socio-economic fabric, specifically designed shelters in order to protect the rock-hewn churches of Lalibela in Ethiopia from erosion and the restoration of the St. Peter and St. Paul wooden cathedral in Surinam. These projects contribute to the preservation of the national heritage, and thus the cultural identity of partner countries, while also contributing to develop the potential of their tourism industry.

<sup>10</sup> The European Development Fund (EDF) is the main instrument for providing Community aid for development cooperation in the African, Caribbean and Pacific (ACP) states. For more information: [http://ec.europa.eu/development/how/source-funding/edf\\_en.cfm](http://ec.europa.eu/development/how/source-funding/edf_en.cfm)

Over a third of the EC's financial support to culture in ACP countries comes currently from two programmes open to participants from the whole ACP region:

– The first is the Film and Television Support Programme, which co-finances the production, distribution and promotion of audiovisual works from ACP countries, including movies, TV series and animation films. This focus on cinema and audiovisual cooperation reflects the economic importance of the sector and the importance of audiovisual media as a vector of culture.

- The second is the Cultural Industries Support Programme, which provides support to cultural actors. While the programme is open to all ACP countries, particular emphasis will be put on strengthening the culture sector in five pilot countries with a view to maximising the sector's economic and job potential. The programme will also support the creation of an ACP Cultural Observatory, which will allow getting a better view and understanding of the cultural sector in the ACP region and will help structuring the sector on a professional and political level.<sup>11</sup>

In addition, within the new financial perspectives for 2007-2013, new instruments enable the EC to better mobilise funding for culture in EU external assistance. They are:

- The Development Cooperation Instrument (DCI), which includes, in its thematic programme "Investing in People", provisions on culture (art 12. 2. d. i.), which foresee support for promoting intercultural dialogue, cultural diversity and respect for other cultures; for international cooperation between cultural industries, for support for the social, cultural and spiritual values of indigenous peoples and minorities and for culture as a promising economic sector for development and growth.

An amount of EUR 50 million is earmarked for the period 2007-2013, for promoting access to local culture, and protecting and promoting cultural diversity and multiethnic and multicultural dialogue. The programme will promote access to culture for all by strengthening local cultural capacity (cultural industries and activities, governments and non-state actors), public/private partnerships, and intercultural dialogue at all levels. It will promote South- South cooperation and the preservation of material and immaterial cultural heritage. It will also support the establishment of networks for exchanges of expertise and good practice as well as training and professionalization of the sector.

The implementation of this thematic programme in the area of cultural diversity is directly linked to the implementation of the 2005 UNESCO Convention by the European Community and geared towards capacity building, both for public policies and cultural expressions in the developing countries.

A second Thematic programme of the DCI, on 'Non-State Actors and Local Authorities in Development' will also be able to contribute, by reinforcing local initiatives and capacities which may have a cultural dimension and are aimed at increasing participation in democratic process and governance.

– The 10<sup>th</sup> European Development Fund will provide initial funding, to which the Member States will be invited to contribute also, for a new EU-ACP Cultural Fund proposed by the European Commission. This Fund aims to support primarily the distribution (in particular local distribution) of ACP cultural goods and services, and secondarily their production and promotion, thus encouraging the emergence of local and regional markets for cultural

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<sup>11</sup> The PAMCE programme is now ended but it supported the mobility of ACP artists towards the EU for participation in festivals and other cultural endeavours

industries. This new EU-ACP Fund will finance action both at country level and at the level of access to EU markets:

– At local level the development of distribution structures will facilitate and encourage the access of local people to culture and to the various means of cultural expression. It can mean the modernisation of cinema or theatre auditoriums, the building and establishment of cultural centres, libraries, on-line services, mobile units and multiple use structures. The development of such structures and networks depends on the emergence of viable intermediaries including film distributors and producers, cinema or theatre operators, publishers, event and festival organisers etc, on the one hand; and on the optimal use of possibilities offered by the information and communication technologies on the other.

– At external level, access of ACP works of art and cultural goods to the EU market is rather limited to the field of music. Films made by ACP filmmakers and co-financed by the European Commission or Member States funds are mostly programmed by specialised festivals, art house cinemas and certain TV stations open to films from the South, and in spite of their high quality, generally they don't have access to the wider public neither in Europe, nor in their country of origin. The access to distribution networks and platforms in the EU is therefore crucial for ACP artists in the field of cinema, theatre, dance, music, literature, plastic art, fashion, multimedia works and all other ways of cultural expression.

EU Member States also undertake and finance cultural cooperation with developing countries, through their individual development policy instruments.

In conclusion, it appears that a coherence of all these instruments is sought, in order to achieve effectiveness. The Protocol is to be read together with these instruments in order to grasp its added-value.

### **3) Recommendations**

#### **– Implementing Articles 6 and 7 of the Convention, in particular measures promoting local cultural expressions**

Insofar as preferential treatment consist of granting better and privilege access to cultural expressions from developing countries, the very development and existence of such cultural expressions is a important element, if not fundamental in the case of reciprocity-based preferential treatment.

Preferential treatment is clearly facilitated when it links partners who both have measures of promotion of local or regional (i.e. supra-national) content, as the basis for reciprocity is already present: each can benefit of the other's measures.

#### **– Regional cooperation/integration, an asset for preferential treatment**

For several reasons, regional (i.e. supra-national) cooperation or integration constitutes a clear asset for preferential treatment.

First of all, preferential treatment schemes between regions has an inherent of multiplying factor: the PCC between the EU and the Cariforum countries is linking 43 Parties ( 42 countries plus the European Community) to the implementation of preferential treatment in the area of culture, which corresponds to more than one fifth of the UNESCO membership and more than a quarter of the WTO membership.

Secondly, and more importantly, the regional level offers positive assets in the area of culture, one of which is the possibility of achieving economies of scale and pooling of resources, in particular for certain types of measures (e.g. training) and infrastructures. In

this respect, some lessons can be drawn *mutatis mutandis*, from the experience of the EU integration in the area of audiovisual, in particular with regard to certain types of measures which are better achieved and concretised on a regional basis than on a national one (e.g. regional distribution of films which is difficult if not impossible to financially support for a single country).

Due to the limited resources to implement financial support mechanisms in most developing countries, this can be interesting perspective for them.

As previously highlighted in the report, making two regions with such region-wide public policies enter in a dialogue and cooperation based on preferential treatment offers a formidable vehicle for the effective improvement of cultural exchanges between these parties, by virtue of extending to each other the benefit of regional measures which are particularly suited to the objective of preferential treatment, notably in the distribution area (e.g. broadcasting or theatrical screening-related measures).

Finally, and insofar as the parties who grant the preferential treatment are members of the WTO, preferential treatment between blocks of countries or regions, if notified to the WTO and meeting certain conditions having to do with the overall scope of the agreement between the parties, can have the additional advantage to offer to all parties the protection of Article V of the WO/GATS, related to economic integration agreements. This protection entails that the preferential treatment measures granted to the partners do not require them to have exemptions from the Most Favoured Nation clause in the WTO/GATS. Considering how difficult, if not impossible, it is for WTO members to enter such exemptions once they have become members of the organisation, this advantage is particularly valuable.

– **Ensuring coherence and synergy between preferential treatment and development cooperation policy and instruments**

Preferential treatment cannot work in isolation. It is only meaningful to address the facilitation of exchanges of cultural goods and services when those already exist. This is particularly relevant for developing countries. Preferential treatment and capacity building for the existence of viable local cultural industries in the developing countries are complementary, and the former can only truly provide effects if the latter is ensured.

This is why it is important to consider preferential treatment in the area of culture as part of an overall strategy for integrating culture in development, and paired with development instruments which help developing countries' capacity building, in particular the development of a local market for their cultural goods and services and the training of culture professionals on key competences and activities of the cultural sector.

– **Working closely with civil society, on both sides of the partnership**

Important to associate them upstream, in order to define clearly the needs, demands as well as sensitivities of the cultural sector, especially in the developing countries. Fine-tuning to the very needs, in order to ensure success.

Important as well for the subsequent implementation that civil society has a good understanding of the substance of the agreement.

## **F. Annexes**

- **Annex 1:** Basic GSP mechanisms
- **Annex 2:** List of the agreements including preferential treatment mechanisms by the EU
- **Annex 3:** Protocol III on Cultural Cooperation of the EPA between the EU and the CARIFORUM
- **Annex 4:** Provisions on market access commitments in the EPA for contractual service suppliers in the area of entertainment services (Services Chapter)
- **Annex 5:** EC Audiovisual Media Services Directive: Articles 1 and 4
- **Annex 6:** Article 151 of the EC Treaty

## Annex 1

### – Basic GSP mechanisms

#### 1. Graduation

- Graduation means that imports of particular groups of products (listed as one section in the EU Customs Tariff) and originating in a given GSP beneficiary country lose GSP and GSP+ preferences.
- Graduation applies when the average imports of a section from a country exceed 15% of GSP imports of the same products from all GSP beneficiary countries during three years (the trigger is 12.5% for textiles and clothing).
- Graduation concerns therefore imports from countries that are competitive on the Community market and so no longer need the GSP to boost their exports to the EU. Graduation only takes place if a country achieves sustained competitiveness across a relatively wide range of products.
- Graduation applies for the whole three-year period of each GSP Regulation. The results of the application of the graduation mechanism are economically sensitive and may imply strong political reactions from affected beneficiary countries, as in the recent case of graduation of Vietnam for footwear. They are also important for the internal EU debate on the bilateral policy in respect of a given GSP country (FTA negotiations, WTO accessions), as in the case of the de-graduation (reinstatement of GSP preferences) of Russia from January for chemical products and base metals.

#### 2. Temporary withdrawal.

- Any of the GSP arrangements may be temporarily withdrawn for serious and systematic violations of core human and labour rights conventions and on a number of other grounds like unfair trading practices, serious shortcomings in customs controls etc.
- This measure is exceptional and has been applied only twice in respect of Belarus (in December 2006) and Myanmar (in 1997) on the grounds of violations of labour rights.
- The withdrawal is always preceded by a Commission investigation.

#### 3. Temporary withdrawal of GSP+.

- GSP+ benefits may be temporarily withdrawn if national legislation of a GSP+ beneficiary country no longer incorporates the relevant conventions or if that legislation is not effectively implemented. Also in the case of this withdrawal a Commission investigation is required.
- Currently there is one investigation ongoing – in respect to El Salvador on non-incorporation of ILO core standards– and an investigation in respect of Sri Lanka will be launched around mid October 2008 on non-effective implementation of certain human rights conventions.

## Annex 2

– **List of the agreements including preferential treatment mechanisms by the EU**

The list of EC regional trade agreements updated on 30 June 2008 is available at: [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_111588.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_111588.pdf)



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### Annex 3

– **Protocol III on Cultural Cooperation of the EPA between the EU and the CARIFORUM**

– **PROTOCOL III On Cultural Cooperation**

The Parties and the Signatory CARIFORUM States,

*Having* ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted in Paris on 20 October 2005, which entered into force on 18 March 2007, or intending to do so promptly;

*Intending* to effectively implement the UNESCO Convention and to cooperate within the framework of its implementation, building upon the principles of the Convention and developing actions in line with its provisions, notably its Articles 14, 15 and 16;

*Recognizing* the importance of the cultural industries and the multi-faceted nature of cultural goods and services as activities of cultural, economic and social value;

*Recognizing* that the regional integration process supported by this Agreement forms part of a global strategy aimed at promoting equitable growth and the reinforcement of economic, trade and cultural cooperation between the Parties;

*Recalling* that the objectives of this Protocol are complemented and supported by existing and future policy instruments managed in other frameworks, with a view to:

- a) integrating the cultural dimension at all levels of development cooperation and, in particular, in the field of education;
- b) reinforcing the capacities and independence of the Parties' cultural industries;
- c) promoting local and regional cultural content;

*Recognising*, protecting and promoting cultural diversity as a condition for a successful dialogue between cultures;

*Recognising*, protecting and promoting cultural heritage, as well as promoting its recognition by local populations and recognising its value as a means for expressing cultural identities;

*Stressing the* importance of facilitating cultural cooperation between the Parties and for that purpose to take into account, on a case by case basis, inter alia, the degree of development of their cultural industries, the level and structural imbalances of cultural exchanges and the existence of preferential schemes for the promotion of local and regional cultural content,

agree as follows:

## **Article 1**

### **Scope, objectives and definitions**

1. Without prejudice to the other provisions of this Agreement, this Protocol sets up the framework within which the Parties shall cooperate for facilitating exchanges of cultural activities, goods and services, including inter alia, in the audiovisual sector.
2. While preserving and further developing their capacity to elaborate and implement their cultural policies, with a view to protecting and promoting cultural diversity, the Parties shall collaborate with the aim of improving the conditions governing their exchanges of cultural activities, goods and services and redressing the structural imbalances and asymmetrical patterns which may exist in such exchanges .
3. The definitions and concepts used in this Protocol are those of the UNESCO Convention on the protection and promotion of the diversity of cultural expressions adopted in Paris on 20 October 2005.
4. In addition, for the purpose of this Protocol, “artists and other cultural professionals and practitioners” means natural persons that perform cultural activities, produce cultural goods or participate in the direct supply of cultural services.

### *Section 1- Horizontal provisions*

## **Article 2**

### **Cultural exchanges and dialogue**

1. The Parties shall aim at fostering their capacities to determine and develop their cultural policies, developing their cultural industries and enhancing exchange opportunities for cultural goods and services of the Parties, including through preferential treatment.
2. The Parties shall co-operate to foster the development of a common understanding and enhanced exchange of information on cultural and audiovisual matters through an EC-CARIFORUM dialogue, as well as on good practices in the field of Intellectual Property Rights protection. This dialogue will take place within the mechanisms established in this Agreement as well as in other relevant fora as and when appropriate.

## **Article 3**

### **Artists and other cultural professionals and practitioners**

1. The Parties and the Signatory CARIFORUM States shall endeavour to facilitate, in conformity with their respective legislation, the entry into and temporary stay in their territories of artists and other cultural professionals and practitioners from the other Party, or, as the case may be, the Signatory CARIFORUM States, who cannot avail themselves of commitments undertaken on the basis of Title II of the Agreement and who are either:
  - (a) artists, actors, technicians and other cultural professionals and practitioners from the other Party involved in the shooting of cinematographic films or television programmes, or

- (b) artists and other cultural professionals and practitioners such as visual, plastic and performing artists and instructors, composers, authors, providers of entertainment services and other similar professionals and practitioners from the other Party involved in cultural activities such as, for example, the recording of music or contributing an active part to cultural events such as literary fairs, festivals, among other activities,

provided that they are not engaged in selling their services to the general public or in supplying their services themselves, do not on their own behalf receive any remuneration from a source located within the Party where they are staying temporarily, and are not engaged in the supply of a service in the framework of a contract concluded between a legal person who has no commercial presence in the Party where the artist or other cultural professional or practitioner is staying temporarily and a consumer in this Party.

2. This entry into and temporary stay in the territories of the EC Party or of the Signatory CARIFORUM States, when allowed, shall be for a period of up to 90 days in any twelve month period.

3. The Parties and the Signatory CARIFORUM States shall endeavour to facilitate, in conformity with their respective legislation, the training of, and increased contacts between artists and other cultural professionals and practitioners such as:

- (a) Theatrical producers, singer groups, band and orchestra members;
- (b) Authors, poets, composers, sculptors, entertainers and other individual artists;
- (c) Artists and other cultural professionals and practitioners participating in the direct supply of circus, amusement park and similar attraction services, as well as in festivals and carnivals;
- (d) Artists and other cultural professionals and practitioners participating in the direct supply of ballroom, discotheque services and dance instructors;
- (e) Mas performers and designers.

#### **Article 4**

##### **Technical assistance**

1. The Parties shall endeavour to provide technical assistance to Signatory CARIFORUM States with the aim of assisting in the development of their cultural industries, development and implementation of cultural policies, and in promoting the production and exchange of cultural goods and services.

2. Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, including by facilitating support, through different measures, inter alia, training, exchange of information, expertise and experiences, and counselling in elaboration of policies and legislation as well as in usage and transfer of technologies and know-how. Technical assistance may also facilitate the cooperation between private companies, non-governmental organisations as well as public-private partnerships.

*Section 2 – Sectoral provisions*

**Article 5**

**Audio-visual, including cinematographic, cooperation**

1. The Parties shall encourage the negotiation of new and implementation of existing co-production agreements between one or several Member States of the European Union and one or several Signatory CARIFORUM States.

2. The Parties and the Signatory CARIFORUM States, in conformity with their respective legislation, shall facilitate the access of co-productions between one or several producers of the EC Party and one or several producers of Signatory Cariforum States to their respective markets, including through the granting of preferential treatment, and subject to the provisions of Article 7 of this Agreement, including by facilitating support through the organisation of festivals, seminars and similar initiatives.

(a) Co-produced audiovisual works shall benefit from the preferential market access referred to in paragraph 2 within the EC Party in the form of qualification as European works in accordance with Article 1 n) (i) of Directive 89/552/EEC as amended by Directive 2007/65/EC for the purposes of the requirements for the promotion of audiovisual works as provided for by Articles 4.1 and 3i.1 of Directive 89/552/EEC as amended by Directive 2007/65/EC. Such preferential treatment shall be granted on the following conditions:

- the co-produced audiovisual works are realised between undertakings which are owned and continue to be owned, whether directly or by majority participation, by a Member State of the European Union or a Signatory CARIFORUM State and/or by nationals of a Member State of the European Community or nationals of a Signatory CARIFORUM State;
- the representative director(s) or manager(s) of the co-producing undertakings have the nationality of a Member State of the European Community and/or of a Signatory CARIFORUM State.
- both (a) the total financial contributions of one or several producers of the EC Party (taken together), and (b) the total financial contributions of one or several producers of Signatory CARIFORUM States (taken together) shall not be less than 20 percent and not more than 80 percent of the total production cost.

(b) The Parties will regularly monitor the implementation of paragraph (a) and report any problem that may arise in this respect to the CARIFORUM-EC Trade and Development Committee established under this Agreement.

(c) Where preferential schemes for the promotion of local or regional cultural content are established by one or more Signatory CARIFORUM States, the Signatory CARIFORUM States concerned will extend to the works co-produced between producers of the EC party and of Signatory CARIFORUM States the preferential market access benefits of such schemes under the conditions laid down in paragraph (a).

3. The Parties and the Signatory CARIFORUM States reaffirm their commitment to the use of international and regional standards in order to ensure compatibility and interoperability of audio-visual technologies, contributing therefore to strengthen cultural exchanges. They shall cooperate towards this objective.

4. The Parties and the Signatory CARIFORUM States shall endeavour to facilitate rental and leasing of the technical material and equipment necessary such as radio and television equipment, musical instruments and studio recording equipment to create and record audio-visual works.

5. The Parties and the Signatory CARIFORUM States shall endeavour to facilitate the digitalisation of audio-visual archives in Signatory CARIFORUM States.

## **Article 6**

### **Temporary importation of material and equipment for the purpose of shooting cinematographic films and television programmes**

1. Each Party shall encourage as appropriate the promotion of its territory as a location for the purpose of shooting cinematographic films and television programmes.

2. Notwithstanding the provisions contained in Title I of the Agreement, the Parties and the Signatory CARIFORUM States shall, in conformity with their respective legislation, consider and allow the temporary importation from the territory of one Party into the territory of the other Party of the technical material and equipment necessary to carry out the shooting of cinematographic films and television programmes by cultural professionals and practitioners.

## **Article 7**

### **Performing arts**

1. Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, in conformity with their respective legislation, including by facilitating increased contacts between practitioners of performing arts in areas such as professional exchanges and training, inter alia participation in auditions, development of networks and promotion of networking.

2. The Parties and the Signatory CARIFORUM States shall encourage joint productions in the fields of performing arts between producers of one or several Member States of the European Community and one or several Signatory CARIFORUM States.

3. The Parties and the Signatory CARIFORUM States shall encourage the development of international theatre technology standards and the use of theatre stage signs, including through appropriate standardisation bodies. They shall facilitate co-operation towards this objective.

## **Article 8**

### **Publications**

Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, in conformity with their respective legislation, including by facilitating exchange with and dissemination of publications of the other Party in areas such as:

- (a) organisation of fairs, seminars, literary events and other similar events related to publications, including public reading mobile structures;
- (b) facilitating co-publishing and translations;
- (c) facilitating professional exchanges and training for librarians, writers, translators, booksellers and publishers.

## **Article 9**

### **Protection of sites and historic monuments**

Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, including by facilitating support to encourage exchanges of expertise and best practices regarding the protection of sites and historic monuments, bearing in mind the UNESCO World Heritage mission, including through facilitating the exchange of experts, collaboration on professional training, increasing awareness of the local public and counselling on the protection of the historic monuments, protected spaces, as well as on the legislation and implementation of measures related to heritage, in particular its integration into local life. Such cooperation shall conform with the Parties and the Signatory CARIFORUM States respective legislation and is without prejudice to the reservations included in their commitments contained in Annex 4 of this Agreement.

## Annex 4

- **Provisions on market access commitments in the EPA for contractual service suppliers in the area of entertainment services other than audiovisual services (Services Chapter)**

### **ARTICLE 83 Contractual services suppliers and independent professionals**

1. The EC Party and the Signatory CARIFORUM States reaffirm their respective obligations arising from their commitments under the GATS as regards the entry and temporary stay of contractual services suppliers and independent professionals.

2. Without prejudice to paragraph 1, the EC Party shall allow the supply of services into the territory of its Member States by contractual services suppliers of the CARIFORUM States through presence of natural persons, subject to the conditions specified below and in Annex IV, in the following sub-sectors:

- (1) Legal advisory services in respect of international public law and foreign law (i.e. non-EU law)
- (2) Accounting and bookkeeping services
- (3) Taxation advisory services
- (4) Architectural services
- (5) Urban planning and landscape architecture services
- (6) Engineering services
- (7) Integrated Engineering services
- (8) Medical and dental services
- (9) Veterinary services
- (10) Midwives services
- (11) Services provided by nurses, physiotherapists and paramedical personnel
- (12) Computer and related services
- (13) Research and development services
- (14) Advertising services
- (15) Market Research and Opinion Polling
- (16) Management consulting services
- (17) Services related to management consulting
- (18) Technical testing and analysis services
- (19) Related scientific and technical consulting services
- (20) Maintenance and repair of equipment, including transportation equipment, notably in the context of an after-sales or after-lease services contract
- (21) Chef de cuisine services
- (22) Fashion model services
- (23) Translation and interpretation services
- (24) Site investigation work
- (25) Higher education services (only privately-funded services)
- (26) Environmental services
- (27) Travel agencies and tour operators' services
- (28) Tourist guides services
- (29) *Entertainment services other than audiovisual services.*

Without prejudice to paragraph 1, the Signatory CARIFORUM States shall allow the supply of services into their territory by EC contractual services suppliers through presence of natural persons, subject to the conditions specified below and in Annex IV.

The commitments undertaken by the EC Party and by the Signatory CARIFORUM States are subject to the following conditions:

- (a) The natural persons must be engaged in the supply of a service on a temporary basis as self-employed persons established in the other Party and must have obtained a service contract for a period not exceeding twelve months.
- (b) The natural persons entering the other Party must possess, at the date of submission of an application for entry into the other Party, at least six years professional experience in the sector of activity which is the subject of the contract.
- (c) The natural persons entering the other Party must possess (i) a university degree or a qualification demonstrating knowledge of an equivalent level **1** and (ii) professional qualifications where this is required to exercise an activity pursuant to the law, regulations or requirements of the EC Party or of the Signatory CARIFORUM State applicable where the service is supplied.
- (d) The temporary entry and stay of natural persons within the Party concerned shall be for a cumulative period of not more than six months or, in the case of Luxembourg, twenty-five weeks, in any twelve-month period or for the duration of the contract, whichever is less.
- (e) Access accorded under the provisions of this Article relates only to the service activity which is the subject of the contract and does not confer entitlement to exercise the professional title of the Party where the service is provided.
- (f) Other discriminatory limitations, including on the number of natural persons in the form of economic needs tests, which are specified in Annex IV.



## Annex 5

### – EC Audiovisual Media Services Directive: Articles 1 and 4

#### Article 1

For the purpose of this Directive:

(i) “European works” means the following:

- works originating in Member States,
- works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of point (ii),
- works co-produced within the framework of agreements related to the audiovisual sector concluded between the Community and third countries and fulfilling the conditions defined in each of those agreements,
- application of the provisions of the second and third indents shall be conditional on works originating in Member States not being the subject of discriminatory measures in the third country concerned;

(ii) The works referred to in the first and second indents of point (i) are works mainly made with authors and workers residing in one or more of the States referred to in the first and second indents of point (i) provided that they comply with one of the following three conditions:

- they are made by one or more producers established in one or more of those States, or
- production of the works is supervised and actually controlled by one or more producers established in one or more of those States, or
- the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States;

(iii) Works that are not European works within the meaning of point (i) but that are produced within the framework of bilateral co-production treaties concluded between Member States and third countries shall be deemed to be European works provided that the co-producers from the Community supply a majority share of the total cost of production and that the production is not controlled by one or more producers established outside the territory of the Member States.

#### Article 4

1. Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

2. Where the proportion laid down in paragraph 1 cannot be attained, it must not be lower than the average for 1988 in the Member State concerned. However, in respect of the Hellenic Republic and the Portuguese Republic, the year 1988 shall be replaced by the year 1990.

3. From 3 October 1991, the Member States shall provide the Commission every two years with a report on the application of this Article and Article 5.

That report shall in particular include a statistical statement on the achievement of the proportion referred to in this Article and Article 5 for each of the television programmes falling within the jurisdiction of the Member State concerned, the reasons, in each case, for the failure to attain that proportion and the measures adopted or envisaged in order to achieve it. The Commission shall inform the other Member States and the European Parliament of the reports, which shall be accompanied, where appropriate, by an opinion. The Commission shall ensure the application of this Article and Article 5 in accordance with the provisions of the Treaty. The Commission may take account in its opinion, in particular, of progress achieved in relation to previous years, the share of first broadcast works in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a low audiovisual production capacity or restricted language area.

4. The Council shall review the implementation of this Article on the basis of a report from the Commission accompanied by any proposals for revision that it may deem appropriate no later than the end of the fifth year from the adoption of the Directive.

To that end, the Commission report shall, on the basis of the information provided by Member States under paragraph 3, take account in particular of developments in the Community market and of the international context.

## Annex 6

### – **Article 151 of the EC Treaty**

#### Article 151

1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- artistic and literary creation, including in the audiovisual sector.

3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.

5. In order to contribute to the achievement of the objectives referred to in this Article, the Council:

- acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251,
- acting unanimously on a proposal from the Commission, shall adopt recommendations.

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

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

*Prepared by:*

**PROF. MANDLENKOSI STANLEY MAKHANYA**

*Pro-Vice-Chancellor, University of South Africa, South Africa*

This report has been prepared in October 2008 at the request of UNESCO Secretariat for the second session of the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions. The author is responsible for the choice and the presentation of the facts contained in this Report and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization.

## Executive Summary

This paper focuses on South Africa's perspective on preferential treatment, development cooperation and cultural diversity in terms of its own recent postcolonial politics after 1994. It reads 'preferential treatment' as 'redress' and 'restoration' and also as a way of expanding its international relations, both in Africa and within the Global South. Moreover, it examines the importance of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) in establishing cultural parity with developed countries, especially in Europe and North America.

In the second section, the concept of 'preferential treatment' is examined in terms of its history and constituent meanings related to 'eligibility', 'reciprocity' and 'rules of origin'. The argument centres on the concept as a means of achieving cultural balance within the global cultural economy as South Africa negotiates trade agreements with various clusters of nations, including the Southern African Developing Countries (SADC), a range of other African states, India and Brazil, as well as developed nations.

The third part of the paper reviews the legal and institutional framework concerning preferential treatment granted by South Africa to other countries. Few preferential treatment agreements in respect of cultural goods and services are already in operation in bilateral or multilateral treaties signed by South Africa. Reciprocity is the prevailing basis of most agreements. The analysis therefore explores the potential of existing frameworks for such preferential arrangements by citing specific landmark cultural projects and partnerships with other countries. The linkages between Article 14 and 16 of the 2005 Convention are also central to this discussion.

Section D analyses existing agreements and preferential mechanisms. The examples cited show that preferential treatment is not inscribed in South Africa's bilateral or multilateral cultural agreements, and therefore remains underutilized in cultural exchanges.

The last section presents a set of recommendations for the implementation of Article 16, which include:

- The use of Article 14 (Official Development Assistance (ODA) from developed countries) to fund innovative multilateral and bilateral projects between parties to the Convention which focus on research, especially the mapping of cultural industries. It is imperative, in view of the foregoing, that baseline studies are undertaken on the economic aspects of culture in South Africa and the SADC region, from which specific and relevant trading strategies can be derived to inform the country's approach to preferential treatment.
- The commissioning of detailed research on preferential treatment in the cultural domain in comparative and transnational perspective, including both developed and developing countries.
- The need for many capacity-building initiatives in South Africa's cultural industries, which should also be funded through bilateral ODA agreements.
- Strengthening the export capabilities of South Africa's markets to enhance capacity through a well-managed skills-development plan.
- The identification of and focus on markets in Africa and beyond.
- Conducting seminars/workshops/conferences on how to develop markets in the developed world for African cultural products.
- The development of marketing strategies in developed countries for South African cultural goods and services.

- The introduction of measures to encourage investment by developed countries in cultural industries in South Africa and the SADC region.
- Attracting other forms of industrial and technological cooperation in Africa.
- The formation of appropriate institutions to manage preferential treatment arrangements and funding.
- The articulation of civil society with government initiatives on both sides of each partnership.

## **A. Introduction: Preferential treatment, development cooperation and cultural diversity**

South Africa's position on Article 16 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression (hereinafter referred to as the "Convention")) is that it represents a significant instrument for developing countries to promote the diversity of their cultural expressions both within their respective countries as well as collaboratively through transnational culture flows. At the passing of the Convention, we welcomed the spirit of Article 16 and proposed the inclusion of 'sustainable development based on mutual respect and reciprocity between the developing and developed world'. 'Preferential treatment' is, in our view, an important platform in development cooperation because it enables developing countries to harness their own 'cultural diversity' on a more equal footing with developed countries which have far greater economic resources, thus precluding a development-assistance mentality.

Preferential treatment has a restorative element which represents a way of redressing distortions of global capital in favour of countries that were long exposed to colonial rule. The unbalanced cultural flow between developed and developing countries can only be evened out by means of preferential treatment agreements. The challenge remains that only a small number of developing countries (such as China and India which have large economies) are net exporters of cultural goods. South Africa is the only country in sub-Saharan Africa to play a prominent role in the trade of core cultural goods. Even so, South Africa was a net importer, spending US\$ 322.6 million on imports against US\$ 64.1 million earned from exporting cultural products (UNESCO Institute for Statistics 2005: 32).

Preferential treatment also facilitates cooperation regionally and continentally among African states, internationally through the African diaspora, and more broadly within the 'Global South'. A cultural voice 'is emancipatory when it can both communicate as well as rise above the power structures and posit its distinctiveness' (Singh 2007: 51). Preferential treatment is therefore a means by which South Africa can recover, curate and promote its own cultural diversity in order to compete more equitably with developed countries in cultural production, and can use its ties with other developing countries to counter the economic and cultural hegemonies of developed countries and achieve more balanced exchanges.

Globalization and its concomitant expansion of markets has profoundly affected cultural policies in developing countries, not least South Africa (Alexander et al 2006), as they (mainly fast-growing Asian economies, such as India, China and South Korea) weigh the value of indigenous/ traditional knowledges and intrinsic identities against the invasiveness of international consumer cultures. In these circumstances, global rules to regulate cultural flows provide a useful complement to nation-state initiatives (which is why Article 16 has such far-reaching potential). The circuits of international cooperation in development are thus extended as developing countries enter into partnerships with the developed world, but in ways that are more mutual, less economically distorted, and ultimately in the interests of a more democratic cosmopolitanism.

A more coordinated and integrated approach to cultural policy through partnerships among government, capital and civil society is being advocated in South Africa. Local content quotas in the music and film industries have not, for the most part, been very effective. More space and better funding needs to be made available to assist South African musicians and film-makers in producing quality products for the national broadcaster. Preferential treatment could therefore provide an international route to improving the standard of cultural performance among local artists by offering career-enhancing opportunities and favourable exposure to global markets which could then be reinvested in the local cultural economy. The National Film and Video Foundation (NFVF) and Book Development Council (BDC) have proven the potential of other initiatives in civil society which could benefit enormously from international promotion.

Cultural diversity is also important in shoring up South Africa's teenage democracy and is a cornerstone of its constitution. It is therefore essential that cultural diversity be permitted to flourish to redress the cultural hegemony of the apartheid era. As W.L. van der Merwe (1996: 77) points out, 'we are late-comers to the intellectual scene of multi-culturalism'. Post-apartheid cultural policy concentrated on nation-building through the creation of jobs to ensure economic benefit to as many people as possible. This meant that the concerns of creative and cultural practitioners themselves played a secondary role. Externally derived models and structures were features of the cultural scene between 1994 and 2000. For instance, the Arts Council and national lottery concepts were imported from the United Kingdom. These were not, however, hugely successful and we have increasingly turned to non-Western countries in reviewing the current state of cultural development.

South Africa's role in regional and continental terms has also changed dramatically since the advent of democracy which has led to relationships with the Southern African Development Community (SADC), the African Union (AU) and the New Economic Partnership for Africa's Development (NEPAD) in the field of culture. Consequently, the present debate about preferential treatment represents an opportunity to widen consultation in the context of a growing international contribution to South Africa's own national, regional and continental project to promote cultural diversity, which itself has already proved to be a powerful vehicle of development cooperation.

Since culture is intrinsic to the realization of human aspirations, cultural diversity is an important factor in promoting economic and social development in industrialized as well as developing countries (cf. Acheson and Maule 2004). Moreover, cultural diversity is enhanced by conditions in a country, region, or globally, which are conducive to creative activity and to the production and distribution of a wide range of cultural products. The UNESCO Convention also advocates intensive international cooperation and dialogue involving public institutions, civil society and the private sector in order 'to enable the benefits arising from cultural diversity to have effect worldwide' (Throsby 2004: 42).

In sum, South Africa supports the Convention because of its overarching objective to promote and protect cultural diversity, but also because it aims to identify those measures which states and public bodies could legitimately implement to safeguard cultural diversity. Even more importantly for an emerging economy, South Africa strongly endorses the Convention's resolve to ensure that international trade rules do not prevent such intervention and supports its process of international cooperation to assist developing countries to preserve and fully exploit their cultural heritages (Smith 2007: 27).

## **B. The concept of 'preferential treatment'**

'Preferential treatment', like 'cultural and creative industries', has different meanings in different contexts and at different times (Galloway and Dunlop 2007), as well as a history in trade and development. The Convention has a historical legacy that dates back to the Uruguay Round at least. This complex history has both legal and political ramifications; it is carefully catalogued by Michael Hahn (2008) in a detailed study that examines 'The Convention on Cultural Diversity and International Economic Law'. He deals with the various international debates that centred on 'trade and culture' to the point at which 'cultural diversity' acquired the meaning of 'not only encouraging the free exchange of cultural manifestations, but also the right of states to limit the free influx of words, sounds and images, in order to enable them to protect national cultural expression from being squeezed out of the market by overwhelming competition' (Hahn 2008: 236).

He also assesses the impact of the Convention on international economic law (Hahn 2008: 243-246). Hahn shows that the 'complete failure ... of reconciling multilaterally the interests of liberal trade with the protection of cultural diversity stands in stark contrast to what has been possible in bilateral trade agreements'. Their success is most instructive and is borne out by the South African experience, thus giving vitality to the notion of cultural diversity and its application among states. Thus the main effect of the Convention, in Hahn's view (2008: 254), may turn out to be political rather than legal or economic in that it may shape the dynamics of negotiations and the behaviour of negotiating partners.

If we hope to live in a culturally diverse world that humanises and unifies people across national boundaries, then preferential treatment of developing countries in saving their cultural capital is a preliminary enterprise. As Mahatma Gandhi expressed it: 'I don't want my doors to be walled and my windows stuffed. I want the cultures of all lands to blow freely about my house. But I do not want to be blown off my feet by any' (quoted in Baer et al 2004:9). The cultural breeze should blow in every direction and developing countries need to protect themselves against too strong winds from the 'North'. If cultural dialogue and exchange is to happen between North and South, developing countries should be helped – mainly through their own unhindered initiatives – to express their creativity and then to have their cultural products and performances more openly received by the developed world.

Preferential treatment therefore needs to be transported from the economic and trading arena into the cultural domain through the UNESCO Convention, so that it plays for culture the same role as the International Labour Organization (ILO) plays in social policy and the International Environmental Conventions play in environmental politics (Baer 2004: 16). In this way, it need not be constructed as 'anti-WTO'. It is not useful to portray culturalists, who insist on the preservation of cultural identities and values, as conservatives holding on to traditions that are obsolete in a globalized society.

The concept of 'preferential treatment' is also associated with the 'infant-industry phenomenon', based on the argument that budding industries are vulnerable and therefore need protection to develop. Culture is fragile and its value is contested. Preferential treatment is consequently a way of dealing with this fragility and contestation to ensure cultural reciprocity in global exchanges. As Arjo Klamer (2004: 38) reminds us, 'cultural diversity thrives only when inspired by the typical inclination to form groups that are distinct from others'. This distinctiveness can then be transacted in reciprocal ways, in other words, not as cultural competition but as cultural complementarity.

The meaning of 'preferential treatment' has to be removed from its moorings in trade discourses of 'disadvantage' and 'patronage' and placed in the context of cultural reciprocity, graduation and mutual benefit in the longer term. For this to happen, developing countries need support for the recovery of cultural diversity – often lost or diminished under colonial



rule when some cultures were subordinated in social hierarchies – in the short term, as well as greater prospects for cultural performance on par with developed countries in international settings, in the longer term. Preferential mechanisms are therefore necessary to achieve greater parity, such as market access for cultural goods and services as well as operators, more favourable funding agreements and exchange arrangements, more efficient means of cultural diffusion, and the systematic monitoring of progress.

Graber (2006: 574) argues that the Convention can 'be used as a point of reference when the definition of boundaries between trade and culture is discussed in future WTO trade negotiations or dispute settlement procedures', and advises that this 'potential' needs to be strongly advocated, 'both by the affirmative action of the CCD Parties and within the WTO structure. For this to succeed, the political momentum in the ratification process will have to speed up to enable the Convention 'to play its intended role as a counterbalance to the WTO in matters of artistic and cultural expressions'.

Eligibility is an important element of preferential treatment. Here developing countries will need to stand together. Those with stronger economies need to rein in their cultural ambitions in order not to distort further the global cultural landscape. India, China, Brazil and South Africa will need to support the cultural assertions of much smaller developing economies to broker better access to Northern markets. Sensitivity to lower-income developing countries should be the basis of bilateral and collective agreements within the Global South, perhaps with the backing of Canada and France whose original battles around 'cultural exception' produced the more inclusive 'cultural diversity' discourse enshrined in the UNESCO 2005 Convention (Ferri 2005). Eligibility may change with time as developing countries join the ranks of developed economies. At present, however, certain political alignments are important in pursuing the intention of Article 16 of the Convention.

At the opening of a conference on 'Cultural Diversity for Social Cohesion and Sustainable Development', Makhanya (2006, 'Introductory Notes') reminded his audience that 'as Africans we are informed by the principles and protocols of the African Union and its collaboration with a broad range of countries in the developing world subscribing to the ethos of cultural diversity, which is underpinned by democratic values, social justice and tolerance, is indeed indispensable for social cohesion, peace and security at national and international levels.' He contrasted this with the colonial and apartheid past, especially its intolerance of cultural diversity which led to 'social division, racial separation and even cultural imperialism'.

Making his point, Makhanya declared that 'A nation with no national identity, made up of citizens with no sense of their individual identity, cannot prosper socially or economically. The nurturing and valuing of cultural diversity are critical to sustainable development on our continent.' Connecting the local and the global, he added that 'On the one hand our sense of identity is rooted in our past and where we come from, and includes a heritage springing from the very cradle of humankind, while on the other hand, we are bombarded by the onslaught of globalization, which presents both threats to the preservation of this cultural heritage, as well as the challenge to promote and protect the diversity of our cultural contents and artistic expression in the global market.' (Makhanya 2006. 'Introductory Notes').

If developing economies embrace the cultural project outlined above, gains are likely to be greater and quicker; joint action and planning should result in significant cultural activity leading to networked interactions that simultaneously include existing meaning and production systems around the world, while allowing for various forms of imaginary capacities to arise, especially from below. Culture then becomes – in Appadurai's definition – 'a dialogue between aspirations and sedimented traditions' (2004: 84). Global imaginaries thus accommodate both a 'politics of recognition' and a 'capacity to aspire'.

Transnational engagements among developing countries have the potential to unleash the imagination as a social force. Cultural diversity is therefore affirmed nationally but escapes the 'predatory stability' of the nation state without falling victim to the 'predatory mobility of unregulated capital' (Appadurai 2000: 7). Preferential treatment, in this sense, fosters both a nation-centred cultural diversity as well as transnational cultural reciprocity. It could radiate outwards from individual African states, including South Africa, and the diaspora. Cultural diversity in the wider circle of the Southern African Developing Countries (SADC) could also expand to Global-South networks, through the India-Brazil-South Africa (IBSA) nexus (Bothma & Machado 2007; du Preez 2007), and then to other developing countries, and ultimately, through support from developed countries, to the North. In this way cultural flows will criss-cross the globe rather than move in linear fashion from dominant cultures to the rest.

Reciprocity is another useful instrument in cultural exchange. It is in South Africa's interest to enter into reciprocal agreements with other developing countries, especially in fields of cultural performance, education, music, fine arts and heritage production. South Africa's rich natural cultures are also eminently suited to reciprocal arrangements around tourism. The potential to connect cultural reciprocity and development is consequently very sensible. All South Africa's bilateral and multilateral agreements with developed countries are based on reciprocity, but usually adjusted to relative rates of exchange for the respective currencies. In the case of countries in European Union, for instance, South Africa tries to attract R10 from the European partner for every R1 invested itself.

Reciprocity also applies to agreements with most developing economies, with the exception of those concluded with some African countries, such as the Democratic Republic of the Congo (DRC), in which reciprocity does not include financial provisions of the exchanges. South Africa covers the costs in both directions, based on its foreign policy priority to forge links with certain African countries determined by the Department of Foreign Affairs. In most other cases, however, reciprocity refers to a sharing of the costs of cultural exchanges by both parties to the agreement. For example, a group of performers travelling from Mozambique to South Africa as part of a programme of cooperation will have their travel and performance costs covered by the sending nation and the receiving country will defray the accommodation expenses, travel within South Africa and other local costs.

But reciprocity also implies symmetry in cultural transactions which do not always pertain between developed and developing countries. Unbalanced cultural flows therefore justify the need for preferential treatment. In cultural policy terms, the access of cultural flows is related to the development efforts of local cultural industries and the reinforcement of local cultural capacity to produce and disseminate cultural expressions. The application of non-reciprocity where balance is absent is therefore congruent with the objective of achieving more parity in cultural exchanges.

On the question of rules of origin it is extremely difficult to draw limits, since cultural products may be locally specific as well as common to a region. The colonial boundaries in Africa have not separated shared material cultures, nor have they severed precolonial histories, so that African cultural forms are sometimes widely dispersed. Cultural specificity and origination are also sometimes a way of maintaining hegemonic patterns. In the South African context there is a case to be made for preferential treatment being granted to previously disadvantaged African artists or cultural entrepreneurs whose access to markets and reciprocal agreements were minimal.

But it should also be remembered that democratic cultural modalities have emerged through the melding of diverse cultures in the country to create dynamic cultural products across racial divides. This is particularly the case in music, film and theatre. Such new collectives may have as much claim to preferential treatment as more homogenized black African cultural productions whose origin in rural communities is worthy of recognition and

development. For this reason, it may be strategic to work through agencies such as the Department of Arts and Culture, various professional cultural associations with strong links to community cultural networks, and groups in civil society, such as cultural unions and educational institutions.

### **C. The legal and institutional framework concerning preferential treatment granted by/to the country/group of countries under study**

The concept of preferential treatment in the cultural domain is relatively recent and is consequently not a central feature of bilateral agreements in the South African case. It also pertains mainly to developing countries which have put in place various frameworks that govern bilateral and other agreements with developed and developing states. In many countries, including South Africa, artists and cultural producers do not always have the technology, equipment, resources or expertise to create their works in the contemporary media. This is why the Convention has important stipulations such as Article 14 on Cooperation for Development and Article 15 on Collaborative Arrangements. The International Fund for Cultural Diversity is also an important mechanism in the support of cultural development.

Article 14(d)(ii) states that Parties shall endeavour to support international cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector by, inter alia, the following...(d) Financial support through (ii) the provision of official development assistance, as appropriate, including technical assistance, to stimulate and support creativity. This provision empowers developed and developing countries to access Official Development Assistance (ODA) budgets. Typical recipients of ODA are education, health, environment, HIV/AIDS, democratic governance, conflict resolution and post-conflict reconstruction, peace and security. Departments of Culture, however, generally have the lowest budgets in both developed and developing countries, and allocations to international relations for servicing cultural agreements are usually very small. This is why cultural agreements are usually based on reciprocity. Culture is also often excluded from ODA monies since its role in development has not been defined as 'central'.

Article 14(d)(ii) provides developed countries with legal grounds to lobby for a portion of their respective governments' contributions to the ODA budget, thus allowing them to access substantial funds for international cooperation. On the other side of the funding equation, developing countries are obliged to articulate the primacy of culture in development and offer innovative projects and programmes to demonstrate this, in order to be an ODA recipient. Many ODA donors have a preference for regional interventions which is why African, or at least southern African, projects are more likely than single nation-state cultural enterprises to attract funding.

The Swedish-South African Cultural Partnership Programme based on institutional development, for example, drew on ODA funds from Sweden to twin South African and Swedish organizations to increase capacity over a three to five year period. The South African-Flemish Partnership was sponsored in the same way. These were landmark projects in the cultural sector because they were the first in South Africa to receive official development assistance. They are examples of projects that promote research, policy and an investigation of the role of culture in development, including indigenous knowledges. They extended the boundaries of culture beyond the current areas of stewardship by the various state departments concerned with cultural affairs. International cooperation is thus promoted through joint lobbying by the culture ministries of developed and developing countries to the

ODA. The CCD now provides an international framework which gives such partnerships additional legitimacy (National Treasury, International Development Cooperation Unit 2008).

A focus on policy areas and more intensive interrogation of the cultural economy through research are critical foundations that need to be laid before preferential treatment can achieve a meaningful purpose. It usually assumes that the particular cultural goods and services under its purview are properly constituted, that they compare with international norms and standards and have a ready market outside the borders of the country of origin. But much research and development still needs to be undertaken to establish whether this is, in fact, the case in respect of the viability of South Africa's cultural industries. Such research is essential so that our cultural industries are indeed able to engage in trade in competitive international environments. At present, there are glaring inequities among them, lamentably incoherent policy frameworks, various splintered sectors within the cultural domain, generally inadequate intellectual property and copyright protections, and a serious lack of coordination among cultural industries, government and civil society, which all require urgent attention.

Bilateral relationships between states are often the most productive cultural conduits. South Africa's links with developing countries have proliferated since 1994, thus opening up spaces for mutual cultural contact and exchange at a level unknown before. In 2004 the South African government decided that all national policies and legislation promulgated and implemented since the advent of democracy should be reviewed. The objective was 'to get the role and competency of government in matters that are cultural into proper focus' (Arts and Culture Policy Review, 2006: 11).

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. Schedule 4 of the South African Constitution (1996) also states that cultural concerns are a functional area of concurrent national and provincial legislative competence. And the Culture Promotion Act 35 of 1983 is germane in that empowers the Minister of Arts and Culture to promote culture locally and globally. Research could establish how these legislative instruments could increase the prospect of cultural advances through the preferential treatment principle of the CCD.

But even more pertinent is the finding of the Arts and Culture Policy Review (2006: 14) that 'The process of recognising, accommodating, fostering and protecting diverse cultures is incomplete, and very little constitutional jurisprudential development is evident in the functional area of cultural matters'. This judgment naturally limits the effectiveness of the copious legislation enacted since 1997 in respect of cultural policy, from the Cultural Institutions Act 119 of 1998 to the National Heritage Council Act 11 of 1999, not to mention the National Film and Video Foundation Act 73 of 1997 and the Pan South African Language Board Act 59 of 1995.

South Africa has, however, piloted a project called 'Investing in Culture', which received funding from the National Treasury as part of the expanded public works programme, and has been operational for four or five years. It was initiated to provide 'start-up capital' to potential or existing cultural enterprises for between one and three years to develop sustainable businesses in this field. Those that demonstrated self-sufficiency after three to five years were then considered for further funding, thus departing from the dependency model which was endemic in the cultural sector. More than R100 million per annum was distributed and the DAC website provides a list of beneficiaries.

Chapter three of the Arts and Culture Policy Review considers the contribution of the arts, culture and heritage to the economy, which is germane to the CCD's mandate internationally. The South African entertainment industry is valued at approximately R7.4 billion and employs about 20 525 people. Of this, film and television is worth R5.8 billion and has a sound technical base. More than 100 000 people are employed in the music, film and

television industries, and the craft and related trade sector accounts for a further 1.2 million employees. Globally, the cultural industries achieve fifth place in the economic sector in terms of turnover, after financial services, information technology, pharmaceuticals, bio-engineering and tourism. For this reason, the Government Plan of Action has placed specific emphasis on the creative industries in economic growth (Arts and Culture Policy Review, 2006: 31).

Various regional initiatives have been undertaken to profile the cultural capacities of South Africa, including the Creative Industry Development Framework (of the Gauteng Provincial Government). Such schemes are designed to support community creative expression through performances, craft markets and other strategies, so that cultural production can be elevated to the 'first economy' in South Africa. The sector relies on government for most of its funding. There is a general shortage of infrastructure, which is why preferential treatment in terms of the Convention could be crucial in placing South African cultural industries on their feet.

One of the notable recommendations of the Arts and Culture Policy Review (2006: 36) is 'protection of cultural practitioners through improved coordination and monitoring of appropriate copyright legislation' and improved coordination between the Department of Trade and Industry (DTI) and other departments, such as Science and Technology. In the context of preferential treatment, the DAC and DTI will have to engage intensively on how it could influence South Africa's current trade agreements and more specifically on how it might affect trade in cultural goods and services. The DAC is tasked with the development of cultural industries and the DTI is responsible for the commercial and trading aspects of cultural production.

In respect of greater integration of the cultural domain, the National Film and Video Foundation (NFVF) held an inter-governmental department summit in September 2008 to address the vexed issue of lack of coordination in the film industry specifically. Its heavy reliance on government funding, and especially on the DTI's grant and incentive schemes, explains its attempts to facilitate better communication. The Convention's Article 16 has given greater urgency to the need for formal consultation between the DAC and DTI in order to calibrate the modalities, responsibilities and strategies for harnessing the benefits that may accrue to South Africa's cultural industries from the preferential treatment clause.

The DAC already has over seventy bilateral cultural agreements, reciprocal in nature, which allow various exchanges of expertise, expression and artistic works among the signatories. None of these, however, itemise any trade-related priorities, although it is true that these would have to comprise broad statements of intent to engage in mutually beneficial trade of cultural goods and services and to provide access to each other's markets in the cultural agreements. And the specifics of trade in these goods, services and markets would have to be spelt out in the trade agreements. The Convention permits this approach to be placed on the agenda in the dialogue between cultural and trade departments of government. There is therefore much work to be done internally in developing countries to achieve a state of readiness among their respective cultural industries to capitalise on preferential treatment, as well as to persuade trade ministries to accept cultural industries as prospective export entities.

The Arts and Culture Policy Review's disclosures are extremely relevant to the preferential treatment envisaged by the Convention. It candidly reports that the 'cultural industry' in South Africa has always been regarded as a lesser enterprise: 'The sector has been viewed by government and the private sector as a cost to the national fiscus and has been associated with subsidies, tax incentives and donor funding rather than a productive sector of the economy.' (Arts and Culture Policy Review 2006: 33). Theatre, visual arts,

music, filmmaking, design and fashion are regarded as separate sectors without connections among them, they have been poorly organized and they do not have skills-development programmes designed to empower formerly disadvantaged communities, according to the report.

There is also no established framework for relationships between cultural industries and capital, which means that they have not properly exploited potential export opportunities for South Africa's cultural products. Finally, the Review states that 'the sector has not as yet benefited from technological development and increased access to information and knowledge industries'. A major concern is that the music industry 'is losing millions of Rands each year through piracy' and the lack of integration in the cultural sector has limited its capacity to ensure larger investment and participation by stakeholders (Arts and Culture Policy Review 2006: 33). Arts, Heritage and Culture rely heavily on government funding. A substantial part of the Department of Arts and Culture's budget is allocated to these 'industries'.

Chapter four of the Policy Review looks at arts, culture and heritage continentally and internationally. Chapter 14, Section 231 of the Constitution of South Africa outlines the legislative framework governing international agreements. Customary international law is law in the Republic unless it is inconsistent with the Constitution. Aspects of South Africa's foreign policy are also germane to the frameworks that inform international relations, and emphasize the country's commitment to peace and security as well as economic and political development on the African continent. Also of significance is its declared aim to pursue a non-aligned approach and 'diplomacy of bridge-building between "North" and "South"'. In multilateral forums, it strives to promote its interests in regard to global issues, such as due respect for human rights, democracy, protection of the environment, and global peace and security (Arts and Culture Policy Review 2006: 39-40).

The 2006 Government Programme of Action on the International Relations, Peace and Security (IRPS) Cluster identifies the consolidation of the African agenda, South-South cooperation and global governance in the fields of politics and security, as well as socio-economic policy as priorities. In terms of preferential treatment, therefore, the South African government favours arrangements that privilege continental African cultural development and enterprise in addition to South-South agreements, which could then collectively attract support from developed economies. South Africa clearly prefers collectivities in terms of legislative and legal frameworks in its relations with the North. There are also more explicit guidelines about international arrangements in the arts and culture sector, for example, the National Film and Video Foundation Act and the South African Heritage Resources Act (Arts and Culture Policy Review 2006: 40-41).

In terms of precedent, the Department of Arts and Culture (DAC), through the International Relations' Chief Directorate entered into a co-funded partnership with Sweden to the amount of R57 million (the DAC contributing R12 million) and Flanders, which contributed R22 million (to the DAC's R3 million). The Arts and Culture Policy Review, in light of these agreements, reflected that South Africa has the option to weigh its global connections in order 'to build on our unique convergence of cultures to develop international links for cultural exchange on the basis of mutual respect' (Arts and Culture Policy Review nd: 42). South Africa's diplomatic articulation with Africa, Oceania, the Caribbean and the Commonwealth, especially Canada, and Asia has opened up a range of possibilities which need substantive proposals, particularly in relation to grant-making, partnerships, research and innovation, policy and practice advocacy, networking and information dissemination and programme management (Arts and Culture Policy Review 2006: 42-43).

#### **D. Analysis of existing agreements and preferential treatment mechanisms**

South Africa has strong trade and development ties with the European Union and with Mercusor countries in Latin America, via a free-trade agreement with Brazil, but India is at the top of government's export-orientated trade agenda. It is expected that the IBSA alliance will open up trade to the whole of southern Africa, thus bringing benefits to the fourteen-country SADC market of about 140 million people. Trade with Asia also centres on Japan, South Korea, Malaysia, Thailand, Indonesia and China. In terms of preferential trade arrangements, South Africa enjoys access to a growing number of markets through tariff reductions and differentiated quotas. The United States of America, for instance, provides opportunities for market access to various African countries, including South Africa, through the African Growth and Opportunity Act (AGOA).

Other countries, including Canada, the Czech Republic, Hungary, Norway, Japan and Switzerland, also open their markets through the Generalized System of Preferences (GSP) mechanism. Europe, however, remains South Africa's biggest source of investment, accounting for almost half South Africa's total foreign trade. This status is enshrined in the Trade, Development and Co-operation Agreement (TDCA) signed in 1999. Growing links with the Middle East, especially Saudi Arabia, Iran, Israel, Turkey and the United Arab Emirates present fresh markets for South African goods (Secretariat ACP 2008).

In 2006-7 the Department of Arts and Culture (DAC) supported about 400 South African artists and cultural practitioners to showcase their talent abroad and forge closer links with counterparts around the world. To this end, bilateral agreements have been signed with France, the United Kingdom, China, Cuba, India, New Zealand and Belarus. During 2007-8 the DAC was expected to ratify a number of international treaties, including the UNESCO Convention for the Safeguarding of Intangible Heritage and the Underwater Cultural Heritage Convention. These will enhance the country's capacity to protect and promote its heritages, which the DAC believes will contribute to social cohesion and the building of a broad South African national identity. In addition, South Africa hosted the SADC National Arts Councils and launched the Commonwealth Foundation (Arts and Culture 2008: 14).

Reading the various bilateral cultural agreements that South Africa has with India, the Slovak Republic, China and the Commonwealth of the Bahamas, among others, the basis centres on reciprocity in the sense of funding exchanges so that costs are shared. There is little evidence of preferential treatment, except in the sense of offering the facilities and audiences that would be available to local artists. Cooperation is thus the core tenet of these arrangements, in the spirit of reciprocity. Four of South Africa's bilateral agreements (with Italy, France, Canada and the United Kingdom) contain provisions for audiovisual co-production treaties which have subsequently been signed. This is in line with states prioritising cultural sectors, sometimes dictated by local conditions, but often the result of global forces as well.

As Singh (2007: 47) illustrates, a number of developing countries have provided a combination of taxes, quotas and subsidies to revive their film industries that have struggled to remain competitive for political or economic reasons, such as those in Argentina and Mexico. South Africa has, since the end of international isolation in the early 1990s, emerged as a major site for film production in Africa with Tsotsi winning the Oscar for the best foreign film in 2005. Yesterday (2004) was also nominated for the award. These are the products of collaboration with developed countries, especially the USA. And as South Africa prepares to host the Fifa World Cup in 2010, its cultural industries also assume considerable importance in terms of tourism. Various cultural discourses now articulate with commercial and political

ones as 'African Renaissance' becomes a credo for the African continent and NEPAD its economic custodian.

The rest of the section discusses cultural fields in which existing agreements abound, but where preferential treatment mechanisms still need to be negotiated. The purpose is to highlight potential sites of intervention by CCD in the context of South African treaties across a range of developed and developing countries. The film and audiovisual industries, more than others in the cultural sector, have assiduously asserted the commercial and trading aspects of their international agreements. It is not coincidental that two of the four co-production treaties have been signed with countries that actively promote the CCD – Canada and France (NFVF 2008). Most of the literature on cultural industries focuses on film, probably on account of Hollywood hegemony, but also because the industry is amongst the most controlled through the WTO.

A document from UNCTAD to the DAC, dated 9 July 2008, announces the dissemination of operational guidelines by the CCD in respect of preferential treatment for developing countries, the integration of culture into sustainable development policies, the intellectual property-rights aspects of cultural goods and services, and the measurement of cultural activities. The circular indicates that Africa's share of global trade in creative products amounts to less than one per cent of world exports. Various domestic policy weaknesses and global systemic biases are deemed the reasons for this state of affairs (Brennan 2008).

One of the most significant developments in giving substance to South Africa's participation in the UNESCO's 2005 Convention is the establishment of the South African Coalition for Cultural Diversity (SACCD) in September 2007 at SAMRO House in Johannesburg which was followed by a meeting of Coalitions and Cultural Professional Organizations arranged by the Canadian co-secretariat of the International Liaison Committee of Coalitions for Cultural Diversity in association with the South African Music Rights Organization (SAMRO) and the SACCD, with the financial support of the Commonwealth Foundation. The meeting brought together various South African cultural agencies and delegates from other African Commonwealth countries, including Botswana, Kenya, Zambia, Uganda, Malawi, Mauritius, Namibia, Swaziland, Tanzania and Sierra Leone. It adopted the 'Johannesburg Declaration' on 10 September 2007.

An important instrument of cultural development is the Department of Arts and Culture (DAC) whose business plan for 2007-2010 indicates that almost R205 million has been allocated to the 'Cultural Development and International Co-operation' (12.75 per cent of its budget). Among its projects is a 'mapping of cultural industries', more effective 'governance, coordination and social cohesion of the craft sector', showcasing and 'promotion of South African crafts' and the 'establishment of a craft centre (emporium)'. Crafts will be marketed internationally through the 'Beautiful Things (BT)' brand.

Another major feature of the strategic plan is the establishment of the 'Indigenous Literature Publishing Project (ILPP)' that will produce a series of books in different languages by writers of different backgrounds from across the regions of South Africa. The DAC also has international ambitions for South African music through increased participation at MIDEM, POPKOM and WOMEX. It is especially concerned to promote local content and indigenous music at the Moshito Music Conference and Exhibition, and to combat piracy of copyrighted work as well as set up revenue streams for the growth of the music industry. As part of this enabling strategy, the DAC realizes the need for a national statutory body for the music industry in South Africa (DAC Strategic Plan 2007-2010).

There have also been specific initiatives in African regional bodies in response to the CCD, especially in respect of trade in cultural goods and services and the development of cultural industries. A sub-group of the SADC Ministers of Culture Colloquium, called the SADC Permanent Secretaries/Directors General of Culture Forum, was established in 2006,



spearheaded by the DAC. Its 'Framework of Implementation' has already identified markets for cultural goods within the SADC region. This has been achieved against the backdrop of the SADC Protocol on Trade which was implemented in 2000 and which anticipated the establishment of a free trade area by 2008. South Africa has negotiated two free-trade agreements – the first with SADC and the second with the European Union (the SA-EU Trade Development Co-operation Agreement) – which allow for preferential access for certain products through lower tariffs among the contracting countries.

The formation of the African, Caribbean and Pacific (ACP) Group, representing continental and diaspora interests, which endorsed the Convention in the Dakar Statement (2005), has also profiled the importance of developing the cultural industries of these countries and regions. This was followed in 2007-8 by the Support Programme to Cultural Industries in ACP Countries to assist the 78 member countries to give efficacy to the Convention. The ACP Secretariat is assisted by a Programme Management Unit that is funded by the 9<sup>th</sup> European Development Fund (EDF). The objective of the programme is to contribute to the restructuring of the cultural sectors of the ACP member states to enhance creativity, promote cooperation and exchanges, facilitate independence and viability, and safeguard cultural diversity and values.

It also aims to heighten the capacities of policies and decision-makers, cultural operators and various domains of culture and their attenuated industries in the affiliated ACP countries through the establishment of a 'cultural observatory' to offer technical advice and information to the legal and institutional bodies in each state. In addition, an Intra-ACP Support Fund for Culture has been set up to professionalize the activities of ACP cultural operators and an ACP/ILO/UNCTAD/UNESCO joint project has been inaugurated to strengthen the creative industries in Fiji, Mozambique, Senegal, Tobago, Trinidad and Zambia.

The Support Programme to Cultural Industries in ACP Countries is expected to contribute significantly to realizing the ambitions of the Dakar Declaration and Plan of Action for the Promotion of ACP Culture and Cultural Industries (2003), as well as those of the Santo Domingo Resolution (2006), adopted by the ACP Ministers of Culture. Two million Euros will be allocated to the Intra-ACP Support Fund for Culture from the total budget of 6.3 million Euros for the period 2007-2012, in order to benefit the cultural sector professionals in the participating countries. A detailed work programme for grants, containing information, the calendar and the scope of action for the Fund and a call for proposals will be published by the ACP Secretariat by the end of 2008.

Like the music industry, publishing and the book trade represent one of the mainstays of cultural industries. They have high economic value, but offer a less tangible cultural worth. South Africa, unlike India which is the third largest producer of books in English, has no comprehensive book development strategies in place, despite the intentions of the Draft National Book Policy of 2005. The Indian comparison is also instructive in that it publishes in 22 local languages. Preferential treatment could help to change this. High printing costs inhibit access to educational and trade books, putting them out of reach of the ordinary public. Small print-runs escalate the expenditures. Other factors that increase the price of books are skills shortages, lack of coordination between publishers and printers, the tardy implementation of new technologies, the high price of local paper at import parity, and the off-shoring of printing (South African Book Development Council 2007: foreword).

The distinguishing feature of the South African book retailing sector is its high level of concentration. In each market segment there is one player that is noticeably bigger than its competitors. Exclusive Books, for example, is believed to have a market share of 39-43 per cent. In its report, produced in June 2007, the South African Book Development Council

recommended that the industry should research new technologies, provide more training, and lobby for the dropping of import tariffs on printing plates. It also proposed that the library market act as a driver for growth and closer cooperation among publishers, their representatives and academic booksellers. (South African Book Development Council 2007: vi-xii). Preferential treatment in each of these areas would dramatically alter the reading culture of our communities, transform the education sector and open up international partnerships with publishers to broker South African writings to other markets. Such arrangements could also transfer indigenous knowledges to global forums.

Copyright is increasingly regarded as among the most important commercial issues in our knowledge society, but it is under scrutiny. It is becoming more and more restrictive in terms of WTO rules and in some circles is seen the accomplice of an 'intellectual land grab' of copyright acquisition without any borders. Smiers (2003: 60) contends that 'Most of the artistic creations from the past and present are becoming the property of a limited number of cultural conglomerates, which try to present us...with the cultural content they own.' And as artists begin to use technology and multi-media in sophisticated combinations, the line between ownership and originality becomes more and more blurred (Gordon 2007: 25). 'Creative-commons' agreements are presumably a response to these developments as artists in developed countries opt for non-commercial uses of their work, but where does this leave the struggling cultural practitioners in developing countries whose intangible cultural capital accrues to others?

## **E. Conclusions and recommendations**

As the literature around preferential treatment and cultural diversity expands, so the complexity of trade in cultural goods and services increases and mechanisms will have to be put in place to monitor the implementation agreements. As far as South Africa is concerned, the debate has generated a review of policy and the establishment of a chapter of the Coalition for Cultural Diversity which, after a year in existence, is lobbying for greater cooperation among between government and civil society. The Coalition has also called for sustained high quality research to accompany policy-making. Examples of good practice on how to translate policy into legislation, procedures and successful programmes should inform such research, which needs also to be based on detailed sector-specific statistics.

This research agenda is dependent upon collaboration with UNESCO and could itself be the object of preferential treatment agreements with developing countries. Research will produce more consistent and coherent policy positions, enabling more persuasive advocacy and reducing isolation among cultural organizations that have a significant role to play with relevant South African government ministries and UNESCO's CCD.

Secondly, the rubric of cultural goods and services has become the most significant determinant of cultural value as well as an important factor in international trade. This is the result of the commodification of culture and the expanding network of cultural interdependencies across the world. Gordon (2007: 20) agrees with other commentators that 'cultural practices lie at the very heart of contemporary globalization'. This gives added importance to the Convention as it takes some of the WTO's grip on culture away and through preferential treatment tries to restore more balance to global cultural exchanges.

It is to be hoped that its forceful political expression will soon be matched by its efficacy as an operational instrument to ensure more equal cultural competition by developing countries. Preferential treatment offers an avenue for minority voices to assert themselves into national and global discourses so that democratic values are entrenched. In this regard it is apposite to quote Herbert Schiller who observed that the locus of global power in the post-war era was moving from the appropriation of territory to the annexation of imagination' (Gordon 2007: 21).

Thirdly, international cultural cooperation is critical to the maturing of South Africa's democracy as it offsets the deficits of apartheid isolation. Preferential treatment could, for example, enable administrators and managers to acquire training and experience abroad. It could also facilitate research in cultural fields so that the information base is extended and research practices are implemented and replicated. It could also permit international arts educators to play a role in the non-formal training of practitioners and administrators, encourage the establishment of exchange programmes, support the participation of previously disadvantaged South Africans in international exhibitions, festivals and forums, and embed artist-in-residence practices in local arts institutions so that cultural reciprocity permeates the national cultural scene.

Most of all, Article 16 of the Convention places a large responsibility on developed countries to provide the necessary legal and administrative frameworks that should facilitate cultural transactions. They are called upon to create an enabling environment not only for effective market access to the cultural goods and services of developing economies, but also mechanisms to protect them once they compete with dominant cultural interests and to ensure that their intellectual content is guarded against misappropriation. Under preferential treatment, therefore, the intellectual and cultural property of developing countries is allowed to compete on an equal footing.

South Africa is in an advantageous position as the host country to the Fifa World Cup in 2010 to gain particular benefit from preferential treatment in terms of trade in cultural goods and services. It therefore needs to capitalize on this important event to give substance to the ideals of the CCD for the region and to extend the 'Afropolitanism' that international sport has the potential to promote.

Finally, some recommendations for the implementation of Article 16 include:

- The use of Article 14 (ODA from developed countries) to fund innovative multilateral and bilateral projects between parties to the Convention which focus on research, especially the mapping of cultural industries. It is imperative, in view of the foregoing, that baseline studies are undertaken on the economic aspects of culture in South Africa and the SADC region, from which specific and relevant trading strategies can be derived to inform the country's approach to preferential treatment.
- The commissioning of detailed research on preferential treatment in the cultural domain in comparative and transnational perspective, including both developed and developing countries.
- The need for many capacity-building initiatives in South Africa's cultural industries, which should also be funded through bilateral ODA agreements.
- Strengthening the export capabilities of South Africa's markets to enhance capacity through a well-managed skills-development plan.
- The identification of and focus on markets in Africa and beyond.
- Conducting seminars/workshops/conferences on how to develop markets in the developed world for African cultural products.

- The development of marketing strategies in developed countries for South African cultural goods and services.
- The introduction of measures to encourage investment by developed and developing countries in cultural industries in South Africa and the SADC region.
- Attracting other forms of industrial and technological cooperation in Africa.
- The formation of appropriate institutions to manage preferential treatment arrangements and funding.
- The articulation of civil society with government initiatives on both sides of each partnership.

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

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

*Prepared by:*

**DR KEITH NURSE**

*Director of the Shridath Ramphal Centre for International  
Trade Law, Policy and Services, University of the West  
Indies, Barbados*

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## Executive Summary

This report addresses the concept of preferential treatment as it pertains to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions signed in Paris on the 20th of October, 2005. The main focus of the report is on Article 16 of the Convention, entitled “Preferential treatment for developing countries,” which states that:

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

The aim of the study is to examine how Article 16 on Preferential Treatment in the UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions (2005) can facilitate diversity in the global market place by expanding market access for cultural goods and services from the developing world. The paper addresses these concerns by taking into account the modalities of preferential treatment, cultural cooperation and the role of cultural industries. The paper is organized in the following manner:

**Section A** introduces the subject by first analyzing the trade in cultural goods, services and intellectual property and by assessing the key challenges and opportunities facing developing countries. A short review of the trade policy context for the cultural sector is also done.

The key findings are that the trade in cultural goods, services and intellectual property from the developing world is dominated by a small group of countries mostly from Asia. Most developing countries operate with a deficit in this trade. The evolving trade policy context is very dynamic and complex given the competing tendencies towards liberalization of cultural trade and the protection and promotion of cultural diversities.

**Section B** of the paper then focuses on the key features of preferential treatment, especially as it applies to international trade and specifically to the trade in cultural goods, services and intellectual property. It then addresses some of the key concerns associated with the experience of preferential treatment and relates these concerns to the cultural sector.

Historically, the experience of preferential treatment does not adequately address supply-side constraints or structural conditions in producer/exporting countries. In addition, the benefits of preferential treatment have been concentrated in a small group of countries. There are few examples of trade agreements that include the cultural sector beyond the audiovisual sector.

**Section C** examines the legal and institutional framework of the CARIFORUM EU Economic Partnership Agreement (EPA) that was initialed on December 16, 2007 and officially signed on October 15, 2008. CARIFORUM is the first regional group within the ACP to secure a comprehensive agreement with the European Union (EU) that covers

not just goods but services, investment, and trade related issues such as innovation and intellectual property. The EPA is of specific relevance in that the Protocol on Cultural Cooperation in the agreement utilizes the UNESCO Convention as a starting point and thus is the first attempt to operationalize the UNESCO Convention.

The provisions within the EPA that relate to the cultural sector are wider in scope and detail than what obtained under the Cotonou Agreement especially since it gives legal certainty to suppliers of cultural services from the Caribbean region particularly under the market access provisions for entertainment services. The Protocol on Cultural Cooperation also affords co-production in the audiovisual sector and improvements for cultural exchanges, technical assistance, and collaborations among artists and other cultural professional and practitioners.

**Section D** is the case study component of the paper and focuses on the prospects for expanding cultural exports from the Caribbean to Europe under the recently signed CARIFORUM-EU Economic Partnership Agreement. It analyzes both the market access provisions under entertainment services as well as the key provisions in the Protocol on Cultural Cooperation. In this regard, the challenges and opportunities associated with the EPA are related to the provisions of the UNESCO Convention and key recommendations are developed.

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. However, there are some limits as to how far Article 16 can mirror the preferences in the EPA. In the first instance, the UNESCO Convention is a cooperation agreement largely premised on best endeavour language. As such the preferences that the CARIFORUM countries gained from market access in entertainment services in a legally binding reciprocal trade agreement are not transferable to the UNESCO Convention. In short, Article 16 of the UNESCO convention can draw on the Protocol on Cultural Cooperation and in this regard only on the Mode IV (movement of natural persons) elements, since none of the other services supply modes (cross-border supply, consumption abroad, commercial presence) are facilitated under the Protocol.

**Section E** concludes by reiterating some of the key observations and findings. It specifically identifies the lessons from the EPA and outlines the implementation challenges for Article 16. Recommendations geared towards realizing the objectives of Article 16 are also advanced.

In summary, the paper argues that the main benefits of Article 16 are in terms of cultural cooperation and not in commercial terms. It suggests that Article 16 can facilitate cultural exchanges, training, technical assistance and collaborations. The prospects for advancing the aims of expanding cultural industries and generating cultural exports under Article 16 are limited in scope. However, the Convention is not limited to international trade law and its main contribution could be in norm-setting, for example, through the promotion of a “fair trade” marketing strategy and build a social movement around a concept like “fair culture”.

## SECTION A

### Introduction

The aim of the study is to examine how Article 16 on Preferential Treatment in the UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions (hereafter referred to as the “UNESCO Convention”)<sup>1</sup> can facilitate diversity in the global market place by expanding market access for cultural goods and services from the developing world. The UNESCO Convention, which was signed in Paris, France, 2005 has the overarching goal of protecting and promoting cultural diversity as a global public good.

The evolving trade policy context for the cultural sector is very dynamic and complex given the competing tendencies towards liberalization of cultural trade under the WTO and regional trade agreements and the protection and promotion of cultural diversities under the UNESCO Convention. In addition, there is an increasing awareness that the cultural sector mirrors the existing international division of labour where industrial and technological capabilities along with intellectual property asset management are the key attributes of global competitiveness. In this regard it is recognized that:

*While the developing countries are rich in terms of creativity and cultural expressions, there is a genuine disparity between capacities of the developed and developing countries when it comes to producing and disseminating their own cultural expressions, thereby reducing the opportunities of developing countries to contribute actively to diversity at the international level.<sup>2</sup>*

The paper aims to address these concerns in the context of Article 16 of the UNESCO Convention. The paper will first analyze the trade in cultural goods, services and intellectual property and assess the key challenges and opportunities facing developing countries. A short review of the trade policy context for the cultural sector will also be done. The paper then focuses on the key features of preferential treatment, especially as it would apply to international trade and specifically to the trade in cultural goods, services and intellectual property. It will then address some of the key concerns associated with the experience of preferential treatment and would relate these concerns to the cultural sector. The case study component of the paper will focus on the prospects for expanding cultural exports from the Caribbean to Europe under the recently initialed CARIFORUM<sup>3</sup>-EU Economic Partnership Agreement. The challenges and opportunities

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<sup>1</sup> The Convention (<http://www.unesco.org/culture/en/diversity/convention/>), which was adopted in October 2005,

1. recognizes that “cultural diversity forms a common heritage of humanity”;
2. notes that “cultural activities, goods and services have both an economic and cultural nature because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value”;
3. and, reaffirms the rights of sovereign states to “maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory”.

<sup>2</sup> See Ministry of Education, *Fair Culture – Culture for Sustainable Development*. Background Paper on Cultural Sector and Development Work in the Nordic Countries. <http://www.minedu.fi> accessed May 2008.

<sup>3</sup> The following are CARIFORUM member states: Antigua and Barbuda, The Bahamas, Barbados, Belize,

associated with the EPA will be related to the provisions of the UNESCO Convention and key recommendations will be developed.

### Trade in Creative Goods, Services and Intellectual Property

Most developing countries are net importers except for China, Hong Kong and India. Singapore and the Republic of Korea are the next best performers but they have minor deficits (see Figure 1). For most other developing countries the cultural industries is making an increased contribution to GDP, exports and employment although they have a chronic deficit on trade in cultural goods (see Figure 2).

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

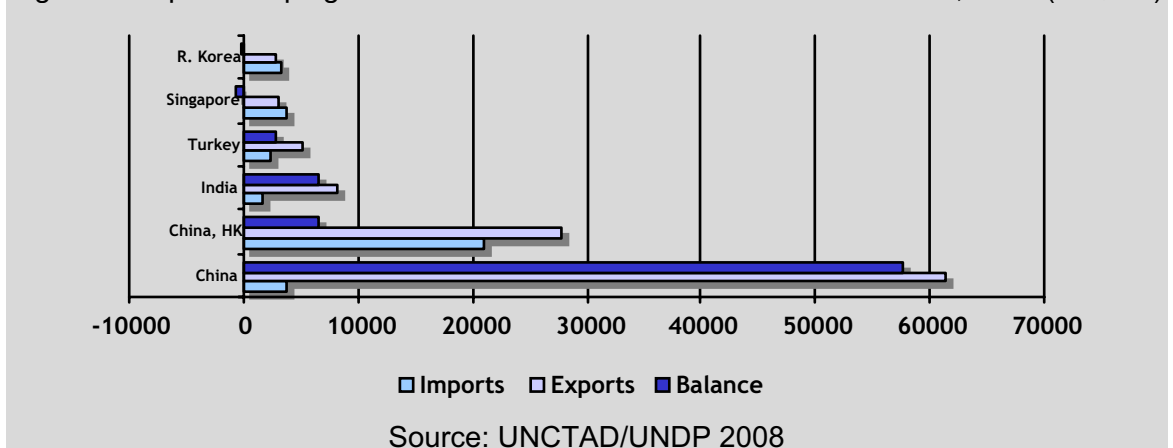
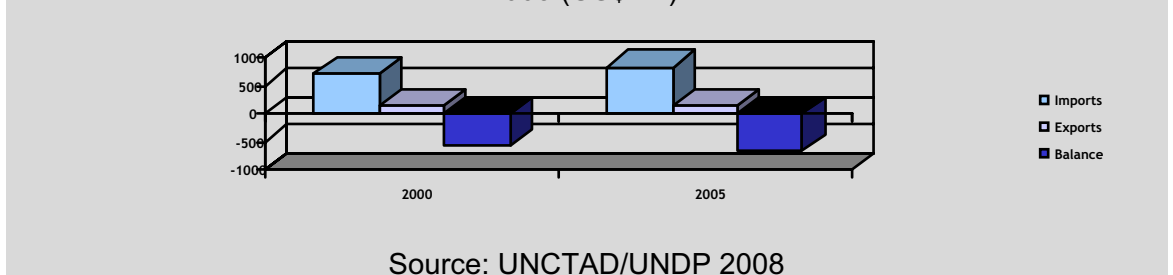


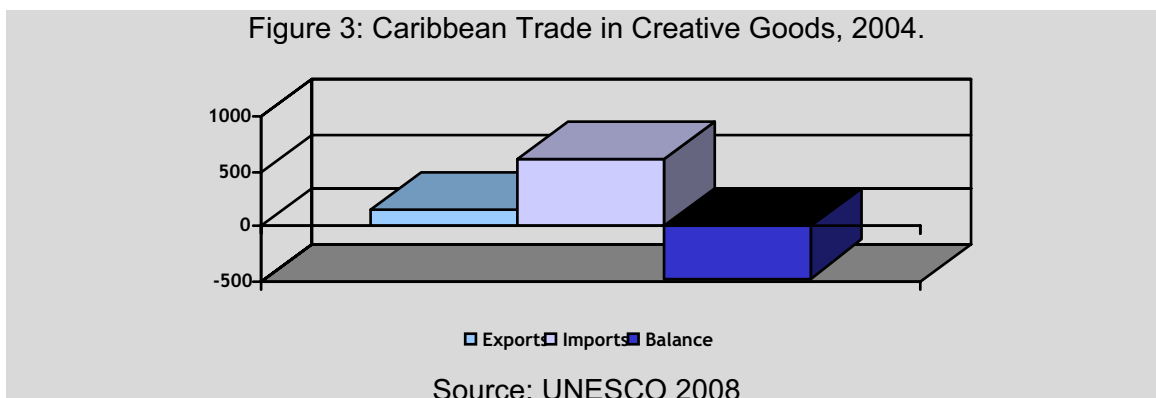
Figure 2: Small Island Developing States: Creative Goods, Imports & Exports, 2000 & 2005 (US\$mn).



The case of Small Island Developing States (SIDS) and Caribbean-SIDS is instructive. What Figure 3 shows is that although several Caribbean countries (e.g. Cuba, Dominican Republic, Haiti, Jamaica, Trinidad and Tobago) are known for their arts and cultural exports they still have a significant deficit in the trade of cultural goods. Part of the explanation is that the table reflects data only for merchandise trade and does not include trade in services, royalties earnings and earnings from cultural, heritage and festival tourism where these economies are able to generate some earnings.

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Dominica, The Dominican Republic, Grenada, Haiti, Guyana, Jamaica, St Christopher and Nevis, St Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago.



The analysis of trade in the creative sector needs to move beyond the goods sector to incorporate trade in the services sectors as well as trade in copyright and royalties (an area of trade that is not catered for in the UNESCO Convention). Data on trade in creative services are largely undeveloped on account of the weak informational infrastructure, particularly in developing country regions. Best estimates put the size of the creative services sector at \$89 billion in 2005 up from \$52.2 billion in 2000, an 11.2% annual growth rate. In terms of regional shares, the developed economies accounted for 82% of total exports while developing countries' share was 11% and that of transition economies was 7%.<sup>4</sup> In 2005 the top exporting services were architectural services (\$27.7 billion) followed by cultural and recreational services (\$27.5 billion) (see table 1).

Table 1: Reported Exports of Creative Services, 1996, 2000 and 2005 (\$ billions)

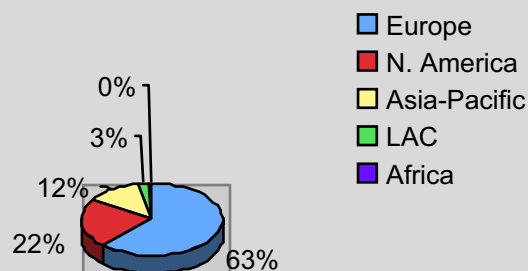
	All Creative services	Architectural	Advertising	Audiovisual	R&D	Cultural & recreational	Other cultural
1996	38.2	9.8	5.0	6.3	13.3	10.5	1.0
2000	55.2	17.3	5.1	13.3	9.6	20.7	2.8
2005	88.9	27.7	15.7	17.5	18.0	27.5	3.5

Source: UNCTAD/UNDP 2008

The most recent data from CISAC on global authors' rights and royalty collections by CISAC's members worldwide in 2006 reached 7,155,532,807 Euros, a 6% increase over 2005. Of this amount Europe accounts for approximately 63% or 4.48 billion Euros. North America is the next largest region in terms of collections with 1.55 billion Euros. Developing country regions like Asia-Pacific collected 878 million, Latin America and the Caribbean 211 million and Africa 34 million (see figure 4). These data only cover royalty collections from the national societies and not the royalty payments between collection management organizations, for example, inflows and outflows to foreign collections societies.

<sup>4</sup> See UNCTAD/UNDP (2008) *The Creative Economy Report 2008: the Challenge of Assessing the Creative Economy: Towards informed policy-making*. UNCTAD/UNDP, Geneva, p. 134.

**Figure 4: Global Royalty Collections, by Region, 2006**



Source: CISAC 2007

Prospects for this aspect of creative trade (i.e. digital content like Internet TV and mobile music) appear to be very strong based on recent data from a CISAC study (see box 1). This is a burgeoning element of the creative economy from which only few developing countries are benefiting. For example, estimates from UNCTAD show that the top exporters of new media from the developing world are the key industrial economies in Asia (China, Singapore, Korea, Taiwan, India and Malaysia) and other developing country regions like Latin America and Africa are not active participants. The scenario for Least Developed Countries and Small and Vulnerable Economies are even more marginal in these growth trends<sup>5</sup>.

#### Box 1: Growth Trends in Creative Digital Economy

- The consumption of audiovisual content on mobile devices, driven mainly by mobile TV, will enjoy a steady growth of 68% per year through to 2010, when it will reach a total market value of \$3 billion. As a comparison, online internet TV is expected to reach \$2.7 billion by 2010.
- Musical content will follow a similar trend. With a projected 4.2 billion mobile subscribers worldwide by 2010 (up from 3.3 bn in 2007), the global market value of the mobile consumption of digital music content is expected to reach \$6 bn while online delivery will reach \$5 bn.
- The Asia-Pacific region is expected to be the key driver of this hypergrowth, generating more than half of the total global income from mobile music downloads by 2010 and surpassing both North America and Europe.

Source: CISAC, Business Scenarios in the Digital Economy ([www.cisac.org](http://www.cisac.org)).

The creative sector is a major growth pole in the knowledge economy. For developing countries the above analysis indicates that they are in relative terms small traders in the global creative economy even when the weak informational

<sup>5</sup> See UNCTAD/UNDP (2008) *The Creative Economy Report 2008: the Challenge of Assessing the Creative Economy: Towards informed policy-making*. UNCTAD/UNDP, Geneva, p. 134.

infrastructure is taken into account. Another key finding is that the developing world should not be viewed as a monolithic group. Instead, an understanding of differentiation among developing countries and regions is needed. Asian economies are fast rising players in the creative economy as represented by the growth of China in goods exports. The Asia region is also expanding global market share in services exports, royalty income, digital trade and new media. Other regions like Latin America and the Caribbean and Africa generate significant cultural art forms but this is not reflected in trade expansion and global competitiveness.

In many respects the problem in these countries is that there is no adequate support from a trade, industrial and innovation standpoint for local or regional cultural enterprises and industries. And in the realm of copyright and royalty collections many developing countries are faced with the problem of under-reporting in relation to the public performance of copyright works by the collective management organizations in OECD countries, particularly the US.<sup>6</sup> It is also that given the nature of cultural industries the challenge is essentially one of creating demand for alternative genres and creating new tastes. The marketing challenge requires the involvement of private firms/operators. How would these challenges be facilitated within the UNESCO Convention and specifically under Article 16 on preferential treatment?

#### The UNESCO Convention and the Evolving Trade Policy Context

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) as indicated in Article 1(h), reaffirms the rights of sovereign states to “maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.” Article 6 on the rights of parties on a national level amply outlines the scope for the policies and measures that may be adopted which include, *inter alia*, the following actions:

- *protecting and promoting diversity of cultural expressions*
- *providing opportunities for the creation, production, dissemination, distribution, and enjoyment of domestic cultural activities, goods, and services, including provisions relating to language used for such activities, goods, and services*
- *providing public financial assistance*
- *establishing and supporting public institutions, as appropriate*
- *nurturing and supporting artists and others involved in the creation of cultural expressions*
- *enhancing diversity of the media, including through public service broadcasting.*

Article 16 on preferential treatment states that:

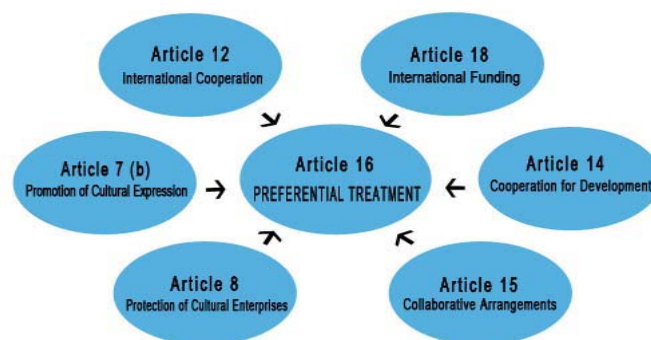
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<sup>6</sup> See Keith Nurse, “Copyright and Music in the Digital Age: Prospects and Implications for the Caribbean” *Social and Economic Studies* 49.1 (2000): 53-81.

*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.<sup>7</sup>*

Article 16 is part of a number of other articles which seek to facilitate the growth and export of the cultural industries. For example, Article 7(b) refers to the promotion of cultural expressions, Article 8 to the protection of cultural enterprises, Article 14 to cooperation for development, Article 15 to collaborative arrangements and Article 18 to the establishment of an international fund (see Figure 4).

Figure: 4 Preferential Treatment and other articles in the UNESCO Convention



The Convention also takes into account the obligations of signatories to other international agreements. Thus, Article 20 states that “Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties,” but “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.”

Technological transformations in the cultural industries sector have been complemented by the emergence of a complex trade policy framework. Cultural and entertainment goods, services and intellectual property are captured in a range of international regimes and instruments in the multilateral and regional trading system<sup>8</sup>. Essentially, there are five critical areas that impact on cultural and entertainment industries and, in many ways, given the innovations and evolving dimensions of the industries involved, these areas are increasingly interconnected:

<sup>7</sup> Convention on the Promotion and Protection of the Diversity of Cultural Expression. Available at <http://www.unesco.org/culture/en/diversity/convention/> Accessed on January 23, 2008.

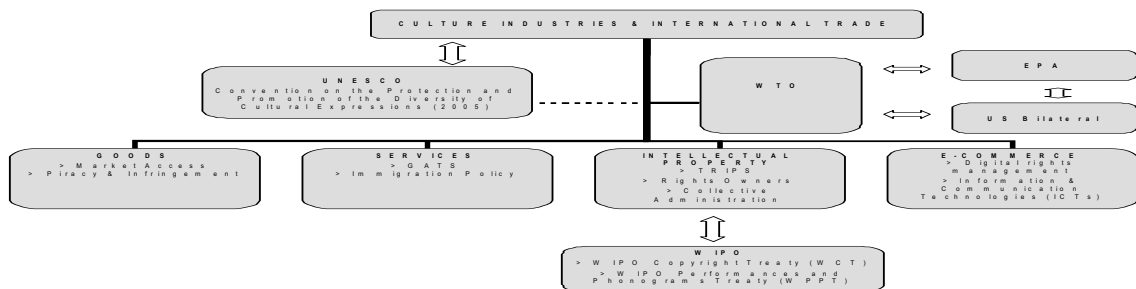
<sup>8</sup> See Van den Bossche, Peter (2007) Free Trade and Culture: A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures. (Amsterdam: Boekmanstudies).



1. *WTO GATS* — covers a range of services that relate to the cultural sector: news agency services, motion picture industry, theatrical services, libraries, archives, museums, etc.<sup>9,10</sup>
2. *WTO GATT* — covers market access in relation to goods.
3. *WTO TRIPs* — covers copyright, geographical indications, trademarks, traditional knowledge, etc.
4. *E-commerce* — given that so many areas are increasingly linked to the digital arena.
5. *The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*—the most recent instrument to be created to foster understanding of the policies that can effectively promote cultural diversity while dealing with the challenges associated with trade in cultural goods and services.
6. *The emergence of regional trade agreements such as the Economic Partnership Agreements between the EU and the ACP and bilateral agreements with the US.*

The diagram that follows illustrates the expansive range of issues affecting cultural industries and highlights the need for close coordination of trade, industrial, and intellectual property policy (see Figure 5).

Figure 5: Diagram Linking Culture Industries & International Trade to Trade, Industrial, & Intellectual Property Policy<sup>11</sup>



For developing countries the introduction of culture into global trade rules and governance is an issue of immense concern. In many respects it is a contest between the liberalization of trade in cultural goods and services under the WTO as well as through regional trade agreements and the promotion of cultural diversity through the UNESCO Convention<sup>12</sup>. The Convention calls for the parties to

<sup>9</sup> For further discussion see Christoph Beat Graber, *Audiovisual Media and the Law of the WTO*, in: Christoph Beat Graber/Michael Girsberger/Mira Nenova (Hrsg.), *Free Trade versus Cultural Diversity*, Schulthess: Zürich 2004, 15-65.

<sup>10</sup> See WTO, Council for Trade in Services, "Audiovisual Services: Background Note by the Secretariat", S/C/W/40, 15 June 1998.

<sup>11</sup> This diagram is taken from Keith Nurse, et al., (2006) *The Cultural Industries in CARICOM: Trade and Development Challenges*. EU PROINVEST and Caribbean Regional Negotiating Machinery, Bridgetown, Barbados.

<sup>12</sup> For further discussion see Tania Voon, *Cultural Products and the World Trade Organization*. Cambridge: Cambridge University Press, 2007.

incorporate culture into sustainable development and for international cooperation to support the development of the cultural industries and policies in developing countries through technology transfer, financial support and preferential treatment.

Many developing countries support the adoption of the Convention based upon its potential to contribute to cultural diversity and to facilitate more balanced trade in cultural goods, services and intellectual property. The key challenge for many developing countries is that while the convention is a legal instrument that is binding it does not generate commitments to signatories as obtains under the WTO. In this sense the convention may encourage more diversity in production but it does not guarantee space in the market. The following quote, which addresses the issue of access to the European audio-visual market, illustrates the dimension of the challenge for market entry. The report states that:

*Support for these enterprises is considered extremely important in the context of diversity as it enables the distribution of cultural goods which may not otherwise make it past the gatekeepers located in the buying departments of major distribution companies. On the European level, some smaller countries find it difficult to enter neighbouring markets. According to 2003 figures published by the European Audiovisual Observatory, only about 30% of all European films were distributed beyond their national borders. This figure drops dramatically when examining the figures for films produced by new member states of the EU; only 18 films produced by these countries were distributed throughout Europe, accounting for 0.01% of the European admissions in 2003. New films from these countries, for example, will either not find a distributor or will enter the market in a small number of copies and be distributed only to selected art house cinemas in big cities and beyond the reach of the majority of European audiences<sup>13</sup>.*

This brings the issue of cultural entrepreneurship to the forefront of the discussion because no legal framework can legislate who will get into the market or will proliferate in the global, regional or national cultural economy. What the Convention does have the potential to do is ensure greater flexibility and policy space within the evolving rules-based trading system such that developing countries can promote cultural entrepreneurship and industries. Here the key concern is whether developing countries will be able to meaningfully participate in the expansion of this sector of the world-economy through the application of a range of industrial and innovation policy initiatives.

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<sup>13</sup> See Article 7: Measures to Promote the Diversity of Cultural Expressions: European Approaches. Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions. First Extraordinary Session Paris, UNESCO Headquarters, 24-27 June 2008. This paper, authored by Danielle Cliché, and commissioned by the UNESCO Secretariat, offers a synoptic overview of existing measures to promote the cultural expressions at different stages of the cultural production as specified in Article 7 of the UNESCO Convention. (accessed July 20 at <http://unesdoc.unesco.org/images/0015/001598/159804E.pdf>).

## SECTION B

### Definition of Preferential Treatment

The term 'preferential treatment' is often used to refer to concessions given to nations, persons or a group of persons who have legitimate claims for requiring assistance, usually as a result of size, disability and/or a historical disadvantage. Preference shown is often aimed at restoring equity among all parties concerned or redressing structural imbalances. Hence, the term owes its origin largely to the era of decolonisation and to civil rights movements across the world; where nations and persons who were disenfranchised called for policy measures that took into consideration the factors inhibiting their ability to realise their goals and objectives. Preferential treatment policies have therefore been adopted at international, regional and national levels, and have been geared towards ensuring equal opportunities for all, regardless of size, race, gender, religion or national identity.

Preferential treatment, as it pertains to International Trade, is often applied in a context of wide disparities between donors and recipients on account of economies of scale, greater resources or technological advantage. This scenario has led many developing nations to call for preferential treatment that would allow them to compete with their developed counterparts in the multilateral trading arena. What is now referred to as 'special and differential treatment' constitutes one of the core principles of the WTO.<sup>14</sup> These sentiments were echoed not only within the WTO but also within other international organizations, *inter alia*, the United Nations Conference on Trade And Development (UNCTAD), which proposed that:

*Developed countries should grant concessions to all developing countries and extend to developing countries all concessions they granted to one another and should not, in granting these or other concessions, require any concessions in return from developing countries.*<sup>15</sup>

From the UNCTAD perspective preferential treatment embodies a combination of internal and external measures. In terms of the former UNCTAD argues that preferential treatment is not dissimilar to that of the infant industry argument whose aim is to protect nascent industries in the home market in the early stages of industrialization. The external dimension involves preferential conditions for sheltered market access for export-oriented industries.<sup>16</sup> Traditionally, concessions to developing countries have been in the form of preferential tariff rates. Preferential treatment provisions have been realised through a wider range of policy instruments:

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<sup>14</sup> See Peter van den Bossche "The law and policy of the World Trade Organization: text, cases and materials" (Cambridge: Cambridge University Press, 2006) p 39

<sup>15</sup> United Nations Conference on Trade And Development, *Yearbook of the International Law Commission, 1978, vol. II, part Two*. "Most-favoured nation clause: statement made by the representative of the UNCTAD secretariat at the 1497<sup>th</sup> meeting, at the request of the Commission." Doc. A/CN.4/L.268

<sup>16</sup> *Ibid* pg. 1888.

1. *provisions aimed at increasing the trade opportunities of developing country members;*
2. *provisions under which the interests of [a] developing country would be safeguarded;*
3. *flexibility of commitments, of action, and use of policy instruments;*
4. *transitional time periods;*
5. *technical assistance; and*
6. *provisions relating to least-developed country Members.*<sup>17</sup>

#### Principles Applied – One example

The adoption of such principles have resulted not only in preferential tariff treatment, but also in the introduction of agreements geared towards the empowerment of developing states, by creating the legal framework necessary to increase their participation in multilateral trade. One example of such an arrangement is the WTO agreement for Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (also known as the 'The Enabling Clause'). This agreement, introduced in 1979, signaled the formal recognition of the principle of special and differential treatment under WTO law, and encouraged preferential tariff rates for developing countries as well as the formation of free trade agreements (FTAs) among developing countries. In practice, the Enabling Clause showed direct preference to developing countries by allowing them to form FTAs among themselves, under much less stringent conditions than those contained in the General Agreement on Tariffs and Trade (GATT).<sup>18</sup> In addition, it safeguarded the interests of least-developed countries by calling on developed countries "to exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of [least-developed] countries."<sup>19</sup> Hence, the preferential treatment shown under this WTO agreement not only attempts to facilitate the increased participation of developing nations in multilateral trade but also ensures that developed nations do not seek retribution for concessions made to developing nations.

#### Preferential treatment: Other applications

While the concept of preferential treatment has been applied in many ways to International Trade, it is in no way limited to this field. Indeed, preferential treatment has been applied to other genres of Regional and International Law. In 2001, the European Commission for Democracy through Law (also known as the Venice Commission) produced a report on the 'Preferential Treatment of National Minorities

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<sup>17</sup> WTO. 2000. Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions in "Special and Differential Treatment Provisions in the CARIFORUM-EC Economic Partnership Agreement" Caribbean Regional Negotiating Machinery. Available at [www.crnw.org](http://www.crnw.org) accessed on May 16, 2008.

<sup>18</sup> Paul Kruger "The Enabling Clause and the Article XXIV" Published on June 13 2006 at <http://epa.tralac.org/scripts/content.php?id=4978>. Accessed on July 24, 2007.

<sup>19</sup> Agreement for Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903, 28 November 1979. Source: [www.wto.org](http://www.wto.org). Accessed on July 9, 2007.

by their Kin State'.<sup>20</sup> The Commission highlighted efforts by member states of the Council of Europe to safeguard the rights and interests of their citizens and persons belonging to national minorities living outside the borders of their country of citizenship. The Commission noted the special attempts by several European nations to preserve and safeguard the cultural expression and development of their citizens living in other countries. For example, Article 6 of the 1997 Polish Constitution states that: "The Republic of Poland shall provide assistance to Poles living abroad to maintain their links with the national cultural heritage."<sup>21</sup> Additionally, Article 7 of the Romanian Constitution (1991) outlines that:

*The State shall support the strengthening of links with Romanians living abroad and shall act accordingly for the preservation, development and expression of their ethnic, cultural, linguistic, and religious identity under observance of the legislation of the State of which they are citizens.*<sup>22</sup>

It was therefore acknowledged that preferential treatment under law, was being shown to citizens living in other countries, in an attempt to give special support to such persons who live abroad, but wish to preserve their cultural heritage.

Preferential Treatment has also been used at the level of domestic legislation, often in national Employment Laws in an attempt to protect the interest of those who may have suffered at the hands of a historic disadvantage, those who are differently-abled or those whose medical condition hinders their ability to work. In New Zealand for example, under the Human Rights Act 1993, it is not unlawful for an employer to show preferential treatment to a woman who is pregnant or to a person who has responsibility for dependents.<sup>23</sup> Also, under Canada's Aboriginal Employment Preferences Policy; "it is not a discriminatory practice for an employer to give preferential treatment to Aboriginal persons in hiring, promotion or other aspects of employment, when the primary purpose of the employer is to serve the needs of Aboriginal people."<sup>24</sup> Policy measures of this nature are often adopted in an attempt to ensure that all persons have an equal opportunity to secure employment. Notwithstanding, some governments have adopted more active and direct preferential treatment provisions to ensure equality. In 2006, the Spanish government passed a gender equality law that showed preferential treatment to companies that appointed a greater number of women to their board of directors. In

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<sup>20</sup> European Commission for Democracy through Law, "Report on the Preferential Treatment of National Minorities by their Kin State." Available at [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)019-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp). Accessed on May 17, 2008. Similar provisions can be found, at the aforementioned website in Article 7a of the Slovak Constitution (amended in 2001).

<sup>21</sup> European Commission for Democracy through Law, "Report on the Preferential Treatment of National Minorities by their Kin State." Available at [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)019-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp). Accessed on May 17, 2008.

<sup>22</sup> Ibid.

<sup>23</sup> Human Rights Commission, Human Rights Act, "Exemptions". Available at <http://www.hrc.co.nz/index.php?p=402>. Accessed on May 17, 2008.

<sup>24</sup> Canadian Human Rights Commission, "Aboriginal Employment Preferences Policy." Available at [http://www.chrc-ccdp.ca/legislation\\_policies/aboriginal\\_employment-en.asp#tphp](http://www.chrc-ccdp.ca/legislation_policies/aboriginal_employment-en.asp#tphp). Accessed on May 17, 2008.

fact, companies were given a total of eight years to ensure that at least forty percent of their board members were women.<sup>25</sup>

Thus, preferential treatment provisions range from varying degrees of being passive or direct and they may be utilized at a national or international level. Nonetheless, they are meant to safeguard the interest of select groups, in order to ensure equality for all.

## SECTION C

### Preferential Treatment & the UNESCO Convention: Article 16.

The UNESCO Convention calls for the application of the principle of preferential treatment in Article 16. The Convention therefore calls upon developed nations that are signatories to the treaty to grant preferential treatment to artists and other cultural professionals and practitioners as well as to cultural goods and services from developing nations. This measure is geared towards increasing the inflow of cultural products and services from developing countries into developed nations so as to facilitate the proliferation of cultural exchanges between them. To this end, the treaty prescribes two approaches to achieve this goal:

As the treaty does not stipulate what type of preferences should be shown or how preferences should be granted, this does allow countries to exercise a great deal of latitude to make such decisions. Notwithstanding this, they are obliged to adopt a relatively formal approach to their decisions through the utilisation of institutions to administer any preference being shown. Under the Convention, developed countries should form institutions to oversee preferential treatment to cultural practitioners from developing countries as well as goods and services. Such preference can be shown *inter alia*, through technical assistance to cultural practitioners from developing countries, not only through the disbursement of funds but also perhaps through education (in utilising intellectual property law for example) as well as through the transfer of technology.

It is quite probable that this measure seeks to ensure that preferential treatment is offered to goods and services from developing countries under a regulatory framework that ensures that such treatment does not create undue difficulties for artists from developed countries. The treaty therefore requires that developed countries strengthen or construct a legal framework that can facilitate exchanges of cultural goods and services between artists and professionals from developed and developing countries. Nonetheless, as the Convention does not stipulate the type of measures and/or provisions that such a framework should contain, governments are free to exercise their discretion to find innovative ways to legislate preferential treatment of cultural goods and services from developing countries. It may be useful to note that the legal framework in question is not limited to international trade law and could include a recommendation for the establishment of an institution to implement the provisions of the Convention of legislation and policies. Thus, for

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<sup>25</sup> The Guardian Newspaper, "Firms protest at female quota for boardrooms." Available at <http://www.guardian.co.uk/world/2006/jun/26/spain.gender>. Accessed on May 17, 2008.

example, a developed state can decide to grant preferential tariff rates to cultural products from developing countries and/or liberalise the movement of cultural practitioners into their state. As long as an institution exist to oversee the implementation of the legal framework that permits either one (or both) of these policies, then such measures should be consistent with Article 16 of the UNESCO Convention.

#### Preferential Treatment. The UNESCO Convention & other legal frameworks

In summary, the preferential treatment provision of the UNESCO Convention is somewhat similar to corresponding principles and provisions in other branches of national and international law (some of which were discussed earlier). Article 16 of the UNESCO Convention seeks to improve the entry of cultural expressions from developing countries into developed countries by giving preferential treatment to artists and practitioners from developing countries. In so doing, it repeats the theme of preferential treatment offered under WTO law of attempting to increase the participation of developing countries in the circulation and exchange of goods and services. However, it differs from WTO law (and in particular, the Enabling Clause) in the extent to which it gives government discretion to decide upon the measures that they can utilise in order to show preferential treatment to another party. This is perhaps more akin to the approach taken to the aforementioned Human Rights legislation adopted by the government of New Zealand, where employers are free to decide how they show preferential treatment to a woman who is pregnant or to person who has responsibility for dependents. To illustrate the point it is argued that the implementation of Article 16

*...could encourage WTO Members to impose measures that are inconsistent with the general MFN rule in the WTO and not exempted by WTO provisions for special and differential treatment of developing countries.*<sup>26</sup>

Thus, it is important to note that there are only three justifications under WTO law for MFN-inconsistent preferential treatment which has been granted under Article 16 of the UNESCO Convention by one UNESCO signatory state (and WTO Member) to another UNESCO signatory (and WTO Member), which provides a commercial benefit or advantage to the latter member. These are (i) GATT XXIV which deals with regional integrations through FTAs and customs unions and hence permits the granting of such preferences; (ii) GATS II:2 which allows a WTO member to maintain a measure which is inconsistent with the MFN obligation and meets the conditions of the Annex on Article II Exemptions. Many of the Article II Exemptions are in fact related to co-production agreements in AV; and (iii) GATS V which deals with economic integration as it relates to services.<sup>27</sup>

Yet perhaps the greatest difference between the preferential treatment offered under the UNESCO Convention and similar concessions offered under other legal

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<sup>26</sup> Tania Voon, *Cultural Products and the World Trade Organization*. Cambridge: Cambridge University Press, 2007; 187.

<sup>27</sup> This point is based on personal correspondence with Pierre Sauve and Natasha Ward.

frameworks is the obligation to grant preferential treatment through an appropriate institution. Indeed, it is likely that the UNESCO Convention is the only international agreement which requires that developed countries that are signatories form or mandate an institution to grant preferential treatment to developing countries. Nonetheless, this approach may not only help to formalise such arrangements, but may also cause the overall administration and granting of such concessions to be equitable and transparent.

## SECTION D

### The Case of the CARIFORUM-EU Economic Partnership Agreement

The CARIFORUM-EU Economic Partnership Agreement (EPA) that was initialed on December 16, 2007 is the first regional group within the ACP to secure a comprehensive agreement with the European Union (EU) that covers not just goods but services, investment, and trade related issues such as innovation and intellectual property. The EPA reinforces and widens Duty Free Quota Free (DFQF) access for CARIFORUM (CARICOM<sup>28</sup> along with the Dominican Republic) goods into EU markets. In the services sector the EPA provides market access for Caribbean firms and professionals in terms of cross border trade, investment, consumption abroad and temporary movement of persons in business services, communications, construction, distribution, environmental, financial, transport, tourism and cultural and entertainment services.

One of the innovative features of the EPA is the level of market access obtained for entertainment services - the first of its kind for the EU in any trade agreement - and the deepening of cultural cooperation under the Cultural Protocol. As such, the cultural sector is addressed in the EPA through two approaches: (a) a trade liberalization construct where market access for entertainment services is granted by both parties, and (b) through the Protocol on cultural cooperation which is premised on the UNESCO Convention.

The key issues in the EPA for the cultural sector is evaluated in the following analysis. In addition, the discussion provides a brief overview of the Cotonou Agreement, signed in June 2000, which governed cultural cooperation between the EU and the ACP. The goal, in part, is to compare the two agreements in terms of the scope for cultural industries expansion. Given that the EPA is not yet in force it is impossible to go beyond this to assess the impact of the agreement.

### The Cotonou Agreement

The EPA replaces the Cotonou Agreement, the successor agreement to the Lome Convention which had been in force since 1975. Cotonou ushered in the shift from

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<sup>28</sup> CARICOM is a regional grouping of developing archipelagic states. CARICOM has 15 full members: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat (UK), Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago.



the non-reciprocal trade preferences mostly in commodities (e.g. sugar, bananas, rice, etc.) towards reciprocal trade arrangements such as the EPAs which were due to take effect in 2008.

In terms of the cultural sector the Cotonou Agreement discusses directly and indirectly to key aspects of the industry. For example, Article 46 speaks about the protection of intellectual property rights, including copyright, neighbouring rights and artistic designs. Also, in chapter 4 on trade in services, Article 41.5 in the agreement states that

*The Community shall support the ACP States' efforts to strengthen their capacity in the supply of services. Particular attention shall be paid to services related to labour, business, distribution, finance, tourism, culture and construction and related engineering services with a view to enhancing their competitiveness and thereby increasing the value and the volume of their trade in goods and services.*

In the area of cultural development, Article 27 states that cooperation in the area of culture shall aim at:

- a. integrating the cultural dimension at all levels of development cooperation;*
- b. recognizing, preserving and promoting cultural values and identities to enable inter-cultural dialogue;*
- c. recognizing, preserving and promoting the value of cultural heritage;*
- d. supporting the development of capacity in this sector; and*
- e. developing cultural industries and enhancing market access opportunities for cultural goods and services.*

Cultural cooperation is one of the innovations under the Cotonou Agreement whose goals are in general “to strengthen the sector’s organizational capacities, to professionalize artists and cultural bodies and to develop cultural resources through the implementation of micro-projects by decentralized operators – for example associations, societies and private operators”.<sup>29</sup> This is reflected in a number of support programmes for cinema (production and distribution of ACP films), heritage (preservation, presentation and development of ACP sites and attractions), events in Europe, and events in ACP states which are estimated to total 83 million Euro up till the 8<sup>th</sup> EDF (see Table 2). The cultural cooperation programmes also included the Support Programme for Decentralized Cultural Initiatives (PSICD) as well as projects funded under national and regional indicative programmes. Table 2 outlines the various programmes and the funding under the various mechanisms. These would require ACP states to prioritize the sector and include the cultural sector/industries in the list of areas to be funded under the EDFs. This would often prove to be a challenge given that these funds tended to be earmarked for infrastructural and

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<sup>29</sup> See Ricardo Gambini (2002), “Cultural Industries and the ACP Countries: Problems, opportunities and cooperation”. *ACP-EU Courier* No. 194, p. 45.

social projects like health and education. Under the Dakar Action Plan the ACP Group and the European Commission have identified two cultural programmes to be financed under the 9th EDF:

- The Support Programme for the ACP film industry and the audiovisual sector (budget €8 m).
- The Support Programme for the ACP cultural industries, with a budget of €6,333,333.<sup>30</sup>

Table 2: Funding for Cultural Programmes – Combined up to 8<sup>th</sup> EDF

Programmes	Budgetary Instruments	Funding (Euro)
Cinema	NIP; RIP; T-ACP	15,450,000
Heritage	NIP; RIP	24,205,000
PSICD	NIP	16,195,000
Events in Europe	T-ACP	5,950,000
Events in ACP Countries	NIP; RIP; T-ACP	5,413,000
Regional coordination projects	RIP	12,265,000
Various national projects	NIP	4,483,000
<b>TOTAL</b>	<b>114 projects</b>	<b>83,961,000</b>

Notes: EDF: European Development Fund; NIP: National Indicative Programme; RIP: Regional Indicative Programme; T-ACP: "Tous ACP (All ACP)" fund.

Source: Ricardo Gambini (2002), "Cultural Industries and the ACP Countries: Problems, opportunities and cooperation". *ACP-EU Courier No. 194*.

As Table 2 illustrates the funding for cultural cooperation was not insubstantial. While the funding element is very important from a trade policy standpoint the provisions in the Cotonou Agreement are not binding and are therefore considered to be "limited and generally hortatory". It is also argued that the Cotonou Agreement did not upgrade the status of cultural cooperation for the following reasons:

- Cultural cooperation tends to be narrowly defined and perceived as a soft issue, in contrast with programmes focusing on economic growth and poverty alleviation.*
- The management of cultural cooperation is generally entrusted to small project units, detached from mainstream cooperation processes (both in terms of content and institutionally).*
- Some EDF funding has been available for cultural cooperation...these schemes had major limitations, including the absence of a solid strategic framework, a narrowly conceived project approach and a preference for investing in large-scale, high-profile 'cultural events'.<sup>31</sup>*

<sup>30</sup> See The Courier no. 1 (2007). Accessed <http://www.acp-eucourier.info/Meeting-of-ACP-Ministers.98.0.html?&L=0> October 21, 2008.

<sup>31</sup> See InfoCotonou 2 in [www.ecdpm.org](http://www.ecdpm.org) accessed May 2007.

In conclusion, it can be argued that the Cotonou Agreement contained non-binding commitments. We now turn to the EPA to evaluate how it addresses the cultural sector.

#### Market Access Provisions in the EPA

The first key element of the EPA from the perspective of the cultural sector is the level of trade liberalization between the CARIFORUM countries and the EU where for the first time the EU has made a comprehensive offer in the liberalization of entertainment services (CPC 9619) other than audio-visual services (see Box 2). The rules of the Services and Investment chapter and the general provisions of the EPA govern the liberalization of the entertainment and cultural services. Under the EPA, CARIFORUM countries secured market access commitments by 27 European states, with some limitations in two states, Germany and Austria.<sup>32</sup> Once the EPA comes into force these commitments will take effect immediately for the EC-15, within three years for the EC-10<sup>33</sup> and in five years for Bulgaria and Romania.

#### Box 2: EU Services Commitments - Entertainment services CPC 9619 (other than audio-visual)

96191	Theatrical producer, singer group, band and orchestra entertainment services
96192	Services provided by authors, composers, sculptors, entertainers and other individual artists
96193	Ancillary theatrical services n.e.c.
96194	Circus, amusement park and similar attraction services
96195	Ballroom, discotheque and dance instructor services
96199	Other entertainment services n.e.c.

Trade in international services is supplied through one or a combination of four modes (see Table 2). Under the services chapter in the EPA the EU has liberalized its market to different degrees (relative to its offer in the Doha Development Agenda (DDA)) in each of the modes of supply. In Mode 1 (cross-border supply) the margin of preference granted to CARIFORUM countries is not very significant given that the EU listed reservations. Similarly, in Mode 2 (consumption abroad) the gains have not been very high given that this is the least restricted mode of supply. In Mode 3 (commercial presence) there are the expected exclusions for the audio-visual sector<sup>34</sup> but there are general improvements, for instance the fact that the

<sup>32</sup> Germany limited its commitments to 96191 and 96192, and Austria to only Authors, and Dance Instructor services.

<sup>33</sup> Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia.

<sup>34</sup> The audiovisual sector is highly contested under the WTO-GATS. At the conclusion of the Uruguay Rounds the EU and other large producing countries took exemptions from the MFN principle for the

commitments cover more EC member states; and that they involve the removal of many nationality requirements, some residency requirements and limitations on juridical form.<sup>35</sup>

Table 2: Modes of Supply in Entertainment and Cultural Services Trade

Mode 1: Cross-border supply	Supply of services from one country to another, for example, sound engineering services or architectural services transmitted via telecommunications.
Mode 2: Consumption abroad	Consumers from one country using services in another country, for example, cultural, festival and heritage tourism.
Mode 3: Commercial presence	A company from one country establishes a subsidiary or branch to provide services in another country, for example, setting up a booking agency.
Mode 4: Movement of natural persons	Individuals traveling from their own country to offer services in another, for example, an artist or band on tour.

The area where the CARIFORUM countries gained the highest level of preference is in terms of Mode 4 (movement of natural persons). The EPA provides for quota free market access for temporary entry (for up to six months in a calendar year) by contractual service suppliers (CSS)<sup>36</sup> and employees of these services firms. Market access is subject to qualification requirements and economic needs tests.<sup>37</sup>

Under Mode 4 provisions artists, cultural practitioners and professionals will enjoy the same basis for entry as business professionals once they are CSS or registered businesses. For entertainment and cultural services, the following conditions apply for contractual service suppliers:

- a) *The natural persons are engaged in the supply of a service on a temporary basis as employees of a juridical person (firm or company), which has obtained a service contract for a period not exceeding 12 months.*
- b) *The natural persons entering the other Party should be offering such services as an employee of the juridical person supplying the services for at least the year*

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audiovisual sector. Nineteen countries included this sector in their GATS schedule including the US ( See WTO, Council for Trade in Services, "Audiovisual Services: Background Note by the Secretariat", S/C/W/40, 15 June 1998.

<sup>35</sup> For detailed analysis see Pierre Sauve and Natasha Ward, "Services and Investment in the EC-CARIFORUM Economic Partnership Agreement: Innovation in Rule-Design and Implications for Africa," p. 7-8.

<sup>36</sup> Under the EPA chapter on Services, Contractual Service Suppliers (CSS) are defined as follows:  
Natural persons of the EC Party or of the Signatory CARIFORUM States employed by a juridical person of that EC Party or Signatory CARIFORUM State which has no commercial presence in the territory of the other Party and which has concluded a bona fide contract to supply services with a final consumer in the latter Party requiring the presence on a temporary basis of its employees in that Party in order to fulfil the contract to provide services.

<sup>37</sup> The main criteria for economic needs tests will be the assessment of the relevant market situation in the Member State or the region where the service is to be provided, including with respect to the number of, and the impact on, existing services suppliers.

*immediately preceding the date of submission of an application for entry into the other Party. In addition, the natural persons must possess, at the date of submission of an application for entry into the other Party, at least three years professional experience<sup>38</sup> in the sector of activity which is the subject of the contract.*

- c) The natural person shall not receive remuneration for the provision of services other than the remuneration paid by the contractual service supplier during its stay in the other Party.*
- d) The temporary entry and stay of natural persons within the Party concerned shall be for a cumulative period of not more than six months or, in the case of Luxembourg, 25 weeks, in any twelve month period or for the duration of the contract, whatever is less.*
- e) Access accorded under the provisions of this Article relates only to the service activity which is the subject of the contract; it does not confer entitlement to exercise the professional title of the Party where the service is provided.*
- f) The number of persons covered by the service contract shall not be larger than necessary to fulfill the contract, as it may be decided by the laws, regulations and requirements of the European Community and the Member State where the service is supplied.*

In trade policy terms the quota free market access for CSS is an important achievement for the CARIFORUM countries. It offers some level of preference because very few EU states have commitments for the temporary movement in entertainment services.<sup>39</sup> This is also a critical area for diversification of the Caribbean export economy and to boost competitiveness in other related services like tourism and ecommerce. In this sense the EPA does not lock the Caribbean into the established international division of labour.

#### The Protocol on Cultural Cooperation

The Protocol on Cultural Cooperation (see annex I) provides the framework within which the Parties shall cooperate for facilitating exchanges of cultural activities, goods and services, including inter alia, in the audiovisual sector. In addition the Protocol aims to facilitate the implementation of cultural policies that protect and promote cultural diversity, collaboration with the aim of improving the conditions governing exchanges of cultural goods and services and to redress the structural imbalances and asymmetrical patterns which may exist in such exchanges.

The Protocol also aims to put into practice the UNESCO Convention. Indeed, the preamble of the Protocol states that it intends “to effectively implement the UNESCO Convention and to cooperate within the framework of its implementation, building upon

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<sup>38</sup> Obtained after having reached the age of majority.

<sup>39</sup> See CRNM “Getting to know the EPA” [www.crn.org](http://www.crn.org). accessed September 2008. It states that “only two EU states have made commitments in the WTO for the temporary movement of contractual service suppliers in entertainment services; and in the EU-Chile Trade Agreement only four states.”

the principles of the Convention and developing actions in line with its provisions, notably its Article 14, 15 and 16.”

In summary, the Protocol has three key components. The first relates to articles in the Protocol that concern issues of exchanges, training and collaborations. As Table below illustrates these include Articles 2, 4, 7, 8, and 9. The areas captured here range from cultural exchanges and dialogue to technical assistance and collaboration in performing arts, publications and the protection of sites and historic monuments. These articles are not binding commitments and are essentially hortatory. In this sense, they are reminiscent of the provisions for the cultural sector in the Cotonou Agreement.

Table 3: Key Aspects of the Protocol on Cultural Cooperation

Exchanges, training and collaborations	Art. 2 – Cultural exchanges and dialogue Art. 4 - Technical assistance Art. 7 – Performing arts Art. 8 – Publications Art. 9 – Protection of sites and historic monuments
Temporary movement	Art. 3 – Artists and other cultural professionals and practitioners
Audio-visual services	Art. 5 – Audio-visual, including cinematographic, cooperation Art. 6 – Temporary importation of material and equipment for the purpose of shooting cinematographic films and television programmes

The second key element of the Protocol involves the temporary movement and entry of artists and other cultural professionals and practitioners. It relates to the movement of two groups: (a) those involved in the shooting of cinematographic films or television programmes, and (b) a broader list of entertainment services providers involved in cultural activities such as, for example, the recording of music or contributing an active part to cultural events such as literary fairs, festivals, among other activities. From a Caribbean standpoint an important addition is the mention of ‘mas performers and designers’ as a category of service providers (see Box 3).

Box 3: Artists and other Cultural Professionals and Practitioners

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| <ul style="list-style-type: none"> <li>(a) Theatrical producers, singer groups, band and orchestra members;</li> <li>(b) Authors, poets, composers, sculptors, entertainers and other individual artists;</li> <li>(c) Artists and other cultural professionals and practitioners participating in the direct supply of circus, amusement park and similar attraction services, as well as in festivals and carnivals;</li> <li>(d) Artists and other cultural professionals and practitioners participating in the direct supply of ballroom, discotheque services and dance instructors;</li> <li>(e) Mas performers and designers.</li> </ul> |
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There are two important restrictions that apply to temporary movement under the Protocol. The first is that under Article 3.1 of the Cultural Protocol, these entertainers are facilitated temporary entry “provided that they are not engaged in selling their services to the general public or in supplying their services themselves” while staying in the other Party. The rationale is that the Protocol would address the temporary movement of those who cannot avail themselves of the market access commitments undertaken by Title II “Investment, Trade in Services and E-Commerce”. The second restriction is that entry, when allowed, shall be for a period of up to 90 days in any twelve month period. In effect, these elements of the Protocol target the movement of not-for-profit cultural operators as well as those pursuing contracts and involved in marketing.

From a commercial standpoint the main achievement of the Protocol is the inclusion of Articles 5 and 6 which focus on the audio-visual sector. The provisions of these articles allow for co-productions between producers in the EU and CARIFORUM countries. The co-produced works are to qualify as European works within the EC and as CARIFORUM works where preferential schemes for the promotion of local and regional content are established. This preference is subject to ownership and nationality requirements as well as financial contributions on an 80/20 split for both Parties.

The inclusion of the audio-visual sector in the Protocol represents an area of preference for CARIFORUM countries given the sensitivities and the usual exclusion of the audio-visual sector from multilateral and bilateral agreements by the EU and other developed countries.<sup>40</sup> In this sense the Protocol is a complement to the market access commitments under entertainment services because it includes the audio-visual sector which is excluded under the services commitments. From the standpoint of the EU because of the non-binding provisions on cultural cooperation the inclusion of the audio-visual provisions under the Protocol serves to preclude third countries from using the MFN provision to claim that their own service supplier are entitled to equal treatment.<sup>41</sup>

## SECTION E

### Conclusion and Recommendations

Historically, the experience of preferential treatment does not adequately address supply-side constraints or structural conditions in producer/exporting countries. Factors such as tariff escalation, rules of origin and content regulations have limited the scope for moving up the value chain and so have reinforced the traditional division of labour. In addition, the benefits of preferential treatment have been concentrated in a small group of countries. For example, GSP led to a concentration of exports from a small number of countries, e.g. Hong Kong, China, and the East Asian newly industrializing economies. Another key point is that preferential treatment has largely served the interest of the traders and not that of the suppliers from the developing world. A good example is that of banana exporters to the EU market.<sup>42</sup>

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<sup>40</sup> For a detailed discussion of this see Silvia Formentini and Lelio Iapadre, *Cultural Diversity and Regional Trade Agreements: The Case of Audiovisual Services*, UNU-CRIS Working Paper, W-2007/4.

<sup>41</sup> This point is based on personal correspondence with Pierre Sauve and Natasha Ward.

<sup>42</sup> See Keith Nurse, “Hegemonic Rivalry and the Periphery: The Case of the Transatlantic ‘Banana Wars’” in Faruk Tabak, ed. *Allies as Rivals: The U.S., Europe, and Japan in a Changing World-System*. (Paradigm Publishers: New York, 2005): 165-186.

The growth of what are increasingly called preferential trade agreements (PTAs) between developed and developing countries often have the effect of locking the weaker party into an established comparative advantage and thereby maintaining the existing division of labour. At issue is the capacity of the negotiated agreements to diversify the production structures of the developing country partner. From this perspective there are few examples of PTAs that include the cultural sector. The EPA is among the first of its kind. It is also a critical case study because it represents the first attempt to implement Article 16 of the UNESCO Convention.

### Lessons from the EPA

The provisions within the EPA that relate to the cultural sector are wider in scope and detail than what obtained under the Cotonou Agreement. The main difference is that previously access to the EU market was purely on a discretionary basis whereas the EPA commitments give legal certainty to suppliers of entertainment services from the Caribbean region particularly under the market access provisions for entertainment services. The Protocol on Cultural Cooperation also affords improvements for cultural exchanges, technical assistance, and collaborations among artists and other cultural professional and practitioners. In addition, the Protocol, which is subject to the wider provisions of the EPA, allows for a dispute resolution process where contracting parties renege on their commitments.<sup>43</sup>

The benefits to CARIFORUM in the cultural component of the EPA are the key provisions in the services agreement of the EPA that apply to entertainment services. As a legally binding agreement the EPA offers a higher level of certainty and transparency and so has the potential to generate business and trade in the cultural sector that did not emerge before. The market access provisions for entertainment services afford market access in all four modes to different degrees. While Mode IV movement of natural persons is the main preference gained other modes such as crossborder supply and commercial presence allow for wider market access and market penetration.

The other key preference gained for CARIFORUM countries is Article 5 on the audio-visual sector in the Protocol on Cultural Cooperation. The benefit is that co-produced works will be treated as European or Caribbean works and so avoid local content requirements for broadcasting in either Party. The other advantage is the funding arrangements associated with co-production works. In short, the key benefits are access to the EU market and funding from Europe in a sector that has high upfront investment and marketing costs. In this regard, some analysts argue that the level of preference granted to the CARIFORUM countries “represents as close to new market access opportunities as the EC’s EPA partners could have hoped for without actually resulting in new liberalization commitments on national treatment or market access.”<sup>44</sup>

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<sup>43</sup> CRNM “Provisions on the Cultural Sector in the CARIFORUM\_EU Economic Partnership” Background Document for the Second Joint Meeting of the COTED and COHSOD, Georgetown, Guyana, January 24, 2008. For instance it is argued by the CRNM that “if [Caribbean] artists or cultural practitioners find authorities in individual EU states renege on their commitments or making it too difficult for them to enter to supply services or do other activities, this can be formally challenged through the dispute resolution process”.

<sup>44</sup> Pierre Sauve and Natasha Ward, “Services and Investment in the EC-CARIFORUM Economic Partnership Agreement: Innovation in Rule-Design and Implications for Africa,” p. 18.



## Implications for implementing Article 16

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. However, there are some limits as to how far Article 16 can mirror the preferences in the EPA. In the first instance, the UNESCO Convention is a cooperation agreement largely premised on best endeavour language. As such the preferences that the CARIFORUM countries gained from market access in entertainment services in a legally binding reciprocal trade agreement are not transferable to the UNESCO Convention. In short, Article 16 of the UNESCO convention can draw on the Protocol on Cultural Cooperation and in this regard only on the Mode IV (movement of natural persons) elements since none of the other services supply modes (cross-border supply, consumption abroad, commercial presence) are facilitated under the Protocol.

The key challenge associated with applying the Protocol to a wider group of developing countries is that it is highly unlikely that the EU would be prepared to multilateralize preferences in the audiovisual sector to countries outside the ACP grouping. The content regulations and the funding requirements may prove to be too burdensome. It would also reduce the preference granted to the ACP under the EPA and so it is expected that the ACP countries would object as well.

In this sense the UNESCO Convention may be only able to offer preference in relation to the temporary movement of artists and other cultural professionals and practitioners. Even here, under the EPA the preference is quite limited as it restricts commercial activities (i.e. selling services) and allows temporary entry up to 90 days within a 12 month period. The temporary movement allowed for is only for those pursuing exchanges, training opportunities and collaborations. It also allows for those persons operating as business service sellers to negotiate contracts – a term used to describe natural persons who are representatives of contractual service suppliers.

The other potential benefits relate to capacity building and technical assistance in areas like publications and the protection of sites and historic monuments. These provisions have some potential benefit but these Articles are all premised on “best endeavours” and so generate no firm commitments and therefore lack certainty. In many respects, although the language of the Protocol is more assertive, the relevant Articles (2, 3, 4, 7, 8 and 9) are reminiscent of the provisions for the cultural sector in the Cotonou agreement.

In terms of cultural goods the EPA does not offer any specific guidance. In the negotiations this was not defined as an offensive interest for CARIFORUM countries. However, based on the analysis in the introduction it was noted that the trade in cultural goods was dominated by a small group of developing countries, the usual suspects from Asia, China, India, Singapore and South Korea. Thus the task for the UNESCO Convention would be how to widen the pool of beneficiaries utilizing Article 16. Graduation policies or other discriminatory measures are unlikely to address this problem. The key issue is how to expand the production and export market of goods

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from diverse countries. The challenge is one of how to bridge the problem of cultural distance and build markets for genres of cultural products in the developed economies.

In summary, this paper argues that the potential scope and impact of preferential treatment under the UNESCO Article 16 is quite narrow. Indeed, it can be argued that the main benefits are defined in terms of cultural cooperation and not in commercial terms. What Article 16 can facilitate are cultural exchanges, training, technical assistance and collaborations. The prospects for advancing the aims of expanding cultural industries and generating cultural exports are limited in scope and consequently it is difficult to see how Article 16 of the Convention, on its own, can adequately contribute to the protection and promotion of diversity of cultural expressions in a rapidly commercializing global cultural economy.

As indicated earlier the Convention is not limited to international trade law and could include a recommendation for the establishment of an institution to implement the provisions of the Convention. The notion of an institution can be interpreted quite broadly to include norm-setting. In this regard, it may be more practical to implement the spirit embodied in Article 16 through the promotion of a “fair trade” marketing strategy rather than relying on legal instruments alone to facilitate the circulation of cultural goods and services from the developing world. Given the challenges of cultural proximity and the issues of tastes and genre preferences it may well make more sense to build a social movement around a concept like “fair culture” which could involve a wide array of non-state actors. In this sense the Convention could be used to legitimize such a construct and therefore widen global appeal for cultural content from the developing world.

## ANNEX

### CARIFORUM - EU ECONOMIC PARTNERSHIP AGREEMENT PROTOCOL ON CULTURAL COOPERATION

*Having* ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted in Paris on 20 October 2005, which entered into force on 18 March 2007, or intending to do so promptly;

*Intending* to effectively implement the UNESCO Convention and to cooperate within the framework of its implementation, building upon the principles of the Convention and developing actions in line with its provisions, notably its Article 14, 15 and 16;

*Recognizing* the importance of the cultural industries and the multi-faceted nature of cultural goods and services as activities of cultural, economic and social value;

*Recognizing* that the regional integration process supported by this Agreement adds up to a global strategy aimed at promoting equitable growth and the reinforcement of economic, trade and cultural cooperation between the Parties;

*Recalling* that the objectives of the Protocol on Cultural Cooperation are complemented and supported by existing and future policy instruments managed in other frameworks, with a view to:

- a) integrating the cultural dimension at all levels of development cooperation and, in particular, in the field of education;
- b) reinforcing the capacities and independence of the Parties' cultural industries;
- c) promote local and regional cultural content;

*Recognising*, protecting and promoting cultural diversity as a condition for a successful dialogue between cultures;

*Recognising*, protecting and promoting cultural heritage, as well as promoting its recognition by local populations and recognising its value as a means for expressing cultural identities;

*Stressing the* importance to facilitate cultural cooperation between the Parties and for that purpose to take into account, on a case by case basis, inter alia, the degree of development of their cultural industries, the level and structural imbalances of cultural exchanges and the existence of preferential schemes for the promotion of local/regional cultural content.

The Parties agree:

***Article 1***  
***Scope, objectives and definitions***

1. Without prejudice to the other provisions of this Agreement, this Protocol sets up the framework within which the Parties shall cooperate for facilitating exchanges regarding cultural activities, goods and services, including inter alia, in the audiovisual sector.
2. While preserving and further developing their capacity to elaborate and implement their cultural policies, with a view to protecting and promoting cultural diversity, the Parties shall collaborate with the aim of improving the conditions governing their exchanges of cultural activities, goods and services and redressing the structural imbalances and asymmetrical patterns which may exist in exchanges of these.
3. The definitions and concepts used in this Protocol are in the UNESCO Convention on The Protection and Promotion of the Diversity of Cultural Expressions concluded in Paris on 20 October 2005.
4. In addition, for the purpose of this Protocol, “artists and other cultural professionals and practitioners” means natural persons that perform cultural activities, produce cultural goods or participate in the direct supply of cultural services.

*Section 1- Horizontal provisions*

***Article 2***  
***Cultural exchanges and dialogue***

1. The Parties shall aim at fostering their capacities to determine and develop their cultural policies, developing their cultural industries and enhancing exchange opportunities for cultural goods and services of the Parties, including through preferential treatment.
2. The Parties shall co-operate to foster the development of a common understanding and enhanced exchange of information on cultural and audiovisual matters through an EC-CARIFORUM dialogue as well as on good practices in the field of Intellectual Property Rights protection. This dialogue will take place within the mechanisms established in this Agreement as well as in other relevant forums as and when appropriate.

***Article 3***  
***Artists and other cultural professionals and practitioners***

1. The Parties shall endeavour to facilitate, in conformity with their respective legislation, the entry into and temporary stay in their territories of artists and other cultural professionals and practitioners from the other Party, or, as the case may be, the Signatory CARIFORUM States, who cannot avail themselves of commitments undertaken on the basis of the Title on “Establishment, Trade in Services and E-commerce” of the Agreement and who are either:

- (a) artists, actors, technicians and other cultural professionals and practitioners from the other Party involved in the shooting of cinematographic films or television programmes, or
- (b) artists and other cultural professionals and practitioners such as visual, plastic and performing artists and instructors, composers, authors, providers of entertainment services and other similar professionals and practitioners from the other Party involved in cultural activities such as, for example, the recording of music or contributing an active part to cultural events such as literary fairs, festivals, among other activities,

provided that they are not engaged in selling their services to the general public or in supplying their services themselves, do not on their own behalf receive any remuneration from a source located within the Party where they are staying temporarily, and are not engaged in the supply of a service in the framework of a contract concluded between a legal person who has no commercial presence in the Party where the artist or other cultural professional or practitioner is staying temporarily and a consumer in this Party.

2. This entry into and temporary stay in their territories, when allowed, shall be for a period of up to 90 days in any twelve month period.

3. The Parties shall endeavour to facilitate, in conformity with their respective legislation, the training of, and increased contacts between artists and other cultural professionals and practitioners such as:

- (f) Theatrical producers, singer groups, band and orchestra members;
- (g) Authors, poets, composers, sculptors, entertainers and other individual artists;
- (h) Artists and other cultural professionals and practitioners participating in the direct supply of circus, amusement park and similar attraction services, as well as in festivals and carnivals;
- (i) Artists and other cultural professionals and practitioners participating in the direct supply of ballroom, discotheque services and dance instructors;
- (j) Mas performers and designers.

**Article 4**  
**Technical assistance**

1. The Parties shall endeavour to provide technical assistance to Signatory CARIFORUM States with the aim of assisting in the development of their cultural industries, development and implementation of cultural policies, and in promoting the production and exchange of cultural goods and services.

2. Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, including by facilitating support, through different measures, inter alia, training, exchange of information, expertise and experiences, and counseling in elaboration of policies and legislation as well as in usage and transfer of technologies and know-how. Technical assistance may also facilitate the cooperation between private companies, non-governmental organizations as well as public-private partnerships.

*Section 2 – Sectoral provisions*

**Article 5**  
**Audio-visual, including cinematographic, cooperation**

1. The Parties shall encourage the negotiation of new and implementation of existing co-production agreements between one or several Member States of the European Community and one or several Signatory CARIFORUM States.

2. The Parties, in conformity with their respective legislation, shall facilitate the access of co-productions between one or several producers of the EC Party and one or several producers of Signatory CARIFORUM States to their respective markets, including through the granting of preferential treatment, and subject to the provisions of Article 7 of this Agreement, including by facilitating support through the organisation of festivals, seminars and similar initiatives.

2.a Co-produced audiovisual works shall benefit from the preferential market access referred to in paragraph 2 within the EC Party in the form of qualification as European works in accordance with Article 1 n) (i) of Directive 89/552/EEC as amended by Directive 2007/65/EC for the purposes of the requirements for the promotion of audiovisual works as provided for by Articles 4.1 and 3i.1 of Directive 89/552/EEC as amended by Directive 2007/65/EC. Such preferential treatment shall be granted on the following conditions:

- the co-produced audiovisual works are realised between undertakings which are owned and continue to be owned, whether directly or by majority participation, by a Member State of the European Community or a Signatory CARIFORUM State and/or by nationals of a Member State of the European Community or nationals of a Signatory CARIFORUM State;

- the representative director(s) or manager(s) of the co-producing undertakings have the nationality of a Member State of the European Community and/or of a Signatory CARIFORUM State.

- both (a) financial contributions of one or several producers of the EC Party (taken together), and (b) the total financial contributions of one or several producers of Signatory Cariforum States (taken together) shall not be less than 20 percent and not more than 80 percent of the total production cost the total.

2.b The Parties will regularly monitor the implementation of paragraph 2a and report any problem that may arise in this respect to the CARIFORUM-EC Trade and Development Committee established under this Agreement.

2.c Where preferential schemes for the promotion of local or regional cultural content are established within the CARIFORUM Party, the Signatory CARIFORUM States will extend to the works co-produced between producers of the EC party and of Signatory CARIFORUM States the preferential market access benefits of such schemes under the conditions laid down in paragraph 2a.

3. The Parties reaffirm their commitment to the use of international and regional standards in order to ensure compatibility and interoperability of audio-visual technologies, contributing therefore to strengthen cultural exchanges. They shall cooperate towards this objective.

4. The Parties shall endeavour to facilitate rental and leasing of the technical material and equipment necessary such as radio and television equipment, musical instruments and studio recording equipment to create and record audio-visual works.

5. The Parties shall endeavour to facilitate the digitalisation of audio-visual archives in Signatory CARIFORUM States.

#### *Article 6*

#### *Temporary importation of material and equipment for the purpose of shooting cinematographic films and Television programmes*

1. Each Party shall encourage as appropriate the promotion of its territory as a location for the purpose of shooting cinematographic films and television programmes.

2. Notwithstanding the provisions contained in the Title on “Trade in Goods”, with its annexes, of the Agreement, the Parties shall, in conformity with their respective legislation, examine and allow the temporary importation of the technical material and equipment necessary to carry out the shooting of cinematographic films and television programmes by cultural professionals and practitioners from the territory of one Party into the territory of the other Party.

**Article 7**  
**Performing arts**

1. Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, in conformity with their respective legislation, including by facilitating increased contacts between practitioners of performing arts in areas such as professional exchanges and training, inter alia participation in auditions, development of networks and promotion of networking;
2. The Parties shall encourage joint productions in the fields of performing arts between producers of one or several Member States of the European Community and one or several Signatory CARIFORUM States.
3. The Parties shall encourage the development of international theatre technology standards and the use of theatre stage signs, including through appropriate standardisation bodies. They shall facilitate the cooperation towards this objective.

**Article 8**  
**Publications**

1. Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, in conformity with their respective legislation, including by facilitating exchange with and dissemination of publications of the other Party in areas such as:
  - (a) organisation of fairs, seminars, literary events and other similar events related to publications, including public reading mobile structures;
  - (b) facilitating co-publishing and translations;
  - (c) facilitating professional exchanges and training for librarians, writers, translators, booksellers and publishers

**Article 9**  
**Protection of sites and historic monuments**

Subject to the provisions of article 7 of this Agreement, the Parties agree to cooperate, including by facilitating support to encourage exchanges of expertise and best practices regarding the protection of sites and historic monuments, bearing in mind the UNESCO World Heritage mission, including through facilitating the exchange of experts, collaboration on professional training, awareness of the local publics and counselling on the protection of the historic monuments and protected spaces and on the legislation and implementation of measures related to heritage, in particular its integration into local life. Such cooperation shall conform with the Parties respective legislation and is without prejudice to the reservations included in their commitments contained in this Agreement.



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

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

*Prepared by:*

**PROF. MADHUKAR SINHA**

*Center for WTO Studies, New Delhi, India*

This report has been prepared in October 2008 at the request of UNESCO Secretariat for the Second ordinary session of the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions. The author is responsible for the choice and the presentation of the facts contained in this Report and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization.

## **Executive Summary**

Article 16 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions enjoins developed countries to facilitate cultural exchanges with developing countries. For this purpose they are required to grant preferential treatment to artists and other cultural professionals and practitioners and to cultural goods and services from developing countries. Placing this article within a convention on the diversity of cultural expressions is a clear indication that preferential treatment needs to be viewed both from and outside the context of trade. Since the target of preferential treatment includes artists and other cultural actors, the focus of the proposed preferential treatment takes the nature of positive discrimination in favour of developing countries. By enjoining the developed countries to facilitate cultural exchanges, the Article clearly brings the focus of approach to cooperation instead of competition.

In accordance with this understanding, an examination of existing international and regional instruments of trade and cultural exchanges is necessary. All existing multilateral trade instruments operate on a principle of creating equitable opportunities for trading partners. These instruments, in the spirit of the need for 'Special and Differential Treatment' (SDT) for developing and least developed countries, strive to give certain trading advantages to these parties. However, it can be argued that more than SDT is required for cultural exchanges. Certain specific areas of facilitation of cultural exchanges are in relation to more liberal visa regimes for artists, special customs procedures, capacity building in both content creation and administration of the efforts towards preservation and promotion of cultural exchanges, etc.

The two case studies in this paper on the Indian Film Industry and the demand for Yoga as a cultural expression tend to confirm these conclusions. In the case of Indian Film Industry, it can be seen that despite its visible strength of a large domestic market and growing demand of overseas, there are difficulties in ensuring access of minority voices from within to greater audiences.

The case of preferential treatment to Yoga needs to be seen in the context first of the ability of experts in the field to reach wider audiences outside the trade context. Since Yoga is more than just a form of therapy, the learning of this form of healthy living is not possible without personal interface with a trained professional. That Yoga is part of the intangible cultural heritage of entire humanity also means that it should not be subject to strict trade disciplines; the second aspect relates to the constant threat of misappropriation of this cultural heritage utilizing the models of intellectual property and thus restricting free access to the Yogic potential.

In conclusion it can be said that the operation of Article 16 has to be in the spirit of cooperation, with focus on the facilitation of cultural exchanges between countries by discriminating positively in favour of cultural actors as well as cultural goods and service from developing countries, since only the trade context might not succeed in achieving these objectives. There would be a constant need to ensure that there is no overlap of commitments under this convention within other international legal instruments.

As such, the recommendations are as follows.

- Instil a spirit of cooperation and not competition for the effective operationalisation of Article 16 of the Convention.
- The concept of preferential treatment needs to be applied to artists and cultural professionals and practitioners.
- Visa facilitation for cultural actors could look at a 'GATS Visa' type of document which should not be bound by the Economic Needs Test.
- Developed countries should share expertise, experiences and resources for preservation and protection of cultural heritage and hence of cultural diversity.
- More specialised institutions would be needed in Developed countries to protect the traditional knowledge and traditional cultural expressions from developing countries from misappropriation.
- Developed countries could look at ways of providing easy and inexpensive access to their justice system for Intellectual Property rightsowners from developing countries in enforcing their rights against any infringement in developed countries.
- Screen quotas and television hour quotas of the kind stipulated for domestic content in developed countries could be extended for audiovisual content from developing countries as well.
- Specialized agencies with access to public funding may promote audio-visual content even in the commercial distribution channels and theatres.

## A. Introduction

In the Director General's Report of 1947, an understanding of the role of UNESCO with regards to culture was enunciated stating "orchestration of separate cultures, not into uniformity but into a unity-in-diversity, so that human beings are not imprisoned in their separate cultures but can share in the riches of a single diversified world culture". This forms the backdrop of the understanding of the need to protect cultural diversity as a heritage of mankind. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005 (henceforth, the "Convention") is a step in this direction. It succeeds the UNESCO Universal Declaration on Cultural Diversity, which itself was made in the context of many other international instruments<sup>1</sup>.

Among the provisions of the Convention that seek to promote diversity of cultural expressions, is Article 16 by securing preferential access for cultural goods and services that owe their origins in the developing countries in the developed country markets. Thus, Article 16 tries to contribute to cultural diversity through enhanced access in the larger economies. At the outset this paper would seek to provide a textual interpretation of Article 16. In the following section, the paper shall seek to provide a developing country perspective on the concept of preferential treatment as would be relevant in the context of protection and promotion of cultural diversity. It shall also examine the existing legal and institutional frameworks available within and without India to address the issue of preferential treatment. The issues facing India in the context of preferential treatment shall be examined by means of analyses of certain visa regimes, customs practices at the borders and local practices with regard to access to audiences in developed countries by Indian artists, cultural professionals and practitioners and also by way of two case studies in this context of the Indian Film Industry and of Yoga as a cultural expression. The results and recommendations emanating from the discussion shall try to suggest positive measures which developed countries can take to facilitate cultural exchanges with developing countries both in trade and non-trade terms.

Cultures do not exist or grow in isolation. There necessarily is cross-fertilisation of ideas and expressions leading to growth of newer forms of expression and ideas lending vibrancy to all cultures. The tendency of the dominant entity in any interaction to influence cultural expressions is a well recorded fact. While seeking to maintain the cultural identities and diversities of various peoples, the Convention seeks to provide a degree of sustenance to these cultures by allowing them access to larger markets and in the process allowing for an understanding of the expressions. The issues at stake include, but are not limited to, the context of trade in cultural goods and services. What is undeniable though is that the Convention itself can provide some policy space to the contracting parties to view cultural products

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<sup>1</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), Convention concerning the Protection of the World Cultural and Natural Heritage (1972), Convention on the Protection of the Underwater Cultural Heritage (2001), Convention for the Safeguarding of the Intangible Cultural Heritage (2003) and Universal Declaration on Cultural Diversity (2001). In addition, the Universal Copyright Convention (1952) also had a relevance to the concept of cultural diversity in that it sought to protect and promote contemporary creativity.

outside the prism of pure trade as expressions of human genius are not necessarily driven by commercial intent.<sup>2</sup>

### *Interpreting Article 16*

A textual interpretation of Article 16 of the Convention would involve examination of some of the key features of the Article. This is attempted in the following discussion.

The report of the Rapporteur to the 3<sup>rd</sup> Inter-Governmental meeting of experts clarifies the nature of this Article calling it to be at the heart of the Convention.<sup>3</sup> It is evident that under the Convention, developed countries have taken the commitment to act as the facilitators of cultural exchange with developing countries; secondly, the contours of the proposed preferential treatment are determined by the target groups, which can be stated to comprise two categories: artists who are the exponents of the art form as well as “Other cultural professionals and practitioners”. Thirdly, an acceptable definition of cultural goods and services would have to be developed. Suffice it to say for the moment that this target should necessarily include cultural expressions *per se* as well as products of traditional knowledge. In this regard, it should be pointed out that the classification of certain services as Cultural services is not very clear. For example, cinema, in digital form, could be a cultural good as much as a cultural service.<sup>4</sup> The problem is that the treatment of the same cultural product is very different under GATT when taken to be a good as under GATS when taken to be a service.

The trade connotation is hard to escape.<sup>5</sup> The Informal Working Party on the definition of "cultural goods and services" in its report subsequent to its deliberations (9 – 10 February 2005) laid out the common understanding reached on the term, in which it, inter alia, stated “- *the definition that the group sought is only intended for this specific Convention. It must not result in entering another negotiation, for example on trade.*” And that “- *the concept has to cover both activities which do not have any economic value and activities which do have an economic value.*”<sup>6</sup> It is interesting to note that in the Draft of December 2004, the Article, then numbered 17, had carried five options, only one of which mentioned “cultural goods and services”.<sup>7</sup>

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<sup>2</sup> “The ... UNESCO Convention could provide some flexibility to Members in their approach to WTO disputes and negotiations, so that they enjoy greater policy space in connection with cultural products.” Tania Voon, *Cultural Products and the World Trade Organization*, Melbourne Law School, Legal Studies Research Paper No. 342

<sup>3</sup> “The acceptance by the Plenary of articles 12 to 18 on international cooperation, sustainable development, cooperation for development, collaborative arrangements, preferential treatment for developing countries, cooperation in situations of serious threat and the establishment of an international fund for cultural diversity demonstrates the extent to which the working group on international cooperation held at the second session of the intergovernmental process succeeded in placing the needs and aspirations of developing countries at the very centre – the heart – of this Convention.” Oral report of the Rapporteur, Mr. Artur Wilczynski at the Closing of the Third session of the Intergovernmental Meeting of Experts, 25 May- 3 June 2005.

<sup>4</sup> “Audiovisual products generally involve elements of both goods and services. They ... may also take physical forms such as film reels, CDs, DVDs, and video and audio tapes... seem like ordinary goods (things you can drop on your foot)... However, an audiovisual product that is delivered via satellite or the Internet may be more like a service. The question of whether to classify these “digitized” or “digital” products as goods or services remains unresolved within the WTO ...” Tania Voon, *A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS*, Melbourne Law School, Legal Studies Research Paper No. 244, September 2007

<sup>5</sup> See Annex 1 for a brief discussion on GATS and GATT context for trade in cultural goods and services.

<sup>6</sup> Copy of the report is available at

[http://www.unesco.org/culture/culturaldiversity/docs\\_pre\\_2007/report\\_informal\\_working\\_party\\_en\\_10022005.pdf](http://www.unesco.org/culture/culturaldiversity/docs_pre_2007/report_informal_working_party_en_10022005.pdf), accessed on 10, October 2008.

<sup>7</sup> Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions Text Revised by the Drafting Committee 14-17 December 2004, Article 17, pp.82-83, available at

There would always be a need to keep in mind the Most Favoured Nation (MFN) obligations that the signatories of the Convention have taken while committing to multilateral and plurilateral agreements governed by the World Trade Organization (WTO). Furthermore, developed countries are to provide the enabling conditions not only for effective market access to both categories addressed but also the framework for effective protection of both categories within their borders, as far as cultural content is concerned. The protection so provided would also need to be translated into a framework of enforcement against misappropriation of the intellectual property that both categories would be vulnerable to.

There is also a need to draw a perspective from the Dakar Declaration of the International Network for Cultural Diversity (INCD) in November 2005.<sup>8</sup> The Declaration underlined the fact that there is a body of opinion which would like to keep the entire discussion on trade in cultural goods and services outside the purview of the WTO mandated processes. Absent that, there should be a comprehensive cultural exception in trade agreements. This declaration posits a wish list of exceptions expanding the scope of the probable exceptions under the trade agreements on account of cultural products or products with cultural content. The demand is substantially more than what is arguably reasonable. However, it does bring into relief the aspect that trade in cultural goods and services is more than just commerce.

As such, the working of Article 16 needs to be viewed with reference to both trade and non-trade contexts.

## **B. Concept of preferential treatment**

As has been argued earlier, the preferential treatment proposed under Article 16 aims to facilitate cultural exchanges. In that sense, the system of preferential treatment to be created needs to discriminate positively in favour of artists, *et.al.* from developing countries as much as to allow greater market access for their cultural goods and services. The underpinning of this system has to be cooperation and not competitive trade. That trade would be a method to provide space for such cultural exchanges to take place and hence for preservation and promotion of cultural diversity is a factor in favour of the ethos behind the Article.

### *Trade and non-trade frameworks*

The concept of preferential treatment in the context of Article 16 has to be examined on touchstones of trade as well as non-trade frameworks. The trade framework for preferential treatment draws its sustenance from the processes in the WTO.

### *Trade framework*

The object behind the creation of the WTO was to move towards an international trade regime that minimised tariffs and non-tariff barriers to trade based on the principle of non-discrimination which in turn was based on the twin concepts of Most Favoured Nation (MFN) and National Treatment (NT).

Any preferential treatment itself would under normal circumstances be abhorrent to the principle of non-discrimination. However, the WTO, in its various agreements, also enshrines the concept of Special and Differential Treatment for

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[http://www.unesco.org/culture/culturaldiversity/docs\\_pre\\_2007/clt\\_cpd\\_2004\\_conf\\_607\\_6\\_en.pdf](http://www.unesco.org/culture/culturaldiversity/docs_pre_2007/clt_cpd_2004_conf_607_6_en.pdf), accessed on 10 October, 2008

<sup>8</sup> Dakar Declaration of 21 November 2005 presented to the International Network for Cultural Diversity, Refer Annex 2

developing and least developing countries. Further, the WTO discipline allows for the adoption of Free Trade Agreements (FTAs) between the member states which seek to eliminate tariffs leading to full exploitation of comparative advantage in trade, which is but an echo of the WTO objective. In fact, using the aforesaid flexibilities, many developed countries have voluntarily declared their Generalized System of Preferences<sup>9</sup> (GSPs) in which they stipulate their preferences for countries and products in trade tariffs. The concept of preferential treatment that exists under the GATT draws its sustenance from the 'Enabling Clause'<sup>10</sup> adopted in the Tokyo Round of negotiations in 1979. This allowed the creation of preferential market access regimes by individual countries to countries of their choice on a voluntary but non-discriminatory and non-reciprocal basis. At the last count, the UNCTAD shows thirteen GSP schemes in existence.<sup>11</sup> The developing countries, on the other hand, have instituted a Global System of Trade Preferences (GSTP) with which they are able to have a system of preferential treatment amongst themselves.

There exists a body of literature<sup>12</sup> that criticises the GSP regime for not achieving what it states its objectives to be. The World Bank had stated in 1987<sup>13</sup> that non-reciprocal preferences like the GSP were a "Faustian Bargain". Some critics have also argued that developing countries should jettison the non-reciprocal GSP schemes and seek market access under more reliable and stable reciprocal arrangements. Thus, it can be further argued that preferential treatment under the GSP schemes are not the 'manna' for the recipient developing countries than would appear.

Yet another feature of preferential treatment is that it would normally be a step after equal treatment is achieved. This is not true though in the case of the existing regimes of preferential treatment. There exist many types of non-tariff barriers to trade which, with their opacity, make it appear that preferential treatment offered under GSPs is an additional relief being made available *gratis*. In fact, preferential treatment so granted might in fact just about be able to create a somewhat level playing field for developing countries. Owing to their own internal structures, there exist many frictional costs which are incurred by developing countries even before the goods and services leave their shores. The preferential tariff regimes for goods from such countries would be necessary to bring about a counterbalancing reduction in the retail price. In the case of cultural goods, owing to the need expressed under Article 16, to avoid rewarding inefficiency, developed countries could develop a factor of tariff concession in consultation with the developing countries whereby a relief against such frictional costs could be given.

Tradable cultural services are more likely to face regulatory barriers. It is recognised that GATS does not have any coercive powers on the contracting parties to commit to providing Market Access.<sup>14</sup> What GATS does ensure is that market

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<sup>9</sup> Generalized System of Preferences, General Agreement on Trade and Tariffs, Decision of 28, June, 1971, L/3545

<sup>10</sup> 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', GATT, Decision of 28 November 1979, L/4903

<sup>11</sup> Australia, Belarus, Bulgaria, Canada, Estonia, the European Union, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey and the United States of America

<sup>12</sup> See Annex 3 for a brief reference of such studies.

<sup>13</sup> "It has been suggested that by accepting special and differential treatment the developing countries have struck a Faustian bargain. In exchange for preferences, which brought them limited and risky gains, they have given up a voice in reciprocal trade negotiations and left themselves open to attack by protectionists in the industrial countries, who accuse them of unfair trade. The most mature developing countries, at least, should ask themselves whether this bargain still makes sense." World Development Report, 1987, pp 167

<sup>14</sup> See Annex 3 op. cit.

access commitments once made are subsequently not reneged on. The process of making commitments under the GATS is vulnerable to the extant asymmetry of power in bilateral trade equations. Further, many ostensibly liberal commitments made by a country are circumscribed by the limitations on the commitments placed upfront in the fields of Market Access and National Treatment. Preferential treatment to developing countries to facilitate cultural exchanges in the context of cultural services, could be granted by having no limitations on market access, of course, provided rules of origin are adequately addressed.

Treating cultural goods and services at par with commercially traded goods and services creates a basic problem that not all cultural goods and services are commercially traded. Secondly, the GSPs do not extend to services. As such, preferential treatment to services is determined entirely in terms of the specific statements on limitations placed on the commitments made by the developed countries in favour of services from developing countries in their schedules under GATS. In GATS itself, the realm of cultural services is limited in scope. Further, GATS applies to commercially traded services only. As such, the conventional understanding under WTO processes does not have a direct application on cultural goods and services, albeit overlaps do occur.

#### *Need for alternative paradigms for exchange of cultural goods and services*

In view of this situation, an alternative model needs evolving whereby all cultural goods and services should be given preferential treatment in market access and national treatment. The citizens of any contracting party have a right to be able to access cultural goods and services from any other contracting party on equitable terms. Such is a commitment made by each contracting party to the Convention.<sup>15</sup> As such, the contracting developed countries are committed to provide such access to their citizens. Thus, in doing so, they have to grant market access to the cultural goods and services from developing countries on equitable terms. This would ensure two major things: (a) sustainability of cultural activities in developing countries by providing access to the cultural products of such countries to more mature and remunerative markets, thus protecting and promoting cultural diversity; and (b) A better appreciation and understanding of cultural diversity by all to allow for sustained growth and development.

In light of the above discussion, there appears to be a need to have a system of preferential treatment that has certain features which are not limited to only trade related measures. Even within the context of trade, preferential treatment within the meaning of this Article should entail similar treatment to similar cultural products and services for all developing countries outside the declared GSPs. Further, since there already exists a mechanism of cultural agreements and cultural exchange programmes bilaterally or regionally between countries which allows for special arrangements for cultural exchanges on mutually agreed terms, it stands to reason that a multilateral arrangement is not unachievable.

#### *Non-trade context*

It is the point of this paper that the main focus of Article 16 is not in the trade context. In fact a careful reading of the Article clearly enunciates the importance of preferential treatment to be granted to non-trade elements. Beyond doubt, at the core of cultural activity are people. Without people there would not be any cultural activity or production of cultural goods and services. The agents of these activities are the artists and other cultural professionals and practitioners. Their role in facilitating

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<sup>15</sup> Article 2, Guiding Principles, Principle 7, Principle of Equitable Access and Article 7 – Measures to promote cultural expressions



cultural exchanges is, arguably, very crucial. It would be necessary to examine what could be the contours of preferential treatment to be granted to such cultural actors.

**Visa Facilitation:** There is a plethora of visa regimes governing entry of people into a country. The decision as to which person enters the territory is the sovereign decision of the country granting the right of entry. However, a case can be made to allow for visa facilitation specifically for artists and cultural professionals and practitioners in the manner countries are wont to provide for businesspersons. This is not an argument to sidestep the Mode 4 concerns that countries have expressed in GATS negotiations. It is an effort to place on record that liberalizing visa regimes for cultural exchanges is a non-trade issue. As regards, Mode 4 of services, exceptions to allow for a liberal regime of presence of natural persons from the cultural sector is called for.

**Double Taxation Avoidance:** Operationalisation of Article 16 may require developed countries to have a mandatory 'double taxation avoidance regulation' for cultural professionals and artists. Admittedly tax regimes are one of the most complex set of statutes. However, the proposed regulation could take the form of no deduction of taxes at source for payments received by such individuals who carry a certificate to the effect from the country of origin that they are tax payers in their home country.

**Sharing of resources and experiences on best practices:** Sharing of resources and experiences for capacity building in both administration and management of culture on the one hand and preservation and conservation of expressions on the other, is another manifestation of preferential treatment, specifically because it may entail outgo of taxpayers' money. Market development within the recipient countries for their own cultural expressions using superior techniques tried and tested in the developed world is also an area worth exploring further.

**Intellectual Property Protection:** Authors as well as artists and performers have often faced misappropriation of their intellectual property rights, particularly when their works and performances reach foreign shores.<sup>16</sup> It needs to be recognized that the risk of misappropriation of intellectual property in cultural goods and services from developing countries, is very real in developed countries. The cost of litigation is very high. In addition, the machinery of justice dispensation in the case of piracy and misappropriation of IP in most countries does not make any special consideration for overseas complainants. Absent the monetary and organizational capabilities necessary to seek redress, the authors and cultural practitioners from the developing world need to be supported through specially designed redress schemes which would allow them access to effective enforcement.

**Protection for Traditional Knowledge and Traditional Cultural Expressions:** Developing countries in general have a large repository of folklore in the form of traditional knowledge and traditional cultural expressions. Both these forms are the intellectual property (IP) of a community but do not fit into the Western models of IP which is limited to individual creation and ownership. As such, the same kind of risk that visits the IP of authors and artists from the developing world exists even for TK and TCEs, but without any statutory protection.<sup>17</sup> The operation of Article 16 would

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<sup>16</sup> A case in point is that a large number of websites offering free downloads of Indian music are hosted on servers of Internet Server Providers (ISPs) located overseas. Some of these websites also offer free access to recitals performed privately which were illegally recorded from within the audience while the artist(s) was on tour abroad.

<sup>17</sup> In the case of patenting of chronic wound healing properties of turmeric in the United States [Patent # 5,401,504 granted to the University of Mississippi Medical Centre for "Use of Turmeric in Wound Healing."] despite the properties being traditional knowledge in India for many centuries, by the time the US Patent and Trademarks Office revoked the patent under a subsequent challenge to it by the Indian authorities, it had stood for two years

be greatly strengthened by a set of legally binding international instruments for the protection of TK and TCEs as is being attempted in the World Intellectual Property Organization.<sup>18</sup>

Thus, there are various non-trade issues which also have relevance in putting the Article in operation.

#### *Eligibility*

Once countries have been classified as LDCs and Developing on whatever logic that is acceptable under the UN system, reclassifying them into some other categories on the basis of stages of development is always fraught with danger. What criteria to use? Rate of growth of GDP? Per capita GDP? Absolute GDP? Quality of Life Index score? Gross National happiness? Percentage of persons below the poverty line (if the poverty line itself could be objectively defined)?

It has also been seen in many cases that geographically and politically contiguous countries tend to have cultural contiguity as well, even though the stages of development of the neighbours may be substantially different. In such cases, the mix of cultural goods and services entering commercial and non-commercial trade may have many similarities. An economically determined criterion for distinction may be artificially discriminatory. In fact, any distinction between LDCs and developing countries might also be rendered incorrect in the context of cultural goods and services.

#### *Graduation*

Phasing out of preferential treatment would need to be attempted on the basis of objectively determined criteria made transparent at the time of determining the operation of Article 16. Even though the artists and cultural professional and practitioners are not to be considered market commodities entering international trade and therefore subject to trade disciplines on the basis of the country of origin, it can be argued that when a country reaches a certain reasonable stage of economic development, the fruits of such development would start accruing to the producers of cultural products by way of greater access to assured markets, institutional support, etc. At such time, graduation could be attempted. However, it needs to be mentioned here that the Article does not distinguish between LDCs and Developing countries. As such, there is no graduation possibility between these two blocs under the meaning of the Article. Anomalous situations may occur within the developing countries as well – certain Small and Vulnerable Economies (SVEs) have reached levels of development far greater than the more stable and large economies. If per

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and cost the public exchequer in India in litigation fees. [For a chronology of the events, and discussion on the issues involved, refer to Mashelkar, R.A. Intellectual property rights and the Third World, CURRENT SCIENCE, VOL. 81, NO. 8, 25 October 2001 available on <http://www.ias.ac.in/currsci/oct252001/955.pdf>, accessed on October 10, 2008.] In the case of 'neem' patents where pre-grant oppositions were posted by Indian NGOs, the cost is variously stated to range between US\$ 0.5 to 1 million. The extant IP legislations do not address the issue of 'prior art' and 'novelty' in the context of traditional knowledge exposing many cultural products to misappropriation. There is the other factor of cost of litigation and uncertain enforcement which also inhibits the holder of TK from seeking legal redress.

<sup>18</sup> The WIPO Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF), which met for the first time in 2001 has not yet been able to evolve a workable draft of an international instrument for the protection of such TK and TCEs. The threat of patenting of TK based products and misappropriation of TCEs in the absence of a Copyright-type protection is very real. The recent drafts of a Gap Analysis for both TK and TCEs in the documents WIPO/GRTKF/IC/13/4(b) and WIPO/GRTKF/IC/13/5(b) show the inadequacies in the international regimes at the present moment.

capita Gross Domestic Product is taken as a measure, then certain SVEs have far larger per capita GDP than large developing countries.<sup>19</sup>

The difficulty lies in developing such objectively determined transparent criteria for graduation. There are risks of imperfection in such criteria. The resultant cost of mishandling the scheme of graduation might, in fact be, greater than continuing with a treatment regime for developing countries.

### *Reciprocity*

As regards reciprocity, it is to be pointed out that even under the provisions of the Enabling Clause,<sup>20</sup> preferential treatment was not considered a necessary condition under the GSP regimes. Reciprocity and positive discrimination appear conceptually contradictory. It is essential to hark back to the genesis of preferential treatment contained in the “Enabling Clause”,<sup>21</sup> that is permissible under WTO processes today. It is evident that reciprocity had never ostensibly been a criterion for grant of preferential treatment. However, even while eschewing reciprocity demands from the recipients, the donors have, at times made provisions for benefits to flow to such countries which have met certain non-trade criteria set by the donors.<sup>22</sup> Under the operation of Article 16, such reciprocity appears unnecessary and thus there is a case for making the application of the provisions of the Article universal to all developing countries.

### *Rules of Origin*

It is recognized that rules of origin form the bulwark of the GSP schemes currently under operation. However, cultural content in intangible form cannot be subject to the same discipline as tangible components of traded goods. To insist on rigid rules of origin would militate against the avowed intent of the Convention of promoting and protecting cultural diversity.

Some of the possible complications that may occur can be where the expression might not be indigenous but the exponent is or where the cultural product in question is not unique to the beneficiary country or where the exponent does not belong to the community which holds the traditional knowledge regarding the cultural product, etc. One approach can be to allow such exponents to also be eligible for the proposed preferential treatment because the cause of cultural diversity would be served this way. The major difficulty with this approach is that it tacitly allows misappropriation of cultural products in the absence of any recognizable and statutorily determined rules of access and benefit sharing.

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<sup>19</sup> The World Bank in 2006 estimated the GDP per capita per annum of Trinidad and Tobago at US\$ 13,340 and that of China at US\$ 2040.

<sup>20</sup> Refer Annex 4

<sup>21</sup> 5. *The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.*

<sup>22</sup> E.g. The European Union's new GSP Scheme 2006 – 08 has a special incentive arrangement termed “GSP plus” under which the beneficiary countries have to satisfy many non-trade conditions such as ratification of a large number of conventions and international instruments such as Convention concerning the Freedom of Association; Convention concerning the Application of the Principles of the Right to Organise and Bargain Collectively, Montreal and Kyoto Protocols, etc.

It is necessary to also recognise that abilities of the artists and culture practitioners may lie in such expressions which may be native to foreign lands. Rigidly crafted rules of origin may find themselves inadequately equipped to handle such a situation. Attempts have been made to find a credible solution through the creation of a national registry of cultural products in every country. However, again the case of shared heritage and cultural expressions between countries would render the effectiveness of such a registry meaningless in the international context of preferential treatment. While no solution is readily suggested, it would be necessary to examine whether the costs of restricting preferential treatment only to such exponents and cultural goods and services which are amenable to the classification of origin, are more than the benefits of granting universal preferential treatment to all cultural products and artists and other cultural professionals and practitioners from developing countries, irrespective of the art form.

The Guiding principles of the Convention lay down the basis for all promotion and protection activities to achieve the objectives as laid down in Article 1.<sup>23</sup> At the same time, it would be necessary to ensure that no cultural invasion leading to overpowering of domestic culture takes place.

#### *The Long Tail approach*<sup>24</sup>

If a 'Long Tail' approach is followed, it would allow 'shelf space' to such cultural products from developing countries which would otherwise not have been able to access developed countries' markets. This would enhance the effectiveness of preferential treatment because otherwise in purely demand driven markets, such cultural products would not even be exposed to potential consumers.<sup>25</sup>

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### **23 I. Objectives and guiding principles** *Article 1 – Objectives*

The objectives of this Convention are:

- (a) to protect and promote the diversity of cultural expressions;
- (b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner;
- (c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace;
- (d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples;
- (e) to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels;
- (f) to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link;
- (g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning;
- (h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory;
- (i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.

<sup>24</sup> The term "The Long Tail" was first used by Chris Anderson in the October 2004 issue of 'Wired' magazine article [<http://www.wired.com/wired/archive/12.10/tail.html>] to explain how a strategy could be evolved to sell a large volume of niche items, each in small quantities, to a known set of niche consumers.

<sup>25</sup> An example of *Ouaga Saga* can be cited where a film from a country with no real tradition of feature film making (Burkina Faso) could reach a much larger audience and be appreciated for its content even though there was no established channel of distribution for films from such a country. Wikipedia has the following entry on the subject: "*Ouaga-Saga* is a 2004 comedy film by Burkina Faso-based filmmaker Dani Kouyaté. This film was one of the two or three a year that the Burkina Faso government produces..." Reader review in the New York Times called it, "A film which highlights the reality of life in Ouagadougou in order to survive, it also offers the viewer many light hearted moments; the perfect medicine in today's hectic life. Congratulations to the script writer."

A question that needs to be asked is, “Does market access have synergies with the demand of the consumers of the developed countries to have access to and use of cultural goods and services of the developing world?” Evidently, all the contracting parties have committed to provide access to their own citizens to cultural goods and services that may emanate from other cultures. Then, if owing to structural infirmities, the cultural products of certain countries are not able to reach international consumers, such access would be inhibited. The universal preferential treatment to artists and cultural products from developing countries would redress such an issue.

### **C. Legal and institutional framework of preferential treatment**

The discussion in this section is a reflection on the framework for preferential treatment from the Indian perspective for relevance and applicability.

Article 16 recognizes the need for granting preferential treatment by means of appropriate legal and institutional frameworks. At the outset, it is pertinent to note that the Article seeks to place the onus of creating such frameworks on the developed countries. However, it can be argued that even the recipient countries may need to have corresponding legal and institutional frameworks.

The legal and institutional framework that exists in this area can be broadly classified into International and Regional Instruments and National Frameworks.

#### *International and Regional Instruments*

There exists a complex web of international and regional instruments which include multilateral instruments in the subject areas of protection of cultural heritage, protection of IP, Trade agreements in goods and in services and any international system of trade preferences. Here it would be relevant to mention that there are no international instruments on protection of TK and TCE.

For protection of cultural diversity and heritage, seven prominent instruments exist.<sup>26</sup> In addition to these, there are many other efforts made by the International community to draw attention to the cultural plurality of humankind as well as to maintain a state of dialogue between cultures. Prominent among such efforts is the ongoing “Dialogue among Civilisations” which has continued over nineteen conferences so far. The United Nations has declared the year 2008 as the Year of Languages. The moot point being made here is that at the core of all culture related exercises at the international level is the principle of cooperation.

It is a recognized principle that knowledge begets more knowledge. The need to protect the ability of knowledge holders to create further knowledge has resulted in the development of the concept of Intellectual Property and the rights vested in it. At the core of the principles for the protection of IP is the approach to incentivise the process of generation of knowledge, possibly pulling it out from the realm of altruistic impulses. There are a large number of international instruments<sup>27</sup> which seek to clarify, judiciously limit and protect IP across borders. While the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) is the main omnibus instrument for such protection, brought into existence as Annex 1 C of the Marrakesh Agreement establishing the WTO, the instruments are many, ranging from the Paris Convention of 1883 to the Singapore Trademark Law Treaty of 2007. The TRIPS Agreement recognizes IP rights as private rights which need to be protected both within a

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<sup>26</sup> Refer footnote 1.

<sup>27</sup> See Annex 5.

country and internationally.<sup>28</sup> Criticism of the theory of IP notwithstanding, internationally there is ample recognition of the role that IP purports to play in enhancing the economic competitiveness and the general welfare obtaining in a country.

On the side of trade in products, multilateral trade in goods and services is governed by the GATT and GATS under the auspices of the WTO. The scope of these two agreements extends to cultural goods and services too. The principles of trade and the background of these agreements focus on enhancing the competitiveness of the contracting parties on the premise of comparative advantage. Preferential treatment therein would also be focussed on the same aspect of allowing for competitive positions to be sharpened.

For India, the other relevant sub-group would be the regional framework of SAARC (South Asia Association of Regional Cooperation) Free Trade Agreement known by its acronym SAFTA and the bilateral Comprehensive Economic Cooperation Agreements (CECA) it has with Singapore. Most recent such agreement is the Free Trade Agreement with ASEAN that is to be signed in December 2008. In addition, there are as many as twenty-four other agreements with different countries at differing levels and range of commitments.<sup>29</sup> India is also a member of the GSTP of developing countries. In addition, India is in detailed negotiations for three other agreements, with European Union, Japan and Republic of Korea. Thus far, all the bilateral and regional agreements dealt essentially with trade in goods and services. However, it needs mentioning that in the agreement with EU, for the first time IP forms a crucial subject. Two agreements of a special kind are discussed in brief below.

#### SAFTA

The SAARC (South Asia Association of Regional Cooperation) Free Trade Agreement was reached on 6 January, 2006 in Islamabad, Pakistan. It supplants the SAARC Preferential Trade Agreement (SAPTA) which had been in force since 7 December, 1995. The main features of the Agreement comprise a commitment by non-LDC parties to reduce tariffs to 20% from the existing levels within two years from the date of the agreement, and to 10% if the existing tariffs were less than 20% to start with. Thereafter, the tariffs are to be reduced to Zero over the following five years. For the LDCs the corresponding commitments are 30% in two years, and Zero over the next eight years [Article 7. 1]. It further provides for a review of the sensitive list of items for each of the contracting parties every four years [Article 7. 3 b)]. Two significant features from the point of view of cross-cutting issues discussed in Section D below are that there is a best endeavour clause on simplification and harmonization of customs clearance procedure [Article 8 b)]; and on simplification of procedures for business visas [Article 8 m)]. There is an in-built Special and Differential Treatment arrangement for LDCs in the Agreement [Article 11]. In addition, a specific protection for culture is also provided [Article 14 b) (iii)].

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<sup>28</sup> Preamble of the TRIPS Agreement, “Recognizing that intellectual property rights are private rights;”.

<sup>29</sup> For a brief overview of India’s engagement with RTAs and other agreements, see information posted on [http://commerce.nic.in/trade/international\\_ta\\_current\\_details.asp#b17](http://commerce.nic.in/trade/international_ta_current_details.asp#b17), accessed on 10 October, 2008, See Annex 6.

### Indo – Singapore CECA<sup>30</sup>

The Indo-Singapore CECA was a major breakthrough in Indian trade environment. While the nature of the agreement is indeed comprehensive, the areas of interest from the cultural perspective would relate to the recognition of mutual interest in films as brought in Article 2.15 where each party commits to allow temporary admission to equipment, etc. necessary for making a film. This provision has been used to enter into negotiations for a co-production agreement on cinema by both countries.

The exact nature of offers is clear in the schedule of the CECA on Trade in Services. The Indian offer in Audiovisual Services is but an image of the GATS commitments. The Singapore offer is more liberal which has been a favourite destination for the Indian film industry for shooting. On the Cultural Services side it is interesting to find that Singapore has kept Modes 1, 3 and 4 unbound. For recreational services, library services and archival services Singapore offers free access.

### GSTP – 1998

The GSTP for all practical purposes appears to have been overtaken by international events. Yet, it is an interesting exercise by the G 77 countries towards South-South cooperation. One interesting feature is the provision of SDT for LDCs. Further, though it provides a security exception, it does not have a specific cultural exception.

### Visa issues

In addition to the trade related aspects and the qualitative aspects of IP and Cultural Diversity, a crucial framework relates to the movement of individuals across borders for purposes ranging from personal visits to business visits to search of livelihood, etc. It is a fact of history that entry restrictions that exist on the borders of nation states today are not very old. In fact, for much of history, movement across international borders during times of peace with peaceful intent was freely allowed. Visa regimes today are complex frameworks which express the sovereign right of the State to decide which person enters its territory on terms determined by it.

The GATS discipline on Mode 4 talks only of temporary movement of natural persons. The word 'temporary' has not been defined. The Visa regimes and attendant work permits do not generally distinguish between temporary and permanent movement except under confirmed emigration intent. Additionally, the category of independent professionals, in which category Artists, Cultural Professionals and Practitioners (ACPP) would fall, does not get treatment similar to the category of Business Visitors and Inter-corporate transferees, the latter being exempt from the Economic Needs Test (ENT) in most countries' schedule of commitments in Mode 4. Some developing countries had made a major collective proposal in the Cancun Ministerial Conference seeking greater openness in Mode 4.<sup>31</sup> There is also a demand for a new category of visa called the GATS Visa especially directed at Mode 4 movements.<sup>32</sup>

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<sup>30</sup> For the complete text of the CECA see the links from [http://commerce.nic.in/trade/international\\_ta\\_framework\\_ceca.asp](http://commerce.nic.in/trade/international_ta_framework_ceca.asp) accessed on 10 October 2008.

<sup>31</sup> See TN/SW/14. The proposal laid out the contours of the developing bloc demands including delinking of commercial presence requirements for Mode 4, additional commitments on transparency and procedural aspects affecting temporary entry and stay, elimination of ENT, etc.

<sup>32</sup> For an elementary understanding of the concept of the 'GATS Visa' proposal, see Annex 3 of Untitled document by Nippon Keidanren at [http://www.wto.org/english/forums\\_e/ngo\\_e/nippon\\_keidanren\\_e.doc](http://www.wto.org/english/forums_e/ngo_e/nippon_keidanren_e.doc) accessed on 10 October, 2008.

### Cultural Agreements and Cultural Exchange Programmes

In addition to the set of instruments above, another sub-group of agreements are the bilateral Cultural Agreements India has with many countries. At the last count, India had 118 such cultural agreements out of which 19 are with developed countries. Within the auspices of the Cultural Agreements, India often operates Cultural Exchange Programmes (CEP) with various countries. The CEPs are exchange protocols of short validity period, normally three years. They lay the outline of the ways and means of exchange of artists and cultural professionals and also allow for exhibition of works of art in each other's countries. At present there are 41 CEPs in operation out of which 12 are with developed countries and a further 35 are under formulation.<sup>33</sup>

The CAs are in the nature of chapeau documents within the meaning of which the CEPs are prepared. The CAs are not limited to fields of Culture only. In fact, in the true sense these agreements, in so far as the wider context of word is concerned, are Cultural Agreements since they propose cooperation in the fields of Culture, Education, Arts as well as Science and Technology. The context of the CAs is used to enter into protocols of exchange called the CEPs. Sample taxonomy of twelve CEPs has been prepared.<sup>34</sup> The salient feature of the CEPs is that as much as the developed country partners of India seek to make their own contributions to the exchange, India makes its own contributions to the other developing and least developed partners. Further, by and large the CEPs tend to be documents which try to maintain reciprocity in exchange of benefits and obligations in participation by the contracting parties.

The sample of the CEPs further shows that the following areas attracted greater focus:

#### *Heritage*

Study of artistic heritage

Museums as centres of learning, with proposals for exchange of experts to study conservation techniques

Development of archaeological research and excavations

#### *Library facilities*

Cataloguing, indexing and library services, exchange of library materials and artefacts

Exchange periodicals, books, journals and microfilms of archival sources

#### *Exchanges*

Exchange team of writers/ scholars/ specialists

Exchange experts in the field of fine arts, theatre, dance, music, literature for lectures/ demonstrations.

Exchange contemporary art works and photography for exhibition purposes/ Exhibitions on culture and art

Exchange programme depicting various facets of life through radio and TV

Participation in International Film Festivals

Exchange of documentary films

Participation in the Indian Triennale and International Artist Workshop

Exchange of dance, music and folklore groups/ experts

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<sup>33</sup> See Annex 7.

<sup>34</sup> See Annex 8.



*Documentation, translation and publicity*

Translation and publication of poetries and stories  
Documentation of performing and plastic art  
Preparation of audio-visual presentations, video films, radio and TV programmes on culture

India has reserved greater focus on such States which have concentrations of Indian diaspora. The Government of India has amended the Citizenship Act, 1955 to introduce a new class of citizens called Overseas Citizens by inserting a set of Sections 7 A, 7 B, 7 C and 7 D under the heading 'Overseas Citizenship' to give an institutional legitimacy to the umbilical cord of shared ancestry and culture. In doing so, it has effectively reached out to yet another 20 million persons of Indian descent all over the world, some in numerical majority in their own countries. These Overseas Citizens of India are a special target of the preferential treatment endeavours of India in its visa regimes and cultural exchange programmes and form the bulwark of trade in Indian cultural goods and services.

In the specific case of Suriname, evidently for diaspora considerations the CEP 2003-2005 has many elements which reflect unilateral effort of India to provide greater and preferential access to Surinamese. These relate to Indian sponsorship of cultural groups to Suriname, offer of a scholarship, sending an Indian exhibition of Indian Graphics, hosting a performing cultural group from Suriname for two weeks, etc. As compared to Suriname, the CEP 2004-07 between India and Singapore has at least one specific provision in which Singapore participation is greater. Singapore would set up a comprehensive Indian collection in which the cooperation of National Library of India would be sought. Other than this, the exchange is fairly evenly balanced.

A review of the CEP 2003-2005 between Italy and India reveals some elements of unilateral non-reciprocal benefits being offered by Italy. The Italian Institute for Africa and the Orient proposed to develop collaborative studies and research in fields of linguistics, philology, history, archaeology, and history of arts, philosophy, religions and social anthropology. The Institute also expressed interest in setting up an Observatory on Social, Economic and Cultural reality of contemporary India. The Italian Directorate General for Book Heritage and Cultural Institutes expressed willingness to send books on any subject to universities and cultural institutions evincing interest. The Directorate General for Cultural Promotion and Cooperation of Italy announced translation awards for projects aimed at diffusion of Italian cultural expressions.

Thus, the CEPs under the auspices of the CAs by-and-large tended to be evenly balanced and no specific preferential treatment in favour of India was revealed. Any additionality in the CEPs has generally been with the intent to propagate and cause diffusion of the developed country expressions. As such, in the case of India, the CEP route does not appear to be a preferential treatment approach.

*National regulations and policies*

All national regulations and policies draw their sustenance from the authority of the Constitution of India. The principles for such regulations are those enshrined in the Constitution itself and those which are granted by the State. As such, the first document to be examined is the Constitution.

### The Constitution

The provisions regarding culture in the Indian Constitution are very progressive and effectively commit to protection, preservation and promotion of culture by not just the state but also the people.<sup>35</sup> The multi-culturality of India is an accepted and admired facet of its existence. While politically it is said to be “Federal in nature and Unitary in Spirit” socially and culturally it is the epitome of “Unity in Diversity”.

The Preamble to the Constitution reflecting the will of the people of India, *inter alia*, affirms their resolve to secure for themselves “Liberty of thought, expression, belief, faith and worship...” In doing so the preamble lays down the respect that the Constitution guarantees that the State shall have towards diversity.

In Part III of the Constitution, the citizens are granted rights which are fundamental and are inalienable except under very special circumstances, which are strictly watched by the Judiciary. Article 29 guarantees to the minorities Cultural and Educational Rights. Though it mentions language and script as categories distinct from culture that distinguishes the minorities, in modern parlance all three are normally placed under the overarching concept of Culture. It is Article 29 that sets out the commitment of the Nation and its arms to ensure diversity is not subject to any influences which might overpower its distinctiveness.

The Part IV of the Constitution lays down the fundamental principles of governance [Article 37] and goes on to direct the State to strive to provide the wherewithal to ensure “a decent standard of life and full enjoyment of leisure and social and cultural opportunities... [Article 43]. Thus, though not enforceable by law the Constitution places the onus on the State to ensure ‘cultural opportunities’.

In one major amendment, the Parliament introduced a new part in the Constitution as Part IV A where it placed certain responsibilities on the citizens of the country. One of such “Fundamental Duties” is that every citizen is required “to value and preserve the rich heritage of our composite culture”. Once again there is an explicit recognition of the multicultural nature of India and the need to maintain such composite fabric of national life.

That India is federal in political structure is also guaranteed by the Constitution.<sup>36</sup> Both Central to the State Governments are required to follow the tenets of the Constitution in all matters including those mentioned above.

### State Patronage to Arts and Culture

The Federal Government works through its various Ministries to ensure commitments to the Arts and other facets of the cultural life of the country. The Ministry of Culture and Tourism and a large number of autonomous organizations and offices<sup>37</sup> under it, are charged with the responsibility of ensuring protection and preservation of cultural products and activities, by providing State patronage to the cultural actors and also by providing platforms for the Artists and Cultural Professionals and Practitioners to exhibit their art forms. In addition, the Government also provides opportunities for capacity building and to enhance skills in all related fields through grants. Many similar institutions have been set up and are nurtured by

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<sup>35</sup> See Annex 9 for the relevant extracts related to cultural activities and culture.

<sup>36</sup> Part XI of the Constitution specifically deals with the relations between the Union and State and under the meaning of Article 246 of the Constitution; the Seventh Schedule makes out three lists through which devolution of power is delineated.

<sup>37</sup> Refer to Annex 10 for a list of all such institutions and offices.

the State Governments as well.<sup>38</sup> Chief among them have been the Language Academies which have been proactive in promoting and preserving many local languages. State institutions have also played an important role in sustaining exponents of folk as well as rare classical arts.

#### Role of Cultural Diplomacy

Cultural diplomacy has always been a method to open and sustain a dialogue between countries and cultures. In fact, the role of cultural diplomacy is twofold: to sustain and enhance cultural affinities and to explore and develop cultural links with disparate partners. The Indian Council for Cultural Relations (ICCR) is the premier institution of the Government of India active in the field of cultural diplomacy. It not only maintains Indian cultural centres<sup>39</sup> in many places the world over, it also organises Festivals of India abroad in places where there might be a perceived interest in Indian culture and arranges for many cultural exchange events with other countries.

In many parts of the country, having performed or exhibited before a foreign audience is still considered a sign of the artist having gained acceptance. This enhances her local patronage as well. Within India's neighbourhood such as Central Asia, South-East Asia, West Asia and East Africa there is a great deal of curiosity about India and its culture, especially because of many shared values.

#### *Indian concessions for LDCs*

As pointed out earlier, the GSPs are the most common form of preferential treatment regimes in existence. The GSTP of the developing bloc has had limited success. In addition, India has a definitive stand on preferential treatment to LDCs in both SAFTA and the recent Indo-ASEAN Free Trade Agreement.

During the India Africa Forum Summit held on 8 April, 2008 in New Delhi, the Prime Minister of India announced a Duty Free Tariff Preference (DFTP) Scheme for Least Developed Countries (LDCs), covering 50 countries including 34 from Africa.<sup>40</sup> The salient features of this scheme include, *inter alia*, tariff preferences for 4898 products under a Duty free list (of 4430 products) and a Positive List (of 468 products) covering 94% of the total tariff lines which account for 92.5% of the global exports of LDCs, simplified rules of origin and technical assistance.

The DFTP came into existence in pursuance of the decision taken in the WTO Hong Kong Ministerial Meeting held in December 2005<sup>41</sup> wherein developed country Members and developing country Members declaring themselves in a position to do so, had agreed to implement duty-free and quota-free market access for products originating from the LDCs.

#### *India's commitments under GATS*

India has not taken any commitments in Recreational, Cultural and Sporting Services. The Indian commitments in the audiovisual sector will be discussed below in Section D in the Case study of the Indian Film Industry.

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<sup>38</sup> Refer to Annex 11 for a representative list of such institutions.

<sup>39</sup> See Annex 12 for a list of such Centres.

<sup>40</sup> See Annex 13.

<sup>41</sup> See Annex 14 for the decision given in Annex F of the Ministerial Declaration.

## D. Issues in Cultural Exchanges and Case Studies

In this section we examine major issues in cultural exchanges that Indian artists, cultural professionals and practitioners and cultural goods and services face during the process of cultural exchange. This is attempted with the aid of certain general observations and two case studies which have an impact on cultural exchanges through the means of preferential treatment envisaged under the Article. It bears reiterating that the intent behind preferential treatment appears to include both trade and non-trade frameworks, more in the nature of positive discrimination in favour of developing countries than a trade-only approach under 'Special and Differential Treatment' envisaged under GATT or under the GSPs.

Accessing foreign audience is traditionally possible, in the GATS parlance, either in Mode 2 by foreigners or in Mode 4 by Indian professionals. While Mode 2 is not an issue of major dispute, Mode 4 tends to raise the heat of any discussion. The general hesitation to open up Mode 4 by most developed countries has been on account of the overlap between such movements and migration – the latter not being a trade issue. In any case, movement of natural persons, since a temporary movement not resulting in permanent residence, has a major benefit for both the parties involved – for the recipient an addition to the workforce in areas of deficiency and for the provider, enhanced flow of remittances in the form of factor incomes from abroad.<sup>42</sup> While this is not the forum to delve into a discussion on Mode 4, suffice it to say that the jury is still out on the continued positions taken by negotiators. There is a school of thought that says that “the potentially large global gains from such movement remain unrealized.”<sup>43</sup>

### *General Observations*<sup>44</sup>

Placed here is a collated list of issues that have been garnered from personal interviews with artists, cultural professionals and practitioners. These have, *inter alia*, included Directors of galleries, State players such as Chief Executives of various National Centres for arts, Government organizations involved in cultural diplomacy, Individual Government departments, etc.

### Visas

Artists, Cultural Professionals and Practitioners (ACPP) face myriad of visa regimes. Recognizing that mobility of artists and cultural professionals is an integral part of the cultural exchange envisaged under the Article, it would be necessary to examine whether the visa systems act as barriers to access. ACPP make two categories of trips. As a business trip, in which condition, the person can only transact and solicit business and not render any service. As a service visit (akin to Mode 4 movement under GATS) during which they may actually render service including a performance. The Visa regimes addressing these two movements are

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<sup>42</sup> An example can be drawn from the World Bank's publication Global Economic Prospects, 2006 which shows that India has had a spectacular increase in inward remittances from US\$ 13 billion in 2001 to upwards of US\$ 20 billion in 2003, which translates into a CAGR of 24.03%. The three reasons cited (see Box 4.2) are the increase in number of migrants, the greater facilitation of sending remittances with easing of regulations and the Government's initiative to create attractive portfolio options for Non-resident Indians in the banking industry.

<sup>43</sup> Chaudhuri, S., Mattoo, A. and Self, R. (2004) 'Moving People to Deliver Services: How Can the WTO Help?' Policy Research Working Paper, No. 3238. Washington DC: The World Bank

<sup>44</sup> The discussion in this session is based on the wide range of interviews conducted by the author with various persons (See Acknowledgements). The experiences of the interviewees and their associates have resulted in the structure of this section.

different. For a business trip, not only are the ACPP required to show documentary availability of a host who would be sponsoring the visit but also in many cases clearly reveal the source of funding the visit and proof of sufficiency of funds to sustain her on the visit. This is the bare minimum requirement. Many Embassies and Consulates in India also require mandatory personal interview for all Indian citizens. The details asked for include the confirmed place of stay and complete details of the itinerary.

Sponsorship requirements under Visa regimes effectively mean that official channels are the only method for many traditional artists and craftspersons with extraordinary skills to access foreign audiences, thus acting as a barrier to accessing foreign audience. It is well-known that getting an Indian visa from a developed country is considerably easier than the reciprocal. This calls for a degree of reciprocity in Visa regimes especially for this category of travellers.

In the case of ACPP, some countries have institutionalised the need for clearances from local craft guilds. The insistence by Visa Counsellors for 'No Objection' from the relevant Guild leads to a lot of difficulty in getting visas even for non-commercial events such as lecture-demonstrations, study tours, lecture tours, etc. It may be pointed out here that many guilds in the host country do not even represent the art forms the Indian ACPP excel in. Even for niche arts for which no major market exists in the recipient country, guilds seem to have a final say in Visa facilitation.

While respecting the sovereign right of any country to decide on the entry of foreigners into its territory, a cultural exception can be attempted in the visa system.

#### Reciprocity in cultural exchange process

On the side of the fine arts, India's interest lies in seeking exchanges on equal terms. This has many facets as discussed below.

National Centres for Arts have cited instances where in exchange of exhibits developed countries institutions insist on cultural products of Indian masters or of heritage items, but in exchange, they do not allow exhibition of their works of equivalent quality.<sup>45</sup>

Facilitation of exchange of cultural exhibits would considerably help if there is an International system of accreditation of museums and galleries. Such a system would not only develop confidence in cultural exchange but would also ensure better and more frequent exchange.

At the State-to-State level interactions there is a need to ensure that there is an institutionalized system of review of the outcomes of the jointly organized events to ensure that subsequent access to the market is facilitated. There has been a demand for exchangeable databases of artists, works, galleries with specific interests and spaces including public spaces with nominal rentals. All these add to the ability of the cultural actors to reach a greater audience at acceptable level of exchanges.

It has been noted that the participation fees charged by the topmost artists in the developed world tend to be so high that the Government institutions cannot afford them. As a result the purported exchange is robbed off its basic premise of equivalence or parity. A dedicated support fund for such exchanges may mitigate the

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<sup>45</sup> A case in point was a demand for the exhibition of the "Deedarganj Yakshi" [A 2500 years old exquisite granite sculpture of immeasurable value, currently located in Patna Museum in Patna, Bihar, India] during the Festival of India in a developed country whereas the Indian request for exhibits of comparable aesthetic value was denied on grounds of security, insurance and supposedly poorly equipped exhibition sites in India. The above-mentioned case underlines the need to establish reciprocity by agreeing to exchange of cultural treasures of equal status, which, in turn, enhances confidence and facilitates cultural exchange.

problem. Even so, many top artists do not want to be associated with the Government institutions, even in the developed world, possibly owing to their dislike for the attendant bureaucracy. This inhibits the level of foreign participation in even the topmost Indian events such as the Triennale organized by the Lalit Kala Akademi (The national level institution for Fine Arts)

#### Cooperation and sharing of resources and expertise

It is an undeniable fact that the quality of expertise reached in many developed countries regarding various aspects of promotion and protection of cultural heritage is highly evolved. These include, *inter alia*, gallery exhibitions, museology, conservation, documentation, and archiving and library technology. Developing countries stand to gain much with sharing of knowledge in such spheres. Other areas of such sharing of expertise may be in standardization of International Formats for exchange of cultural exhibits, exchange facilitation in the areas of packaging, raw material transportation.

This type of cooperation can be in the form of development of a network of National Centres of Art of developing and developed countries to evolve a system of institution to institution level interaction. Such a network would facilitate exchange of information on best practices on the side of management and administration, exchange of cultural artefacts, artists on lec-dem visits, etc. and also help on evolving an ethos of Management of Culture.

Assistance in capacity building in ancillary activities such as movement of art works, storage, etc, would always have a beneficial impact. As far as the host country is concerned, a listing of better storage locations country-wise with an atmosphere control level clearly depicted may add to the degree of confidence of the developing country exhibitor.

#### Changing role of the State

State patronage for the Arts has been one of the major reasons for its growth. It is a fact that in recent times governments have been withdrawing from direct investment in the field of culture. Budgetary cuts have meant that state sponsorship to national level institutions even in the developed countries and their events has come down. This has adversely affected cultural exchanges. Institutions have been encouraged to start looking at alternative models of financing including corporate sponsorship. The risk in such an approach is that the ability to market and sell works of art from the developing world becomes a major consideration in actively encouraging developing country access to developed country audience. This is known to have led to a 'Superstar Syndrome' coming into play whereby only presence of celebrity art is considered the benchmark of success of any event and hence worthy of shelf space. This has resulted in restrictions on minority expressions and niche art forms.

#### Travel travails of the ACP

At the individual level there are many vulnerabilities of the Indian ACP that the institutions in the developed countries may not be aware of. The costs faced by the Indian ACP may appear astronomical owing to the low-cost environment at home. In addition, owing to the entirely alien environment with language and cultural difficulties, the threats faced by her are both imaginary and real. Many artists talked of the linguistic barrier when lack of effective interpretation puts them at a loss while communicating their art forms to the target audience. Similar cultural differences, which are normally a cause of celebration in the institutional sense, such as food, become severe handicaps for the individual. These difficulties are faced mainly by

those whose art forms are traditional cultural expressions. In absence of Government level exchange programmes, they do not have a credible alternative to reach such audience.

On the other hand, contemporary Art has many avenues most of which cater to the business aspect of the art. The Auction houses or corporate sponsors support their art forms and hence their difficulties of this kind are substantially mitigated. Yet, it is a common complaint that at such events, business negotiations dominate not art.

#### Role of Artists' and other Guilds

Many guilds and associations of not just artists but also technical staff abound. At times, severe opposition from these guilds is faced by developing country troupes to the extent that even essential support persons have not been allowed to work. This is more likely to be the result of lack of awareness than any attempt to wilfully obstruct cultural exchanges. Hence there is need for state-sponsored exchanges of personnel, ideas, documentation and sharing of practices to enable such frictional problems to be overcome.

#### Non-official exchanges

In the case of non-official exchanges difficulties faced by the cultural actors in their individual and institutional capacities are further exacerbated. As per the experiences shared with the author, many developed countries, possibly owing to the enhanced levels of specialization reached in their civic agencies, have developed systems that are characterised by opacity and complicated rules regarding public performances. All these often lead to greater costs for institutions and individuals from developing countries seeking to perform in public. Chief among these are the existence of a multiplicity of authorities with a hierarchy of approval granting powers and the establishing of official channel partners who are facilitators for such events – authorities speak only to their channel partners creating little monopolies and hence enhancing vulnerabilities of foreign performers, artists and cultural practitioners.

#### Customs

Customs valuation is a grey area. The customs agencies both at home and abroad have often been seen not to be sensitised to the special needs of ACPP. In the case of developing countries, used as they are to state-level exchange programmes, neither are the border authorities equipped to handle issues such as valuation of export-for-exhibition works of art, nor are the procedures in place to allow for smooth clearances. Cases of damage to works owing to inferior warehousing or inappropriate instructions are known to occur often. Further, owing to lack of familiarity with Indian equipment of performance and other accessories, customs authorities abroad are known to have asked for opening of even hermetically sealed sound boxes of instruments such as the Sitar.

The above observations are qualitative in nature but the working of the Article would be greatly facilitated if these aspects are sympathetically and adequately addressed in a spirit of cooperation.

## **Case Study 1**

### **The Indian Film Industry and need for preferential treatment**

#### *Introduction*

The Indian film industry evokes many reactions both within and without the country. Overseas commentators have expressed opinions that range from amazement at the colours and songs and dances that provide for wholesome family entertainment to disparaging remarks about lack of originality, realism, reliance on melodrama, etc. The domestic consumer of the cultural product can be as critical of the lack of resemblance to the reality of India even while absent-mindedly humming a tune from one of the old classics. It is a fact that no other cultural product (Indian madness for the game of cricket not being included here) dominates popular culture in India as does Indian Cinema.<sup>46</sup>

#### *How large is the Indian Film industry*

There are no authentic figures available from authentic sources about the number of people involved directly and indirectly in the Indian film industry. Available estimates put the figure at 4 to 6 million, most of whom are contract workers and not regular employees. With an average family size of four, the size translates into 15 to 25 million persons who are dependent on the Film industry in India – which is 1-2% of the population of the country. This number, even at the most conservative, is the largest in the world in both absolute and percentage terms for a Film industry. The working conditions are said to range between appalling and tolerable for most of the workers. The recent strike by about 100,000 workers in the Mumbai film industry for better wages and working conditions<sup>47</sup> highlighted this concern.

The most definitive documentation about the strength and potential of the Indian Film Industry in recent times has been the annual report of the Federation of Indian Chambers of Commerce and Industry (FICCI) and the consultancy firm PricewaterhouseCoopers (PwC). As per its latest report,<sup>48</sup> in the year 2007, one thousand one hundred and forty-six (1146) Indian films were released in India, in 22 different languages, which is a growth of 14% over the year 2006. Hindi<sup>49</sup> films which are the main fare that is identified by semi-pejorative term “Bollywood” were only 22% of the total films produced. Yet, it is the Hindi films produced in Mumbai which have the greatest visibility and the greatest viewership both within India and overseas. Interestingly, the films being made in the three major southern centres of Chennai, Hyderabad and Bangalore include those in Hindi.<sup>50</sup>

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<sup>46</sup> In a recent article in the Outlook Magazine, the author stated, “From a theatre near you, the Hindi film has now moved into our lives and consciousness”: Bole To... Bollywood, seen at <http://www.outlookindia.com/full.asp?fodname=20081013&fname=Cover+Story&sid=1>; accessed on October 9, 2008

<sup>47</sup> Report in Times of India on 1 October, 2008 available at [http://timesofindia.indiatimes.com/Cities/Mumbai/SRK\\_Big\\_B\\_in\\_Bollywood\\_strike/rssarticleshow/3548740.cms](http://timesofindia.indiatimes.com/Cities/Mumbai/SRK_Big_B_in_Bollywood_strike/rssarticleshow/3548740.cms) accessed on 1 October, 2008

<sup>48</sup> The Indian Entertainment & Media Industry: Sustaining Growth, Report 2008. Unless otherwise mentioned, all tables in this section are from this report.

<sup>49</sup> Hindi is the official language of the country and one of the 22 recognized in the Eighth Schedule of the Constitution.

<sup>50</sup> See Annex 15 for the table on Centre-wise and language –wise distribution of films released in 2007.



In addition to this number, more than 1870 films of short duration were also released in various genres. In this genre, Mumbai is by far the largest centre and commercials are the largest single category, followed naturally by film trailers.<sup>51</sup>

The monetary values associated with the feature Film industry are a revenue of US\$ 2.1 billion,<sup>52</sup> with the domestic box-office collection having a market share of 74%, overseas box office collections contributing 9%, home video sales 8% and ancillary revenues a further 9%. Despite the difficulties faced owing to general economic uncertainty worldwide and piracy, the industry shows a healthy growth rate. All the different segments show growth over the last few years. Even the compound annual growth rate (CAGR) forecast for the next 5 years shows a continuing trend in all the segments with the box-office overseas anticipated to grow at a healthy 19%.<sup>53</sup>

Though there are no primary estimates of viewership in the country. However, taking an average domestic ticket price of US\$ 1.10 the domestic viewership would be 1.45 billion approximately. This is more than the population of India today.

All these figures go to show that the domestic film market is by itself the most important component of the total viewership for the industry. Another feature of the box-office collections is that as per the 2007 FICCI-PwC Report, with 74 titles released in the year 2006, the box-office collection of foreign films was only 4% of the total box-office revenues. This figure reveals the major fact that the Indian viewer by-and-large watches Indian movies. The Indian festival season of 'Eid' and 'Dashara' of early October 2008 saw low viewer interest in foreign films as opposed to what it was six months earlier.<sup>54</sup>

However, as compared to the largest film industry in the world with regard to its financial strength, the Indian industry is but a small player. In fact the comparative size of the world market for films shows where the real money lies.<sup>55</sup>

#### *Foreign interest in Indian film industry*

Another feature of the film industry domestically has been the increasing interest of foreign (read Hollywood) companies in Indian films, both for production and post-production activities. Prominent on production side are Sony Pictures, Warner Brothers, Eros and Viacom. In addition, restoration of earlier films has also attracted foreign participation.<sup>56</sup>

#### *Case for preferential treatment*

Do we discern a reason for preferential treatment in the above figures? *Prima facie* – No. The size of the domestic market and the revealed preference of the Indian audience to its own cinema provide for considerable comfort.<sup>57</sup> "Asia produces two-thirds of the world's cinema and most of it without subsidy where the market makes or breaks a film and the box office is king."<sup>58</sup> Within Asia, the share of India is by far the largest. Not only that, with the advance in technology and proven strengths

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<sup>51</sup> See Annex 16 for tabular figures.

<sup>52</sup> 96 billion Indian Rupees (INR) @ of US\$ 1 = INR 45-47 at the current range of forex rates.

<sup>53</sup> See Annex 17.

<sup>54</sup> "No show for *phoren* films?" Times of India, 7 October, 2008.

<sup>55</sup> See Annex 18.

<sup>56</sup> See Annex 19 for a brief discussion on the new trends in the Indian film industry.

<sup>57</sup> See Annex 20 for a brief exposition on what the competition from foreign films looks like in India.

<sup>58</sup> Sanjoy K Roy, Festival Director, Asian Festival of First Films, in "Looking East Is Epochal Nowadays" Pickle Handbook 2008. Available at [www.picklemag.com](http://www.picklemag.com), accessed on 10 October, 2008.

of India in providing cutting edge technology at extremely low cost, there appears to be a case for more and more off-shoring of many pre-production and post production activities to India from developed countries.<sup>59</sup>

Yet hidden in this picture is the fact that the box-office success rate is woefully low. Some trade estimates say not more than 12-15% of the films make a profit. The figure for small films or films by small filmmakers is even worse. This has major ramifications for culturally diverse and minority voices in Cinema. Sustenance for such diverse expressions from India requires access to mainstream audience in India and the world in the same manner as such voices are provided access anywhere else. Preferential treatment within the country is provided by granting access to public funding through various sources such as the National Film Development Corporation and the Films Division, organising Film Festivals for general and niche films, broadcast by Doordarshan, the State-owned television network and direct subsidy by Audio-visual Publicity Departments of the State Governments. However, this group needs access to the world audience as much as the popular cinema.

An assessment of the market for Indian Cinema abroad was conducted by FICCI and the consultant firm Ernst & Young (E&Y) in the year 2007.<sup>60</sup> E&Y estimates point to UK, USA, Canada and the Middle-East as the largest markets and Japan, Korea, Singapore, Russia, China, Poland, Germany and Spain as key emerging markets. New Zealand, Australia, Brazil, Malaysia are also seen as emerging markets by some content companies whereas some find ready audience in the Caribbean, Kenya, Thailand and rest of South Asia. E&Y finds that the global market for Indian content can be classified into 6 groups, with reasons for preference for Indian content being cultural connect, socio-economic relevance, lack of local industry, exotica in the form of songs and dance, etc.<sup>61</sup>

The report pegged the probable overseas market for Indian content including Television and Cinema at US\$ 200 million, around three clusters – (i) Pure Indian content with the colour, song, drama and dance ensemble targeted at primarily at the Indian diaspora and audience with similar sensibilities, (ii) Indian theme-based content seeking global audience and (iii) serving markets with supply deficiency of local programming content where high cost of fresh programming combined with small size of local audience render local programming cost-ineffective (at a fraction of the cost of similar content sourced from any developed country). “Each of these clusters has its own opportunities, challenges and imperatives<sup>62</sup>...”

The issue of preferential treatment would be somewhat in the first cluster and substantially in the second cluster which seeks to showcase Indian culture. The focus of the first cluster is essentially in the diaspora including old Indian communities in the Caribbean, South Pacific and Africa, as well as newer immigrants in the Western world. However, with regard to the second cluster, some eminent Indian film producers feel that there is no international market for traditional Indian cinema<sup>63</sup> and that without any special appeal the typically weekend audience overseas will not watch Indian cinema.<sup>64</sup> E&Y Report suggests cluster two to be designed for

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<sup>59</sup> Ibid.

<sup>60</sup> “Indian Content On The Move”, Ernst & Young-FICCI Report 2007.

<sup>61</sup> See Annex 21.

<sup>62</sup> Ibid pp 4.

<sup>63</sup> “I have realised that traditional Bollywood cinema cannot be designed for international markets. There is no market. You cannot make a film and hope that it will find a market out there. It will happen only by design.” Bobby Bedi, Managing Director, Kaleidoscope Entertainment, quoted in the E&Y Report.

<sup>64</sup> “The overseas audiences are mostly weekend audiences. Therefore long movies are not popular unless they have some really special appeal.” Shekhar Kapur, Film Maker quoted in the E&Y Report. The average Indian film runs for 2½ hours, requiring audience retention of nearly 3 hours.

international audiences with global releases of 3000-4000 prints against the Indian norm of not more than 250 prints. It also points towards possible synergies with the larger western studios and distribution and marketing companies whereby the latter are seen to be seeking local partnerships in the Indian film industry and therefore are a likely partner for such distribution and marketing of Indian films in their own turf.

Robert Friedman, a member of the US Academy of Motion Pictures, Arts and Sciences and former President of Columbia Pictures Distribution has found that the missing link for India in the United States [arguably the largest film market in terms of revenues] is the absence of distribution channels.<sup>65</sup> He finds nameless pictures from certain countries have access to theatres in the main centres whereas Indian films “don’t seem to get out of the gate.” This is a major statement in favour of preferential treatment for Indian films in major film markets of developed world. Recognizing that Market access is an enabling condition whereas market entry is based on the ability of the expression to connect with its target audience, even the former is not easily possible owing to various barriers to access that may be commercial or institutional.

An argument can be made that the Indian Film Industry does not need any preferential treatment since there is a degree of robustness that it exhibits within the domestic market that does not require any external support. As we have seen, it is fallacious to think of the Indian film industry as a homogeneous structure. There are many centres of films in India, each with a different working ethos, different style and different audience to cater to. The film icons of these centres are also different. Within each such centre, there are different genres being delved in. The “Bollywood formula” is limited to a specific genre of Hindi movies coming out of Mumbai (Bombay). The strength that Bollywood exhibits to the world is not the only picture of the Indian film industry. Even for the Mumbai-based Hindi film industry it would not be appropriate to equate it with the industry that exists in the developed world. There are certain interesting figures which are revealing. The topmost actor in the industry is likely to earn 3 million US\$ per film and would be making two to three films per annum. Compare this with what the topmost Hollywood actor would be earning – 35-40 million US dollars per annum with one to two films per year. The most expensive film ever made in India was said to cost 21 million US dollars, as for Hollywood it is stated to be Cleopatra at 290 million US dollars at 2006 prices<sup>66</sup> and the average cost of a film stated to be 60 million US dollars<sup>67</sup> with the megafilms costing more than 200 million US dollars. We have already seen the financial position of the entire Asian film industry in the global setting.

Despite often being cited as a reason for market access barriers, the vertical integration of the movie industry in the US appears to be a misplaced concern. In fact, in 1948 itself, the US Supreme Court had ruled the practice of Studios owning theatres and thus creating virtual oligopolies as bad in law which led to the Studios divesting themselves of theatre ownership.<sup>68</sup> However, the distribution channels still have substantial studio interest. This is known render ability of foreign films to access to screens liable to insurmountable competition from at least the studio owned distribution companies. Further, the same distribution companies seem to be major players in most Western countries.

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<sup>65</sup> Pickle Handbook 2008 – Changing face of Indian Cinema, pp 106.

<sup>66</sup> Forbes estimate at 2006 prices at [http://www.forbes.com/2006/12/18/movies-budget-expensive-tech-media-cx\\_lr\\_1214moviebudget.html](http://www.forbes.com/2006/12/18/movies-budget-expensive-tech-media-cx_lr_1214moviebudget.html), accessed on 10 October, 2008.

<sup>67</sup> Forbes, *ibid*.

<sup>68</sup> *United States v. Paramount Pictures, Inc.*, 334 US 131 (1948) (also known as the Hollywood Antitrust Case of 1948, the Paramount Case, the Paramount Decision or the Paramount Decree)

In Japan, with its ownership of major Hollywood studios and difficulty in identifying with Indian cultural content, market access is limited in the same manner as in the United States. In China, though a reasonable size market is perceived by industry estimates, since the distribution channels, theatres as well as production houses are by-and-large owned publicly, the cultural policy of the Government has a direct bearing on the access available to Indian films.

*Impact of measures for the protection of cultural values on market access*<sup>69</sup>

The measures for protection of cultural values, in the context of cinema that many countries adopt, include subsidies both direct and indirect in various forms such as interest free or concessional loans to film, other audio-visual media and printing industry. In addition, there are lower import duties on raw materials for cultural industries. National level institutions regularly give grants to artists and their associations to sustain their art forms. There are special marketing strategies for produce of cultural expressions.

Market access restrictions form another type of protection strategy. Some countries provide for screen quotas for films for domestic films while others require hour quota for television broadcasts. Customs duties and quantity restrictions on imports of cultural goods are another set of measures of restricting market access. Countries can institute special cess on normal taxes on sale of cultural goods and provision of cultural services which are directed at supporting vulnerable domestic cultural industries. Limitations on licensing, foreign ownership and investment, domestic content requirements, etc. constitute other parts of the strategy for protection of domestic cultural industry.

Preferential treatment for Indian films in developed country markets could take the form of exemptions from such measures or inclusion of the Indian films in the measures of positive discrimination for domestic films.

*The domestic concerns in India*

Indian cinema is not just the Mumbai-based Hindi Film Industry. The oft-cited identification of the Film industry with the so-called 'Bollywood' formula and its predominance in popular culture has resulted in the minority voice of cinema exemplified by the small and independent filmmakers in all languages is in need of support. Target of the preferential treatment might just be this group. In fact, the fact of the clear stratification within the industry into the widely accepted schema of folk, classical and popular culture clearly requires support for the small producers for the sake of nurturing cultural diversity. It has been stated by industry analysts that even in the overseas market, the non-diaspora audience is seen to be more receptive to non-typical Bollywood. Typically this would be a sub-genre of the Cluster two of the E&Y Report cited above.

Despite the obvious Indian advantages in film production of very low production costs, generally high technical quality of the average popular film, the film industry is susceptible to swings because of its financial size. Even though viewership is high, returns per film are low in absolute and percentage terms. One of the reasons is that other than metros with multiplexes, smaller cities and towns with single screen cinemas do not provide for major hits and the consequent high returns. This easily points to the need not to link industry size with preferential treatment. In fact, all the concerns that would normally be voiced by a country with small and vulnerable film industry would find an echo even in the Indian context of small and

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<sup>69</sup> The discussion here draws substantially from the issues collated by P. van de Bossche. *Free Trade and Culture: A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures*, P. van de Bossche, seen at and downloaded from <http://ssrn.com/abstract=979530> accessed on September 1, 2008.

independent film makers. Thus, to repeat, trade considerations could not be the sole criterion for grant of any preferential treatment.

These concerns find a reflection in the MFN exemptions under Article II of GATS sought by India which reveals cultural context of Cinema as the reason for seeking such an exemption. This fits in with the general assertion made earlier about cinema in India being the pre-dominant expression of popular culture.<sup>70</sup> Similarly, the schedule of Indian commitments in GATS reflects the same concern about the need to retain limitations on both Market Access and National Treatment.<sup>71</sup>

This schedule tends to follow the trend of a large number of countries keeping their Audio-Visual Services Sector unbound. At the same time, this schedule does not fully reveal the autonomous liberalization carried out by India in this sector. There is a considerable degree of freedom of foreign investment in film production and film shooting. The seemingly contradictory position can be explained by the lack of enthusiasm to take binding commitments for undertaking liberalization in this sector. Industry sources seem keen to examine possibilities of greater foreign participation to upgrade technical quality in the industry. The other feature of the schedule is the bias in favour of non-commercial cinema exemplified by the NT limitation of good reviews or awards. All this reflects a cultural concern of being swamped by commercial and/or low quality cinema which would be culture neutral. This might yet be an unfounded concern; however the risk involved is perhaps too great to be taken.

By comparison, the commitments made by the United States of America in the same sector reveal a high degree of confidence of the industry.<sup>72</sup> This feature is also substantially in line with the comparison of the size of the US Film and Television Industry in monetary terms and its very specific strengths in marketing and finance of its products. It is but natural that this industry would seek more markets outside its own borders. It bears pointing out that the United States expressed strong opposition to the Convention itself because of its concern that it would give rise to protectionist tendencies as also an ability of national governments to control the cultural lives of their citizens. In the statement made by the United States Ambassador to UNESCO, there is a mention of, *inter alia*, the risk of the use of the Convention “to control -- not facilitate -- the flow of goods, services, and ideas”.<sup>73</sup> It requires mentioning here that the United States has no MFN exemptions in this sector.

It would be revealing to examine yet another representative set of MFN exemptions and Schedules of Commitments in the Audiovisual Sector. An analysis in brief of a small sample comprising Australia, Brazil, China, Canada, Japan and Singapore is attempted below.<sup>74</sup>

As can be seen from the statements available, there are no MFN exemptions sought by China, Japan and Singapore in the case of films. Australia and Brazil have sought exemptions in the context of co-production agreements. The Canadian exemption additionally has a specific cultural contextual reference to the province of Quebec. Thus, the sample shows no discernible pattern except that those who have sought exemptions have allowed for differential treatment for co-produced films. This

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<sup>70</sup> See Annex 22

<sup>71</sup> See Annex 22 for a partial exposition of Indian commitments in the Sector.

<sup>72</sup> See Annex 22.

<sup>73</sup> Statement of the US Ambassador to the UNESCO made on October 20, 2005 placing US opposition to the Convention on record; available on <http://www.america.gov/st/washfile-english/2005/October/20051020170821GLnesnoM3.670901e-02.html>, accessed on 10 October, 2008

<sup>74</sup> For partial text of the MFN exemptions and Schedule of Commitments in the Audiovisual Sector see Annex 22.

picture is similar to what India has sought as MFN exemption. However, there has been bilateral pressure on India from a range of countries to withdraw this exemption.

The schedule of commitments however reveals much greater variety. From the sample chosen, Australia has made no commitments at all in the sector. Likewise for Brazil and Canada. China has very severe limitations on market access. Even in NT commitments, motion pictures have been kept out of the purview of the limited set of even videos. Further, import limitation of only 20 films is also restricted by revenue sharing requirement. Japan has kept no limitations beyond the horizontal sections, except in Mode 4 where it has kept everything Unbound except as in horizontal sections.

In this way, it can be readily appreciated that countries across the spectrum seem to have great degree of hesitation in opening their own markets to films from abroad. Where the industry itself has major overall strengths, as in the case of the US, the country has greater degree of liberalization in Modes 1-3. Yet, this has not prevented them from seeking more market access from others.<sup>75</sup>

Thus, sustenance of the export market under the supposedly stable market access regime of the GATS does not appear to be bright. The need for co-production becomes an interesting alternative, but as we shall see not a panacea.

#### *Co-production strategy*

Countries enter into co-production agreements (co-pro) for films with other countries to enjoy the synergies of access to financing, market access under the GATS regimes, technical knowhow, cultural benefits, etc. At the core of such agreements is the understanding that both parties would stand to gain from the arrangement. However, it is also a fact that co-pro also leads to side-stepping the trade restrictions that may be in existence on account of limitations in the commitment schedule or the MFN exemptions taken by one of the countries. Further, in the case a developed-developing country co-pro, the added lure is of access to public finances in the developed country.

The perception of the Government is of course different from that of the industry. Governments tend to think of a co-pro as an opportunity to project the soft power that the country may have.<sup>76</sup> However, it is an accepted fact that market develops through exchanges and co-productions are a way of such exchange.

India has co-production agreements with five countries,<sup>77</sup> viz. Brazil, France, Germany, Italy and the United Kingdom. In addition, a sixth co-pro with Singapore is in advanced stage of negotiation. Morocco, Poland and Argentina have shown interest whereas negotiations have been underway with Australia, Canada, Greece, Hungary, New Zealand, Nigeria, Russia (the old Soviet Union had major initiatives), South Africa and Spain.

The choice of countries is based on many criteria such as cultural affinity, political solidarity, identification of the partner as a repository of exotic objects, similarity of philosophical underpinnings of the two societies, immigrant populations, cultural resonance, etc.<sup>78</sup>

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<sup>75</sup> See Annex 23 for an analysis of the requests made by India and made on India under GATS negotiations.

<sup>76</sup> It is a recognized fact that films influence image and understanding of a country. A case in point is the case of a slew of technically superior, thematically rich and lavishly shot films that came out of China in the last ten years.

<sup>77</sup> A taxonomy of the existing co-production agreements is placed at Annex 24.

<sup>78</sup> An example can be given of Indo-Brazil Agreement which is also a reflection of the common interests both countries have exhibited in many international political forums such as Convention on Biological Diversity, WTO, WIPO, United Nations, etc. The film fraternity in Brazil has also evinced interest in the characteristics of the Indian

The main features of the co-pros of India can be stated to be the following:

*Need for appropriate film-making and cultural benefits<sup>79</sup> to accrue to both the countries;*

*Role of designated competent authority in both partner countries to rule and adjudicate on which application constitutes a co-production agreement;*

*Treatment of a co-produced film as a National film for the purpose of access to screens and modes of subsidised financing; and*

*Film making contribution benefits to a country to be in proportion to the financial contribution of the co-producer established in that country.<sup>80</sup>*

It can be readily appreciated that operationalisation of such instruments is not likely to be easy. The role of the competent authorities on both sides can be seen to be of great importance. It is often said that in a bureaucracy, the people with the competence to say 'Yes' are more likely to say 'No'. The excessive reliance on the state players in these agreements can severely detract from the effectiveness of the instruments.

The objective conditions associated with the process of determination of cultural benefits are likely to shift the balance of the project substantially in favour of the partner which allows access to public finance. The Indo-UK agreement is a case in point where the Film Council rules would continue to govern the access of the producers to public funds, the rules naturally being biased in favour of proven British participation.

Other than the agreements in existence, there exist many opportunities for India that emanate out of the Comprehensive Economic Cooperation Agreements (CECA), the FTAs and the PTAs. Many such agreements carry a best endeavour clause asking both parties which may finally prompt the parties to sign a co-pro.

There are mixed reactions to the co-production agreements. Critics argue that they do not succeed except under very special conditions because generally the themes are not easily identifiable as culturally relevant. This is so because the audience sensibilities and sensitivities can be very different in the partner countries. The audience of a multicultural pluralist diverse society like India might have difficulties understanding the concerns in a society which is more individualistic and less diverse. A counter-argument has been forwarded that with narrowing of gaps in appreciation of so-called alien culture, and even with the persistence of diversity, better possibilities might emerge on co-pro. Critics have argued that if more cluster two kind of films from within a single partner are given screen access (TV access is most considered more desirable) and facilitation through financing for dubbing (or subtitling, in case cost of dubbing becomes too high) are likely to have much the similar impact without the attendant risks, costs and bureaucracy.

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film industry that allows it to have a strong domestic market, strong enough to face the Hollywood phenomenon on its own terms. Similarly the interest shown by both India and South Africa reflect not only political convergence but also cultural links through immigrant Indian population in South Africa.

<sup>79</sup> The Indo-UK agreement requires the film to meet the Cultural Test as prescribed by the UK Film Council. The Test requires a film to score a pre-determined number of points in the prescribed criteria to pass the test. The content of the test includes (A) Cultural Content (Film set in the UK, Lead characters British citizens or residents, film based on British subject matter or underlying material and original dialogue recorded mainly in English language); (B) Cultural Contribution (Cultural creativity, cultural heritage and cultural diversity); (C) Cultural Hubs (Principal photography/ visual effects/ special effects and Music recording/ audio post production/ picture post production); (D) Cultural Practitioners (Director, Scriptwriter, Producer, Composer, Lead Actors, Majority of cast and crew and key staff).

<sup>80</sup> A condition in the Indo-UK Agreement.

Critics have further argued that despite cultural contiguity, many countries do not allow unrestricted screening of films from India ostensibly on cultural diversity plank but more likely on political considerations. Among them from within South Asia are Pakistan and Sri Lanka, some countries of South East Asia, some states of North Africa. In addition, the costs, both overt and hidden, of accessing markets in countries like the UK and the USA are a major inhibiting factor for films from India. It has been suggested that a set of measures in the realm of positive discrimination such as subsidised access to shooting locations, permissions to allow film technicians to work with film crews, single window clearances for shooting permission instead of requests having to go through multiple authorities, visa facilitation for film crews to shooting locales and granting privileged access to distribution channels and screens in mainstream locations would yield better results than merely co-production agreements.

Despite the supposed drawbacks of the agreements, the fact remains that such agreements might grant the much needed national treatment to Indian films. This is likely to allow mainstream access as well as develop a culture of films which are 'designed' for foreign audience in both content and quality. Further, products of such endeavours would also allow the Indian diaspora to view films with greater cultural relevance since the cultural interests of both the partners are likely to be reflected.

Indian companies have entered into a number of co-production agreements in the recent past with established Hollywood companies.<sup>81</sup> While the details of the agreements are not in the public domain as yet, it appears that the main feature of these agreements is the symbiosis and reciprocity that the two sides expect from the arrangement.

#### *Cross-cutting issues*

Case for preferential treatment having been made, it is necessary to look at other facilitation issues regarding greater access to developed country audiences by Indian films. As has been mentioned in Section B and general observations made in Section D above, market access is considerably inhibited if the professionals and practitioners do not have easy physical access to the audience. Indian film industry sources often cite the case of countries like Switzerland, Singapore and Malaysia which have allowed access to professionals and practitioners as well as have facilitated shooting projects and subsequently reaped the benefit of greater tourist inflow from India. Further, outdoor shooting also arouses curiosity in the local populace about the films and hence creates a demand, however small it might be.

Film producers, outside co-production projects, have had to face many local Union and guild restrictions. These restrictions can tend to be overly expensive by way of requiring compulsory hiring of specified professionals locally. A recent unrest in the Mumbai based film industry revealed that while India seems to be less finicky about hiring foreign cinematographers,<sup>82</sup> similar courtesies are not extended in most developed countries abroad. Indian film producers talk of strict Union requirements on engagement of local personnel, Hours of Employment Regulations, etc. Preferential treatment in this regard might consider allowing a Mode IV type of movement of support professionals and also allow easier hours of work regulations for non-Indian crew.

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<sup>81</sup> "Hollywood bound", The Times of India 28 Sep 2008, Chidanand Rajghatta, TNN; and "Picture perfect: Alliances will only get better", The Times of India 28 Sep 2008, Avijit Ghosh, TNN

<sup>82</sup> "Our films, their films", Hindustan Times Mumbai, October 02, 2008



## **Case Study 2**

### **Yoga: An Intangible Cultural Heritage<sup>83</sup> of India and Humanity (A case for preferential treatment)**

#### *Yoga as a cultural expression*

The Convention states in Article 4, “Cultural Content refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities” and “Cultural expressions” are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.” Under these definitions, Yoga is a cultural expression as is explained below. This also makes Yoga an interesting case for preferential treatment since it possibly does not have any trade content, per se.

Yoga is one of the systems of orthodox Indian philosophy. It has been variously described as “a means of compressing one’s evolution into a single life or a few months or even a few hours of one’s bodily existence”<sup>84</sup> and as a methodological effort towards self perfection by the development of potentialities latent in the individual.<sup>85</sup> One of the classic definitions of Yoga is “to be one with divine.”<sup>86</sup> The main feature of which distinguishes it as a cultural expression is of course its visible form of practice of postures. However, as per the principles of Yoga enunciated by the ancient Indian text “*Yoga Sutras*”<sup>87</sup> of Patanjali<sup>88</sup> it includes 8 parts (*Ashtanga*): *Yama* – ethics, restraint and abjuring of violence of thought and action; *Niyama* – cleanliness and asceticism; *Asana* – posture; *Pranayama* – breath control; *Pratyahara* – sense-withdrawal; *Dharana* – concentration; *Dhyana* – meditation; and *Samadhi* – full absorption.

In modern times, the spiritual legacy of Yoga has been masked and the health care potentialities have become more popular. Today, Yoga is emerging out as one of the potent alternate health care systems in the present day health care delivery system across the globe. Yoga, once limited to the privileged few in hermitages has become a household activity.

#### *Assessment of the popularity of Yoga*

Though no figures are readily available to quantify the numbers practising Yoga in India and abroad, a fair amount of research is known to be conducted into the physiological and clinical applications of Yoga, both in India and abroad. There are many Institutions either fully or partially involved in such research and regularly their results in indexed journals, both Indian and international. It is variously estimated that more than 18 million regularly practise Yoga in the United States with many more millions being added every year. Similar figures are cited for a large

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<sup>83</sup> The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage defines ICH as the practices, representations, expressions, as well as the knowledge and skills, that communities, groups and, in some cases, individuals recognise as part of their cultural heritage. Yoga is not on the list of Intangible Cultural Heritage from India.

<sup>84</sup> Swami Vivekananda, an Indian philosopher and mystic of the 19<sup>th</sup> century.

<sup>85</sup> Sri Aurobindo, an Indian freedom fighter, mystic and philosopher of 20<sup>th</sup> century.

<sup>86</sup> For a brief understanding of the principles of Yoga, see the website of the Department of AYUSH (acronym for Ayurveda, Yoga, Unani, Siddha and Homeopathy) of the Ministry of Health and Family Welfare, Government of India - <http://indianmedicine.nic.in/yoga.asp>.

<sup>87</sup> “Sutra” is a Sanskrit word which corresponds to ‘aphorism’.

<sup>88</sup> An Indian sage c. 2<sup>nd</sup> Century BCE.

number of other Western countries. It has gained in popularity over the years more a way to healthy living and has led to entire industries coming up offering a number of accessories, manuals both video and printed, courses on full time basis, etc.<sup>89</sup>

#### *Commercial use of Yoga*

Commercialization of Yoga is mostly in the context of its physical expression in the form of physical exercises and postures with attendant health benefits. There are a large number of Yoga training centres all over the world. The trend of health spas and resorts also providing yoga initiation can be considered its commercialisation. However, in most cases, once the trainee has had developed some basic understanding of the postures, the role of the instructor ends and to this extent it differs from the role of personal physical trainer whose physical presence is required continually during the course of the session. This allows the initiated to practise Yoga alone as well.

The other form of commercial use of Yoga is in the form of creation of training manuals and set of instructions in audio-visual media and in print. Naturally, these manuals come under the scope of Copyright law to the extent of forms of expression. The law of Copyrights recognizes both original expressions of existing ideas as well as 'sweat of brow' expended to express existing ideas in non-original forms. Thus, any book or video with original words and original pictures depicting postural techniques of Yoga would find protection under Law.

A form of commercialization of this ancient tradition has been attempted in the recent past by an American of Indian origin. He has not only opened many franchises of his form of Yoga which he calls by his own name but has also sought to strictly enforce his Copyright claims on the sequence of Asanas and exercises supposed to be conducted in controlled conditions under supervision of professionals trained by him, through 'cease-and-desist' letters in which he threatened legal action if his form of Yoga was taught without his authorization. He has also been instrumental in initiating a Yoga competition, which purists would abjure since it goes against the grain of the underlying philosophy. Going further, he has demanded that Yoga be included in the Olympics as a competitive sport.

There have been a number of court cases in this regard in the United States. A series of newspaper reports have pointed to the huge commercial potential of Yoga and the fact that though many traditionalists are strictly opposed to commercial exploitation of an ancient 'art form' there are some who would make money out of the expression.<sup>90</sup>

The above discussion points towards two easily discernible facts. One that there is a considerable commercial potential for Yoga in so far as the physical

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<sup>89</sup> The Daily Telegraph recently published a series of photographs showing Yoga enthusiasts in hundreds in various poses on the Bondi Beach, Sydney, Australia with the by-line, "Yoga enthusiasts perform at an open air class at Bondi beach in Sydney. The event was organized by an online community to encourage people to engage in new community activities and promote healthy living." at <http://www.news.com.au/dailytelegraph/gallery/0,22056,5034922-5010140-3,00.html>, accessed on 10, October, 2008

<sup>90</sup> A sample of such articles is given below:

1. Yoga copyright raises questions of ownership, By Mindy Fetterman, USA TODAY Updated 6/29/2006 1:31 at
2. The Money Pose, By Joshua Kurlantzick March/April 2005 Issue of the Mother Jones at [http://www.motherjones.com/news/dispatch/2005/03/Money\\_Pose.html](http://www.motherjones.com/news/dispatch/2005/03/Money_Pose.html)
3. Yoga Guru Settles Copyright Dispute, Los Angeles Times, May 14, 2005, at <http://articles.latimes.com/2005/may/14/business/fi-yoga14>
4. Bikram goes to the mat, By Hilary E. Macgregor, Los Angeles Times, March 21, 2005 at <http://articles.latimes.com/2005/mar/21/health/he-yogacase21>

expression of it is concerned, even though its practice in India has essentially been on non-commercial principles; and the second that Yoga, like many other forms of Traditional Knowledge and Traditional Cultural Expressions, is prone to misappropriation in the absence of credible legal instruments recognizing it for its true character – an intangible cultural heritage of entire humanity. In the case referred to above, the western models of IP were not found comfortable in tackling an issue of alleged misappropriation of a form of Traditional Knowledge which did not have a date of creation, name of creator or the rightsowner, or which was not amenable to questions as to whether arranging its sequence of activities would tantamount to a new and original expression and whether an environment-neutral expression, when subject to environment control, become a modern tangible expression protected by Copyright or any other form of IPR law.

This risk of misappropriation of TK has caused the Government of India to commission a project with the National Institute of Scientific Communication and Information Resource (NISCAIR) to create a Traditional Knowledge Digital Library (TKDL) for Yoga as was done for Ayurvedic formulations.

In the context of Yoga, the 'niche service' being provided by Indian experts does not threaten any livelihood since the capacity in the host country is restricted as opposed to the extant demand. Heuristically, in fact, it could be stated that it is this scarcity of trained Yoga instructors which leads to the rent-seeking activities of those who would apply principles of IP protection on an essentially free good. On the other hand it could be argued that the approach adopted by some Yoga entrepreneurs would be in opposition to the two principles of Access and Benefit Sharing to and based upon Prior Informed Consent from the holder of the Traditional Knowledge.<sup>91</sup>

Another interesting feature of Yoga is that its ethos of easy-to-follow principles towards healthy living has convergence with policies of many corporate businesses and national governments which seek to institute disease preventive strategies instead of curative solutions. There is a major saving of public and private resources possible if diseases are prevented. Yoga is one such simple and inexpensive approach. Recently, the Morarji Desai National Institute of Yoga (MDNIY), the premier institute in the country for research, promotion and propagation of Yoga was invited to Russia for a demonstration and possible inclusion in the Russian national health programme.

#### *Accessing foreign audience for Yoga*

The most common methods of reaching foreign audience for Yoga today are through (i) Government references whereby the ICCR deputed Yoga Teachers abroad through the cultural centres of Indian Embassies; (ii) Travel agencies providing additional service to the foreigners in the form of Yoga courses; (iii) Yoga schools abroad sponsored by Indian institutions such as Swami Vivekananda Yoga Research Foundation, Kaivalyadhama, Divine Life Society, Shivananda Yoga Vedanta Centre, Iyengar Yoga, etc. which conduct short term courses and training programmes on Yoga; and (iv) Health Clubs/ Spas who have realised the growing popularity of Yoga and have made it mandatory to have the Yoga service in their set ups, where the foreigners are the prime customers. These Indian Institutions also produce CDs, publish books on Yoga, market the Yoga related goods etc. The Indian Government has collaborated with some of the Institutes outside India through the MDNIY. Yoga has also been seen to be a major attraction in Festivals of India held abroad.

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<sup>91</sup> A clear enunciation of the contours of these principles can be seen in the context of the Convention on Biological Diversity in the Bonn Guidelines available at <http://www.cbd.int/decisions/?m=cop-06&d=24> accessed on 10 October, 2008.

The question that needs to be answered is why the Government of India should be interested in propagating Yoga abroad - more likely a way to showcase Indian culture abroad. It has entered the channels of cultural diplomacy. In the process, it allows for sustenance of an ancient 'art form' by encouraging continued adherence to its practice within and without and also encourages the creation of a body of dedicated practitioners who do not have to depend on patronage or altruism for their livelihood.

### *Systemic objections to Yoga*

The norm in the practice of Yoga the world over is that of self-regulation. Some would argue that if honestly practised, such self-regulation yields the best quality of service. Again, this issue is one of governance of a discipline that is not very amenable to institutional governance. There is a history of opposition to Yoga in the West. The opposition is based on two broad categories of approaches: Religious and Institutional.

Since Yoga tends to be associated with Hinduism, it is seen in the context of a large number of other practices associated with the religion. Since some of these practices are perceived as antithetical to the philosophies, teachings and tenets of many other religions, sects and denominations, Yoga itself comes in for criticism.<sup>92</sup> It has to be appreciated that the origins of Yoga as a way of life lie in a time when crystallised views on religion simply did not exist. As such, possibly the cultural moorings of the discipline of Yoga would refer naturally to the environment in which it was created.

The institutional opposition is based on the demands of empiricism that governs modern scientific thought. Since proving the claims of Yoga regarding its therapeutic prowess has been an uphill task, it has not met with any institutional acceptance beyond a form of stretching exercise which is to be treated at par with other such exercises such as pilates, etc. In addition, another set of opposition comes from the fact that there is no regulatory body governing the teaching and practice of Yoga as a system of healthcare. Absent such an institution, the discipline is left with no control over the quality of instruction or standardisation of pedagogy. Further, without independently verifiable efficacy of the therapeutic uses with empirical data based on clinical trials, its claims would remain just that – claims.

### *The case for preferential treatment*

The discipline of Yoga is as Indian as it gets. It is not just a form of healthcare based on therapeutic applications but an approach to healthy living. The philosophical roots of Yoga are also typically Indian and find echo in at least three religions which originated in India, Hinduism, Buddhism and Jainism. The practice of Yoga, at least in the Asana (posture) mode can be considered secular. It is this mode which attracts the maximum attention and following. It is this mode which is also most vulnerable to misappropriation since it has a visible expression which can be fixed in a medium in a tangible form and converted into intellectual property protected by Copyright Law. Its outreach is substantial and is the projection of Indian culture at its

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<sup>92</sup> There would be a plethora of anecdotal references in this regard. Some interesting ones are "Christians get into a devil of a twist over yoga", Independent, The (London), May 4, 1997 by Hattie Sellick; Religion Journal and "Yoga in Aspen Public Schools Draws Opposition", The New York Times, By MINDY SINK, Published: February 8, 2003. There have been equally reasoned arguments in favour of Yoga by Christians who have opposed using Religion as a tool for opposition to it. An interesting piece comes from Pamela Fraser in One Christian's Response to Yoga, available at <http://www.yogafit.com/research/Onechristian.pdf>, accessed on 10 October, 2008.

best. In the 3-category classification of culture, Yoga would lie in both Classical and Popular<sup>93</sup>. Preferential treatment for Yoga would lend authenticity to the practice and prevent incorrect application.

#### *Contours of preferential treatment*

The contours of preferential treatment would essentially be those features already pointed out in the cross-cutting issues at the beginning of this section. To reiterate, it would include Visa facilitation, resource and experience sharing, reduction in the say of guilds and associations regarding instruction, active encouragement to non-official and people-to-people exchanges. It would also entail grant of opportunities towards outreach to enable removal of doubts and misgivings from the layperson's mind about its intent and efficacy.

The second major aspect of preferential treatment would be to create an exception from Economic Needs Test<sup>94</sup> for Mode 4 supply of services for cultural services. That Yoga is a niche service with no major competitive postures is undisputed. That Yoga is a cultural expression is also undisputed. That propagation of secular form of Yoga in almost all societies would have major advantages on health care programmes of national governments by orienting the strategies substantially towards prevention than cure is also easily understood. All this tends to set the ground for major Mode 4 initiatives for Yoga on part of the developed bloc.

#### **E. Conclusions and recommendations**

The preceding discussion sought to examine the way Article 16 of the Convention could be made effective in operation. At the outset itself it was evident that while preferential treatment in the trade context focuses on enhancing the competitiveness of developing countries, the context of cultural exchanges requires a framework of cooperation. It was clear from our discussion that the paradigm of Special and Differential Treatment on tariffs and the General System of Preferences had limited applicability for cultural exchanges necessary for the protection and promotion of cultural diversity envisaged under the Convention. The new paradigm of cultural exchange was seen to require a different perspective altogether. Cultural actors such as artists and cultural professionals and practitioners were seen to need treatment beyond what the trade preferences could provide.

The contours of this new paradigm would require addressing issues of visa access, double taxation avoidance, sharing of experiences and expertise, intellectual property protection and enforcement thereof as well as protection against misappropriation of traditional knowledge and traditional cultural expressions.

The concerns of Eligibility (for preferential treatment), Graduation (from a preferential treatment regime), Reciprocity (as a necessary condition for preferential treatment) and Rules of origin (for cultural goods and services qualifying for preferential treatment) all took a different character in the context of cultural exchanges as compared to that of pure trade context. We found that preferential treatment under the provisions of the Convention would allow the audience from the

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<sup>93</sup> O. R. Goodenough, 'Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation', *Arizona Journal of International and Comparative Law*, Winter, 209 as cited in P. van de Bossche, *op. cit.*

<sup>94</sup> For a developing country perspective on the Economic Needs Test, see Kumar, Pranav – 5. Market Access: Major Barriers, Chapter 4: South Asian Agenda for Services Negotiations – Commonalities and Differences; South Asian Positions in the WTO Doha Round – In search of A *True* Development Agenda, 2005 published by CUTS International

developed world access to the long tail of cultural expressions that would escape them altogether in the absence of such a regime.

An examination of the existing International and regional instruments from the Indian perspective revealed that there were limitations of the trade regimes when it came to facilitating cultural exchanges. On the issue of intellectual property protection and prevention of misappropriation of traditional knowledge and traditional cultural expressions we found that the developing country expressions are as much risk in developed countries as is the reverse. We saw that owing to a high cost (relatively) system of justice, rightsowners from developing countries become more vulnerable to intellectual property rights infringement. We examined some specific regional trade agreements and found that the issue of preferential treatment in trade is a norm in favour of least developed countries. Our examination of the GATS provision on Mode 4 revealed that owing to the reluctance of most developed countries to look beyond inter-corporate transferees and business visitors and also due to insistence on Economic Needs Test, there were considerable difficulties in cultural exchanges which required movement of artists and cultural professionals and practitioners. There was discernible merit in reviving the idea of a GATS visa in the present context. In addition to the trade related issues, a taxonomy of the cultural agreements and the cultural exchange programmes entered into by India with a large number of countries, including developed countries, revealed that no major elements of preferential treatment existed in these agreements and programmes.

National regulations in India emanate from the authority of the Constitution. Not only does the Constitution guarantee minorities cultural rights but it also recognizes explicitly the need to preserve the cultural diversity of the country by instituting suitable provisions as fundamental duties of the citizens and by laying down Directive Principles of State Policy which stipulate the principles of governance by the State. Drawing sustenance from the pronouncements of the Constitution, the State directly encourages Arts.

Our examination of the issues faced by the artists and cultural professionals and practitioners from India in cultural exchanges allowed many basic issues to emerge. These include the problems faced by this category of travellers in visa access and travel, the need for cooperation and sharing of expertise between developed and developing countries, the decline in State support for the Arts in the developed world causing decreased access to audiences of those countries by cultural actors from developing countries, etc.

The limited commitments taken by most countries including many developed countries in audio-visual services under GATS is a major limitation on the access Indian films have to foreign audiences. The size of the domestic market for Indian films notwithstanding it was clear that for its long-term sustenance it has to find audiences overseas as well. Such a reach would allow the minority expressions from the industry to also reach an audience both within and outside the country. Co-production agreements being entered into by India are likely to have a beneficial albeit limited impact in this regard. More proactive positions from the developed countries may be called for.

Yoga, being a quintessentially Indian cultural expression and a form of traditional knowledge was taken up as a case study in this paper. Upon examination of the issues involved in reaching this intangible cultural heritage to the world audience, it was found that most of the issues found relevant in the foregoing discussion were equally applicable in this case.

On the basis of the discussion in the sections above it would be possible to chart out a set of recommendations which could form part of the overall strategy for effective operationalisation of Article 16 of the Convention.

At the outset, it must be emphasised that the spirit of cooperation between the Contracting Parties should be the underlying basis for effectively operationalising Article 16. Furthermore, countries should not view themselves as having competing stakes in the international market for cultural goods and services. This view stems from the fact that the Convention itself focuses on protection and preservation of Cultural diversity.

One of the key factors determining the effective operationalisation of Article 16 would be the willingness shown by the developed countries to grant preferential treatment to facilitate cultural exchanges by involving cultural actors in addition to granting certain trade preferences to developing countries. Once this basic approach is settled then the risk of any conflicting positions emerging between commitments made under this Convention and other treaties and agreements would be minimised.

Proactive positions need be taken by developed countries in visa facilitation for artists and other cultural actors. Perhaps there is a need to introduce a 'GATS Visa' type of visa specifically for cultural actors. There would be need to move away from "Economic Needs Test" in order to allow for more liberal regime for cross-border movement of cultural actors. Combined with this action would be the need to share expertise, experiences and resources for preservation and protection of cultural heritage and hence cultural diversity.

In our view, preservation of cultural diversity hinges critically on the agreement between countries to prevent misappropriation of traditional knowledge that are part of the cultural traditions in the developing countries. Purely non-commercial cultural expressions can also develop into commercial enterprise if adequate care is not taken to guard against changing the character of the expression, as was seen in the context of Yoga. For so doing, concerted action in the form of specialised institutions would be needed to protect the traditional knowledge and traditional cultural expressions from developing countries from misappropriation in developed country markets. Such institutions could exchange experiences with similar institutions that may be in existence in developing countries for harmonisation of approach towards this end.

Owing to the difficulties faced by Intellectual Property Rightsowners for developing countries in enforcing their rights against any infringement in developed countries, it is suggested that counsellor services at concessional rates may be made available to such persons to allow easy and inexpensive access to the justice system. This approach would instil a sense of confidence in the cultural fraternity and would also have domino effect in the developing countries from where these rightsowners hail.

An examination of the schedules of commitments of a large number of countries, both developed and developing showed little or ineffective commitments in the audio-visual services sector. The large size of the domestic market for a cultural product is not a guarantee for its survivability. What is needed is the ability for such a product to reach varied markets so as to create new markets and expand existing ones for long term survival. In addition, it would be necessary in the interests of cultural diversity to allow for such diverse expressions to reach many audiences to avoid the emergence of monoculturalism based on single variety of cultural expression in a particular field. Even while commitments in audiovisual services have been difficult to come by, a view could be taken that in the manner screen quotas and television hour quotas are stipulated in favour of domestic content, developed

countries could think of instituting such quotas for developing country audiovisual content as well. In addition, specialised agencies with access to public funding may be asked to promote audio-visual content even in commercial distribution channels and theatres.

In conclusion, it can be stated that the Convention on the Protection and Promotion of the Diversity of Cultural Expressions provides a great opportunity to view cultural activities and cultural actors from a non-trade perspective. This opportunity should be utilised in a spirit of cooperation and efforts be made to enjoy the cultural diversity that exists on our planet.



## **F. Annex of the expert reports**

### List of Annexes to the Report

1. A brief discussion on GATS and GATT context for trade in cultural goods and services.
2. Dakar Declaration
3. Some Studies on Generalized System of Preferences
4. Enabling Clause
5. List of International instruments for the protection of Intellectual Property Rights
6. List of Trade Agreements of India with other countries and regions
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15. A. Centre-wise, language wise distribution of films released in 2007  
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16. A. Top foreign film earners in India in 2006  
B. Global Filmed Entertainment Market
17. E&Y taxonomy of the texture of global market for Indian content
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19. Taxonomy of Co-production Agreements of India with other countries

## ANNEX 1

### Some contextual points regarding GATS and GATT

Under GATS, the 'modes of service' mean the manner in which services are provided. The four modes so identified are Mode 1 – Cross border supply, Mode 2 – Consumption abroad, Mode 3 – Commercial presence and Mode 4 – Presence of natural persons. Parties are allowed to declare limitations on their offers by specifying them in the schedule of commitments if they are in any of the six categories mentioned in Article XVI: 2 of the Agreement.

The procedure adopted under GATS is one of requests and offers to be made in various sectors of services across the four different modes. Requests are made on contracting parties during bilateral interactions. The commitments by way of offers are universal. There is indeed much scope for coercion on any country to make commitments. Thus, even though coercion is not the only reason for making commitments, asymmetry in commitments is visible.

The extent that GATT applies to trade in cultural goods is gauged from the articles of the agreement that have relevance. Other than Article I (MFN), Article III (National Treatment or NT) generally asks for non-discriminatory application of internal trade measures between domestic and imported goods. However, the screen quota exception under Article III:10 may have an impact on the scope of preferential treatment envisaged in Article 16 of the Convention. Both Article II (Quota Rule) and Article XI (Tariff Rule) seek non-discriminatory application. In addition, there is scope for application of provisions on subsidies, countervailing duties, anti-dumping, safeguards against import surges and general exceptions under Article XX to protect national treasures of artistic, historic or archaeological value.

Regarding facilitation of cultural exchanges it can be said that though the principles behind GATS are similar to those of GATT in so far as MFN and NT are concerned, there are severe limitations on the application of these concepts in GATS, which constitutes the main difference between the two agreements. The concepts are applicable only to those sectors which are mentioned in a member's schedule of commitments. What has not been committed cannot be subject to MFN and NT principles. Even within the schedules, the member can place restrictions on these principles. Further, there is no provision on subsidies, countervailing or anti-dumping duties or safeguards.

## Annex 2

RÉSEAU INTERNATIONAL POUR LA DIVERSITÉ CULTURELLE  
INTERNATIONAL NETWORK FOR CULTURAL DIVERSITY  
RED INTERNACIONAL PARA LA DIVERSIDAD CULTURAL



### DAKAR DECLARATION 21 NOVEMBER 2005

#### Presented to the International Network on Cultural Policy

(INCD Delegation to INCP: Professor Balla Moussa Daffé, Chairman, Senegalese Network of Socio-Cultural Actors; Jacques Béhanzin [Bénin], INCD Vice-Chair for Africa; Mireille Gagné [Canada], INCD Chair; Rafael Segovia [Mexico], INCD Steering Committee; Garry Neil [Canada] INCD Executive Director.)

The 6th Annual Meeting of the International Network for Cultural Diversity brought together 138 delegates from 45 countries. The Conference was held in Dakar in partnership with the Senegalese Network of Socio-Cultural Actors and the National Coalition for Cultural Diversity (Senegal). Together, these Senegalese organizations represent the full range of Senegal's rich arts and cultural sector, from grass roots dance and music groups to the cultural industries, and this reflects as well the broad scope of INCD's membership.

With the adoption of the UNESCO Convention on the protection and the promotion of the diversity of cultural expressions, the INCD and culture ministers in the INCP are moving into a new phase. We must work for the implementation of the Convention and work to find concrete ways to make it effective as a political and development tool. It is especially significant that we are embarking on this next phase of our work in Africa, the birthplace of humanity, and in Senegal, with its rich diversity of arts and culture that, unfortunately, is all too often not widely available.

In three days of dynamic dialogue we focused on four key issues:

- the immediate ratification of the Convention by 70-85 UNESCO member states;
- resisting demands in the WTO and regional and bilateral trade and investment agreements to make commitments that undermine the objectives and principles of the Convention and would render it meaningless;
- identifying policy initiatives and projects that give life to the commitments in the Convention, particularly to create preferential opportunities for artists and cultural productions from the South and to provide the necessary resources to develop cultural capacity and creative industries; and
- enhancing cooperation among states committed to the Convention, especially in fora where its objectives and principles are under threat, and between those states and civil society at national, regional and international levels.

## **Immediate Ratification of the UNESCO Convention**

The International Network for Cultural Diversity is a worldwide network of organizations and individuals in the cultural sector working in our respective arts and culture disciplines to counter the adverse effects of economic globalization. INCD has more than 400 members in 71 countries, a number of which are networks with reach in many other countries.

INCD delegates celebrate along with culture ministers the adoption of the UNESCO Convention by 148 countries. This is a significant victory.

We view the sovereign right of States to implement and modify the policies and measures they need to support their own artists and cultural producers as the central political element of the Convention.

The detailed provisions provide a model of measures and programs that States can use to support their own artists and cultural producers. We urge governments to develop and share innovative cultural policies and practical models to give life to these provisions.

Clearly, collaboration between civil society, including associations of cultural professions, and culture ministers has been critical to the project's success. We believe this collaboration can work for other initiatives which advance our common objectives: a flourishing of artistic activities in every community, the development of strong and vibrant creative industries and more balanced exchanges between cultures.

The challenges of achieving ratification should not be underestimated. INCD has said before that the Convention must be adopted by 70-85 countries if it is to have a real impact. We know this is an ambitious goal, but if civil society and supportive governments work together it is achievable. Our delegates leave Dakar with a commitment to work at the national and regional levels to help our governments to understand why ratifying the Convention is so crucial.

We urge African ministers to bring this issue to their colleague ministers at the meeting of African culture ministers being held soon. A strong statement of support and guidance to heads of state could bring a large number of ratifications, and Africa could effectively take the lead in this process.

Ratification alone is not enough. We will also be insisting that UNESCO assumes the key role it is assigned under the terms, and we urge culture Ministers to do the same. It must collect and disseminate the critical information, so that we can all understand the state of development of the creative industries in each country and the current balance of trade in cultural goods and services. It must also convene a meeting of State Parties as soon as possible after implementation.

## **Resisting Trade Commitments that Threaten Cultural Diversity**

Successful ratification of the Convention will not ease the pressure on governments to make commitments in trade and investment agreements that are incompatible with its vision of genuine cultural diversity and culture-driven development. Given current developments in the WTO and in bilateral and regional negotiations, delegates to the INCD meeting concluded that we must be more vigilant than ever.

We urge states to continue working with each other and with civil society to quarantine cultural goods and services from the trade and investment agreements. Recent moves by the governments of Kenya, Brazil, Venezuela and others to resist demands in the WTO from the European Union to establish minimum benchmarks in the General Agreement on Trade in Services are an important example of the potential for such solidarity.

INCD members at the meeting also signed an urgent appeal to the President of the Republic of Peru to resist the pressure from the United States to conclude a US/Andean free trade agreement without a comprehensive cultural exception.

As governments face pressure to make new commitments at the WTO and in regional and bilateral agreements, we urge Culture Ministers to work with trade ministers to ensure they understand the wide scope of cultural policy tools that are at risk. This extends beyond the audiovisual, publishing and music industries to include telecommunications, electronic commerce, retail and distribution services, the media and many other sectors. Commitments in any of these could potentially paralyze the ability of governments to protect and promote their own artists and cultural producers.

While we are disappointed that the Convention does not provide a legal vehicle to neutralize the negative impacts of existing commitments or current demands, we believe it provides a forum and a focus for states to resist these pressures. INCD urges governments to, for example:

- resist making commitments in areas that impact negatively on cultural activities, goods and services or constrain the sovereign right of governments to determine and implement their own cultural policies and measures;
- work together in expressing collective positions in defense of cultural diversity, and in particular maintain their solidarity in opposing current proposals for minimum benchmarks and new tactics to pressure governments to make commitments in the GATS negotiations;
- seek opportunities in regional and bilateral negotiations to include provisions into agreements that make the objectives and principles of the Convention meaningful and enforceable, for example in the current negotiations for Economic Partnership Agreements between African, Caribbean and Pacific countries with the European Union under the 2000 Cotonou Agreements.

### **Promoting Culture-driven Development**

A central theme of our discussions was that culture is an essential life force of our communities and we rejected approaches that treat culture only as an instrument for market-driven economic growth.

Developing cultural capacity in every society and culture is essential to promoting cultural diversity. Musicians, actors, writers, craftspeople, composers and other artists play a fundamental role in our societies. They both reflect a society to itself and others, and challenge us to think about what we can become. At our meeting INCD delegates learned of inspirational projects in Senegal, South Africa, Brazil, India and elsewhere, in music and traditional crafts. We heard how dance in Botswana has been used to create new economic and employment opportunities and to rescue young people from victimization and marginalization. Working to promote cultural expressions of ethnolinguistic groups and indigenous peoples is vitally important.

Cities are places in which the opportunities of cultural diversity can generate new forms of creativity. We consider local governments as key agents for cultural development and invite them to collaborate with each other, civil society and with other levels of government.

A focal point for our discussions was a paper on Strengthening Local Creative Industries and Developing Cultural Capacity for Poverty Alleviation, prepared for the INCD by Burama Sagnia, an African culture and development specialist. Burama wrote:

The study shows that creative industries are a ubiquitous asset, available in all countries. Through their effective nurturing and exploitation, they could significantly contribute to job creation, income generation and poverty alleviation. However, the opportunities offered by the industries are not fully exploited, especially by the developing countries, despite their rich and diverse cultural heritages. The major challenges facing developing countries include the inadequacy of relevant creative capacity to produce and circulate cultural goods and services in forms that can be readily consumed by developed countries; weak cultural infrastructure and institutional capability; and lack of access to finance and technology.

Like other regions and communities that have been marginalized, Africa has the artists, producers, entrepreneurs, and the stories and music. What it lacks is resources and technology. The Convention offers pathways for governments to create and enhance the opportunities offered by these assets. INCD was disappointed with the final decision on Articles 12 to 15, and Articles 17 and 18, which deal with international cooperation since there are few concrete obligations. But these Articles contain strong principles that can be used to work with and encourage governments to increase their commitment. We pledge to work with Culture ministers to build on these principles.

Specifically, the INCD proposes to culture ministers that we work together to use this tool to build cultural capacity and creative industries, and to provide resources and funding mechanisms for this purpose, to achieve more balanced exchanges of cultural goods and services, to create opportunities in the richer countries for the artists and cultural producers from the global South. For example, we urge governments of the global South to:

- use the measures described in Article 6 on the rights of States at a national level as a model for the development of their cultural policies;
- insist on the full implementation of the responsibilities of developed countries under Article 16 to provide “preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.” Preferential treatment has powerful implications in international law.

### **Future Collaboration**

The Convention acknowledges the fundamental role of civil society in protecting and promoting cultural diversity. We look forward to our continued active and constructive collaboration with culture ministers in the INCP as we move into the era in which the Convention is operational. INCD will work with INCP to ensure the speedy ratification of the Convention, to promote opportunities for cultural actors, and to challenge developments and negotiations that threaten the integrity of local cultures and genuine cultural diversity in the national and international spheres. We look forward to meeting with INCP next year in Brazil to review progress with the Convention and discuss the potential for ongoing initiatives to promote and protect cultural diversity.

### Annex 3

#### Some Studies on Generalized System of Preferences

In a study on the political economy of GSPs in 2004 by Özden, Ç. and E. Reinhardt [2004], “The Political Economy of US Trade Preferences for Developing Countries, 1976-2001”, manuscript, Emory University, Atlanta, GA., it was shown that such preferences are typically revoked when they actually start to boost the recipients’ exports. Since the GSP schemes lie outside the realm of GATT and as such have no binding character attributable to them, they are susceptible to unilateral modification and even cancellation by the donor countries at any time.

A study by Biswajit Dhar and Abhik Majumdar “The India-EC GSP Dispute: The Issues and the Process, Working draft commissioned by ICTSD as part of ICTSD’s Asia Dialogue on WTO Dispute Settlement and Sustainable Development” analysing a dispute between India and the European Community [European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (Dispute DS246)] regarding the EC’s GSP Scheme in which India had sought consultations and finally moved for a panel decision at the WTO, contends that the working of the drug arrangement under the EC Scheme actually is a case of EC solving “its problems at the expense of other developing countries.” The study finds that the rulings of the panel and the appellate body have made the operation of the GSP schemes more discriminatory.

It has also been argued by Özden, Ç. and E. Reinhardt in their study entitled “The perversity of preferences: GSP and developing country trade policies, 1976–2000” [Journal of Development Economics 78 (2005) 1– 21] that nonreciprocal trade preferences have had the perverse effect of delaying trade liberalization by the recipients.

It has also been contended by Arvind Panagariya in his study on ‘EU Preferential Trade Policies and Developing Countries’ [available online at: <http://www.columbia.edu/~ap2231/Policy%20Papers/Mathew-WE.pdf>] that de facto the GSP is neither non-reciprocal nor a system of unilateral autonomous preferences but through the various conditionalities has been turned into a reciprocal system of preferences. He says, ‘Finally, despite the original conception of GSP as unilateral, autonomous preferences, they have been effectively turned into reciprocal, contractual preferences through side conditions. Thus, with all the special agendas relating to labour, environment and drug production and trafficking attached to the grant of any significant preferences under GSP, it is difficult to see regard these preferences as non-reciprocal or even non contractual.’

DIFFERENTIAL AND MORE FAVOURABLE TREATMENT  
RECIPROCITY AND FULLER PARTICIPATION  
OF DEVELOPING COUNTRIES

("Enabling Clause")

*Decision of 28 November 1979 (L/4903)*

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries<sup>1</sup>, without according such treatment to other contracting parties.
2. The provisions of paragraph 1 apply to the following:<sup>2</sup>
  - (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,<sup>3</sup>
  - (b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
  - (c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;
  - (d) Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.
3. Any differential and more favourable treatment provided under this clause:
  - (a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;
  - (b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;
  - (c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.
4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:<sup>4</sup>

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<sup>1</sup> The words "developing countries" as used in this text are to be understood to refer also to developing territories.

<sup>2</sup> It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

<sup>3</sup> As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

<sup>4</sup> Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.



*Enabling Clause*

2

- (a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;
- (b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

## Annex 5

### List of International instruments for the protection of Intellectual Property Rights

	Name	Commonly known as	Year
1.	Paris Convention for the Protection of Industrial Property	Paris Convention	1883
2.	Berne Convention for the Protection of Literary and Artistic Works	Berne Convention	1886
3.	Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods	Madrid Agreement (Indications of Source)	1891
4.	Madrid Agreement Concerning the International Registration of Marks	Madrid Agreement (Marks)	1891
5.	Hague Agreement Concerning the International Registration of Industrial Designs	The Hague Agreement	1925
6.	Universal Copyright Convention	Universal Copyright Convention	1952
7.	Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks	Nice Agreement	1957
8.	Lisbon Agreement for the Protection of Appellations of Origin and their International Registration	Lisbon Agreement	1958
9.	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations	Rome Convention	1961
10.	International Union for the Protection of New Varieties of Plants	UPOV	1961
11.	Locarno Agreement Establishing an International Classification for Industrial Designs	Locarno Agreement	1968
12.	Patent Cooperation Treaty	PCT	1970
13.	Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms	Phonograms Convention	1971
14.	Strasbourg Agreement Concerning the International Patent Classification	Strasbourg Agreement	1971
15.	Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks	Vienna Agreement	1973
16.	Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite	Brussels Convention	1974
17.	Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent	Budapest Treaty	1977

Procedure	Name	Commonly known as	Year
18.	<b>Nairobi Treaty on the Protection of the Olympic Symbol</b>	Nairobi Treaty	1981
19.	<b>Treaty on the International Registration of Audiovisual Works (Film Register Treaty)</b>	Film Register Treaty	1989
20.	<b>Washington Treaty on Intellectual Property in Respect of Integrated Circuits</b>	Washington Treaty	1989
21.	<b>Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks</b>	Madrid Protocol	1989
22.	<b>Trademark Law Treaty</b>	Trademark Law Treaty	1994
23.	<b>Agreement on Trade-Related Aspects of Intellectual Property Rights</b>	TRIPS Agreement	1995
24.	<b>WIPO Copyright Treaty</b>	WCT	1996
25.	<b>WIPO Performances and Phonograms Treaty</b>	WPPT	1996
26.	<b>Patent Law Treaty</b>	Patent Law Treaty	2000
27.	<b>Singapore Treaty on the Law of Trademarks</b>	Singapore Trademarks Treaty	2007

## Annex 6

### List of Trade Agreements of India with other countries and regions

#### Trade Agreements

1. India EU Trade and Investment Agreement TIA
2. India Pakistan Trading Arrangement
3. India's Current Engagements in RTAs
4. India-Bhutan Trade Agreement
5. India-Bangladesh Trade Agreement
6. India Chile PTA
7. India-US Trade Policy Forum Joint Statement
8. Asia Pacific Trade Agreement (APTA)
9. India-EU Strategic Partnership Joint Action Plan
10. CECA between The Republic of India and the Republic of Singapore
11. Framework agreement with Chile
12. India-Korea Joint Study Group
13. Framework Agreement with GCC States
14. India-MERCOSUR PTA
15. Framework Agreement with Thailand
16. Framework Agreement with ASEAN
17. India-Afghanistan PTA
18. India-United States Commercial Dialogue
19. India-Sri Lanka FTA
20. India-Mongolia Trade Agreement
21. India-Nepal Trade Treaty
22. India-China Trade Agreement
23. India-Maldives Trade Agreement
24. India-Korea Trade Agreement
25. India-DPR Korea Trade Agreement
26. India-Ceylon Trade Agreement
27. India-Japan Trade Agreement

## Annex 7

### Cultural Agreements and Cultural Exchange Programmes of India

	Only Cultural Agreements	Cultural Agreements and Cultural Exchange Programmes
<b>Developed Countries</b>	Australia, Czech Republic, Greece, Ireland, Italy, Japan, Luxembourg	Belgium, Croatia (Hrvatska), Finland, France, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Slovak Republic, Spain
<b>Developing and Least Developed Countries</b>	Angola, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Burkina Faso, Ecuador, Estonia, Israel, Jamaica, Kazakhstan, Latvia, Lebanon, Lesotho, Libya, Lithuania, Madagascar, Malta, Moldova, Mozambique, Namibia, Nepal, Nicaragua, Pakistan, Panama, Philippines, Romania, Russian Federation, Serbia & Montenegro, Slovenia, Somalia, Tajikistan, Thailand, Trinidad and Tobago, Turkmenistan, Ukraine, United Arab Emirates, Venezuela, Yemen, Zaire, Zimbabwe	Afghanistan, Algeria, Argentina, Armenia, Bahrain, Bangladesh, Belarus, Brazil, Bulgaria, Cambodia, Chile, China, Colombia, Cuba, Cyprus, Djibouti, Egypt, Ethiopia, Ghana, Guyana, Indonesia, Iran, Iraq, Jordan, Kenya, Kuwait, Kyrgyzstan, Laos, Malaysia, Maldives, Mauritius, Mexico, Mongolia, Morocco, Myanmar, Nigeria, North Korea (DPRK), Oman, Peru, Qatar, Rwanda, Senegal, Seychelles, Singapore, South Africa, South Korea, Sri Lanka, Sudan, Suriname, Syria, Tanzania, Tunisia, Turkey, Uganda, Uzbekistan, Vietnam, Zambia

Annex 8

**Taxonomy of the provisions under Cultural Exchange Programmes of India and partners – Sample<sup>95</sup> of 12 CEPs**

Countries		Bangladesh	Brazil	China	Croatia	France	Greece	Hungary	Italy	Korea	Poland	Singapore	Suriname
		YEAR	2005-08	Year not mentioned	Year not mentioned	2005-07	Year not mentioned	2003-06	2003-06	2003-05	2004-07	2005-07	2004-07
ITEMS													
1	Study of artistic heritage	√	√	√	√	√	√	√	√	√	√	√	√
2	Museums as centres of learning. Exchange of experts to study conservation techniques	√			√	√	√	√	√	√	√	√ <sup>96</sup>	√
3	Development of archaeological research and excavations	√		√		√	√	√	√	√		√	
4	Collection of resources (audio, visual and written texts)	√	√	√			√	√					√
5	Cataloguing, indexing and library services	√				√	√		√			√	√
6	Exchange of library materials and artefacts	√			√	√	√		√	√	√	√	
7	Exchange rare publications to enrich the libraries	√					√						
8	Exchange periodicals, books, journals and microfilms of archival sources	√	√	√	√	√	√		√	√	√	√	√
9	Facilitate exchange of literature and publication relating to higher scientific and technical education	√	√		√	√							√
10	Exchange team of writers/ scholars/ specialists	√	√	√		√	√	√		√		√	√
11	Exchange experts to identify areas of cultural studies	√											√
12	Exchange experts in the field of fine arts, theatre, dance, music, literature for lectures/ demonstrations.	√	√	√	√	√	√	√		√		√	√
13	Exchange of historians/ Seminars and studies in the field of history		√				√						√

<sup>95</sup> A sample of only 12 representative countries has been taken to show the contours of the CEPs

<sup>96</sup> Exhibition of antiquities, reproduction of masterpieces subject to copyright conditions.

Countries		Bangladesh	Brazil	China	Croatia	France	Greece	Hungary	Italy	Korea	Poland	Singapore	Suriname	
		YEAR	2005-08	Year not mentioned	Year not mentioned	2005-07	Year not mentioned	2003-06	2003-06	2003-05	2004-07	2005-07	2004-07	2003-05
ITEMS														
14	Visit of a cultural anthropologist												√	
15	Translation and publication of poetries and stories	√		√		√		√	√	√	√		√	
16	Exchange of dance, music and folklore groups/ experts	√	√	√	√	√	√	√	√	√	√	√		
17	Promote the study of language and culture		√	√		√			√ 97	√ 98				
18	Exchange publications of cultural interest in the field of Buddhist Art and archaeology									√		√		
19	Travelling exhibition and study of the nomadic-pastoralist culture							√						
20	Organization of seminar on epic traditions						√							
21	Publication of a special issue of literary magazine, dedicated to contemporary literature						√							
22	Development of audio-visual and printed educational materials for students to learn arts, music, dance, theatre and puppetry	√				√	√		√				√	
23	Documentation of performing and plastic art	√				√	√	√					√	
24	Preparation of audio-visual presentations, video films, radio and TV programmes on culture	√	√			√	√	√	√	√			√	
25	Exchange contemporary art works and photography for exhibition purposes/ Exhibitions on culture and art	√	√	√		√	√	√	√	√	√	√	√	
26	Sending cultural group through the Cultural Exchange Programme			√				√					√ 99	
27	Exchange programme depicting various facets of life through radio and TV	√	√	√		√		√		√			√	

<sup>97</sup> Italy will provide financial support for teaching of Italian language in select Indian Universities

<sup>98</sup> Explore possibilities of cooperation in the area of Information Technology application in culture

<sup>99</sup> India will sponsor 10 -12 member team to Suriname

Countries		Bangladesh	Brazil	China	Croatia	France	Greece	Hungary	Italy	Korea	Poland	Singapore	Suriname
YEAR		2005-08	Year not mentioned	Year not mentioned	2005-07	Year not mentioned	2003-06	2003-06	2003-05	2004-07	2005-07	2004-07	2003-05
ITEMS													
28	Observe each other's National Days by putting out special radio/ TV programmes	√											√
29	Participation in International Film Festivals	√	√	√	√	√	√	√		√			√
30	Exchange of documentary films	√	√			√		√			√		√
31	Encourage participation in Documentary, Short and Animation film festival	√	√					√					√
32	Exchange of suitable performance groups to an international arts festival		√		√			√				√	
33	Participation in International Book Fairs					√	√	√					√
34	Participation in the Indian Triennale and International Artist Workshop	√					√	√	√	√	√	√	√
35	Participation in the Asian Art Biennial	√											
36	Exhibition on tea culture											√	
37	Training in designing of clothes										√		
38	Exchange of handicrafts	√						√		√			



## Annex 9

### **Extracts from the Constitution of India which have references to the cultural ethos and diversity of the country**

#### **Preamble<sup>100</sup>**

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

---

<sup>100</sup> The preamble reflects the will of the people and the fact that the Constitution itself has been given to themselves by the people of India who are sovereign.

### PART III

#### FUNDAMENTAL RIGHTS

##### Cultural and Educational Rights

**29. Protection of interests of minorities.**—(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

### PART IV

#### DIRECTIVE PRINCIPLES OF STATE POLICY

**36. Definition.**—In this Part, unless the context otherwise requires, “the State” has the same meaning as in Part III.

**37. Application of the principles contained in this Part.**—The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

...

**43. Living wage, etc., for workers.**—The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

### PART IVA

#### FUNDAMENTAL DUTIES

**51A. Fundamental duties.**—It shall be the duty of every citizen of India—

...

(f) to value and preserve the rich heritage of our composite culture;

## Annex 10

### List of Offices and Autonomous Bodies under and the Schemes operated by the Ministry of Culture, Government of India

#### A. Attached Offices

1. Archaeological Survey of India, New Delhi
2. Central Secretariat Library
3. National Archives of India, New Delhi

#### B. Subordinate Offices

1. Anthropological Survey of India, Kolkata
2. Central Reference Library, Kolkata
3. National Library, Kolkata
4. National Gallery of Modern Arts, New Delhi
5. National Museum, New Delhi
6. National Research Laboratory for Conservation of Cultural Property, Lucknow

#### C. Autonomous Bodies

1. Allahabad Museum, Allahabad
2. The Asiatic Society, Kolkata
3. Centre for Cultural Resources and Training, New Delhi
4. Central Institute of Buddhist Studies, Leh
5. Central Institute of Higher Tibetan Studies, Sarnath, Varanasi
6. Delhi Public Library, Delhi
7. Gandhi Smriti and Darshan Samiti, New Delhi
8. Indian Museum, Kolkata
9. Indira Gandhi National Centre For The Arts, New Delhi
10. Indira Gandhi Rashtriya Manav Sangrahalaya, Bhopal
11. Kalakshetra Foundation, Chennai
12. Khuda Baksh Oriental Public Library, Patna
13. Lalit Kala Akademi, New Delhi
14. Maulana Abul Kalam Azad Institute of Asian Studies, Calcutta
15. National Council of Science Museums, Kolkata
16. National Museum Institute of History of Art Conservation and Museum, New Delhi
17. National School of Drama, New Delhi
18. Nava Nalanda Maha Vihara, Nalanda, Bihar

19. Nehru Memorial Museum and Library, New Delhi
20. Rampur Raza Library, Rampur
21. Raja Rammohan Roy Library Foundation, Kolkata
22. Sahitya Akademi, New Delhi
23. Salar Jung Museum, Hyderabad
24. Sangeet Natak Akademi New Delhi
25. Thanjavur Maharaja Serfoji's Saraswathi Mahal Library, Thanjavur
26. Victoria Memorial Hall, Kolkata

**D. Zonal Cultural Centres**

1. North Zone Cultural Centre, Patiala
2. North Central Zone Cultural Centre, Allahabad
3. North East Zone Cultural Centre, Dimapur
4. South Central Zone Cultural Centre, Nagpur
5. South Zone Cultural Centre, Thanjavur
6. West Zone Cultural Centre, Udaipur
7. Eastern Zonal Cultural Centre, Kolkata

**E. List of Schemes**

1. Building & Equipment
2. Buddhist & Tibetan Culture Art
3. Celebration Of Centenaries
4. Cultural Complex
5. Emeritus Fellowship
6. Museum
7. National Memorial
8. Pension Grant
9. Salary & Production Grant
10. Scholarship to Young Artist
11. Senior/Junior Fellowship
12. The Cultural Heritage of Himalayas
13. Tribal Folk Art & Culture

## Annex 11

### Partial list of other institutions involved in promotion and propagation of Culture

- **Art Galleries**
  - Government Museum and Art Gallery, Chandigarh
- **Archives and Museums**
  - Goa State Museum
  - Government Museum and Art Gallery, Chandigarh
  - Government Museum, Chennai
  - Government Museum, Tripura
  - Indo French Cultural Centre and Museum
  - National Film Archive of India (NFAI)
  - National Museum Institute (NMI)
  - National Rail Museum (NRM)
  - Rabindra Bharati Museum
  - State Archives, Uttar Pradesh
- **Organisations**
  - Central Reference Library
  - Central State Library, Chandigarh
  - Centre for Cultural Resources and Training (CCRT)
  - Film and Television Institute of India (FTII)
  - Harekrushna Mahatab State Library, Orissa
  - Indian Council for Cultural Relations (ICCR)
  - Indira Gandhi National Centre for the Arts (IGNCA)
  - Indo French Cultural Centre and Museum
  - Kala Academy, Goa
  - Kerala Kalamandalam
  - Kerala State Chalachitra Academy
  - Maritime History Society (MHS)
  - National Council of Science Museums (NCSM)
  - National Research Laboratory for Conservation of Cultural Property (NRLC)
  - Orissa State Archaeology
  - Rajasthan Hindi Granth Academy
  - Sarasvati Mahal Library
- **Others**
  - Centre for Performing Arts, University of Pune
  - Connemara Public Library, Chennai
  - Debate for a Resurgent India
  - International Film Festival of India (IFFI)
  - National Bal Bhavan
  - National Electronic Register of Jain Manuscripts
  - National Mission for Manuscripts
  - Rabindra Bharati University
  - Roerich and Devika Rani Roerich Estate Board
  - Satyajit Ray Film and Television Institute

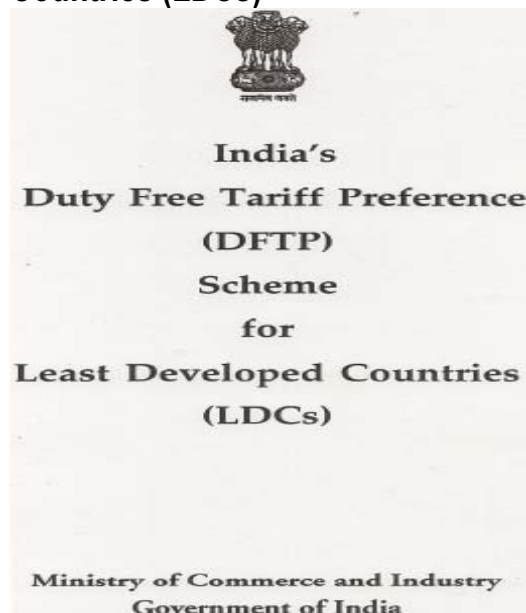
## Annex 12

### List of Indian Cultural Centres maintained by ICCR

1. Maulana Azad Centre for Indian Culture, Cairo
2. Indian Cultural Centre, Suva
3. Sub-Indian Cultural Centre, Lautoka
4. The Tagore Centre, Berlin
5. Indian Cultural Centre, Georgetown
6. Jawaharlal Nehru Indian Cultural Centre, Jakarta
7. Sub-Indian Cultural Centre, Bali
8. Indian Cultural Centre, Astana
9. Indian Cultural Centre, Kuala Lumpur
10. Indira Gandhi Centre for Indian Culture, Phoenix
11. Jawaharlal Nehru Cultural Centre, Moscow
12. Indian Cultural Centre, Durban
13. Indian Cultural Centre, Johannesburg
14. Indian Cultural Centre, Colombo
15. Indian Cultural Centre, Paramaribo
16. Indian Cultural Centre, Dushanbe
17. Mahatma Gandhi Institute for Cultural Cooperation, Port of Spain
18. The Nehru Centre, London
19. Lal Bahadur Shastri Centre for Indian Culture, Tashkent
20. Indian Cultural Centre, Japan
21. Indian Cultural Centre, Kabul
22. Indian Cultural Centre, Nepal

Annex 13

## India's Duty Free Tariff Preference (DFTP) Scheme for Least Developed Countries (LDCs)



### Background

There is a growing acceptance globally that Least Developed Countries (LDCs) have to be provided integrated development assistance to help in their economic development. Integrated assistance includes supply-side development and enhanced market access for their exportable products. In pursuance of this, many developed and developing countries have provided tariff concessions to LDCs for their export products.

India has also granted special and differential treatment to LDCs in different Preferential Trade Agreements (PTAs) and Free Trade Agreements (FTAs) to enhance the trade & investment flows with them, however, there was no generalised preferential scheme for all the LDCs.

### WTO - Duty Free Quota Free (DFQF) Access for LDCs

The Decision to provide Duty Free Quota Free (DFQF) access for LDCs is one of the significant outcomes of the WTO Hong Kong Ministerial Meeting, held in December 2005. This decision as given in Annex F of the Hong Kong Ministerial Declaration *inter alia* requires all developed-country Members, and *developing-country Members declaring themselves in a position to do so*, to:

- (a) Provide duty-free and quota-free market access on a lasting basis, for all products originating from all LDCs by 2008 or no later than

### India's Announcement of DFTP Scheme on

8th April 2008

India Africa Forum Summit, New Delhi

*"We recognize the crucial importance of market access in ensuring the development dimension of international trade. Accordingly, I am happy to announce a Duty Free Tariff Preference Scheme for Least Developed Countries on the occasion of this Summit. Under this Scheme, India shall unilaterally provide preferential market access for exports from all 50 least developed countries, 34 of which are in Africa. The Scheme will cover 94% of India's total tariff lines. Specifically, it will provide preferential market access on tariff lines that comprise 92.5% of global exports of all LDCs. Products of immediate interest to Africa which are covered include cotton, cocoa, aluminium ores, copper ores, cashew nuts, cane sugar, ready-made garments, fish fillets and non-industrial diamonds."*

Dr. Manmohan Singh

Prime Minister of India

the start of the implementation period in a manner that ensures stability, security and predictability;

- (b) Members facing difficulties should provide market access for at least 97 per cent of products originating from LDCs defined at the tariff line level, by 2008 or no later than the start of the implementation period. In addition, these Members shall take steps to progressively achieve compliance with the obligations set out above, taking into account the impact on other developing countries at similar levels of development, and, as appropriate, by incrementally building on the initial list of covered products;
- (c) Developing-country Members are permitted to phase in their commitments and shall enjoy appropriate flexibility in coverage;
- (d) Preferential rules of origin applicable to imports from LDCs are required to be transparent and simple, and contribute to facilitating market access.

### India's Duty Free Tariff Preference Scheme

#### Objective:

While recognising the fact that the LDC Members are required to be given tariff preferences to improve their trading opportunities and use it as a tool for their development, India has announced the Duty Free Tariff

Preference (DFTP) Scheme for all the LDCs. Though undertaken unilaterally, it is in line with the decision taken in the World Trade Organisation's (WTO's) Hong Kong Ministerial Declaration of December, 2005.

The objective of this Scheme is to grant tariff preferences on the exports of products originating in the LDCs on imports to India.

**Country coverage:**

The Scheme is open to all the LDC members (a total of 50, including 34 LDCs in Africa), named as "Beneficiary Country" under the Scheme. The complete list of Beneficiary Country is at Annex-I.

The Scheme provides that in order to get covered under this Scheme as a Beneficiary Country, the individual LDC members shall be required to give a Letter of Intent to the Government of India that they wish to be covered under this Scheme and that they would comply with the provisions of this Scheme.

**Modalities for Tariff Preferences:**

Barring 326 tariff lines which are in the Exclusion List (no tariff preference are available), the Scheme provides for the following categories under which tariff preferences would be available on the products that are originating in the Beneficiary Countries :

3

Therefore, under this Scheme India provides preferential market access on 94% of total tariff lines and only 6% of the total tariff lines remain in the Exclusion List on which no preferential duty access would be granted.

It is noteworthy that these lines account for 92.5% of LDC's global exports. Products of immediate interest to LDCs, especially African LDCs which are covered under this Scheme include cotton, cocoa, aluminium ores, copper ores, cashew nuts, cane sugar, readymade garments, fish fillets and non-industrial diamonds.

**Rules of Origin: -**

For products to be eligible for tariff preferences, a product must be originating in the Beneficiary Country as prescribed under the Rules of Origin which is an integral part of the Scheme. To enjoy tariff preference, a product has to be classified as originating in the Beneficiary Country under:

- (a) Wholly produced or obtained category; or
- (b) Not wholly produced or obtained category.

Preferential concessions shall be granted if the consignments are supported by a DFTP Certificate of Origin prescribed thereunder. The Certificate of Origin is required to be issued by a Government authority designated by the exporting Beneficiary Country.

5

**Consultation:**

The Scheme stipulates that Government of India will accord sympathetic consideration to and will afford adequate opportunity for consultations on the representations made by the Beneficiary Country with respect to any matter affecting the operation of this Scheme.

**Suspension of Preferences and Preferential Safeguard Measures:**

Tariff preference on a product or all products originating from a Beneficiary Country can be suspended under certain circumstances like fraud, irregularities or misuse of the Scheme or if a Beneficiary Country graduates from the category of LDC. Preferential Safeguard Measures can also be taken if due to increase in preferential imports the domestic industry faces serious difficulties. However, it provides that adequate notice is to be given to the Beneficiary Country before taking any Preferential Safeguard Measures.

**Contact Point in Government of India**

For any enquiry about this Scheme, the following may be contacted:

Shri Amarendra Khatua  
Joint Secretary  
Department of Commerce  
Udyog Bhawan  
New Delhi-110011

Telephone: 00 91 11 23061664  
Fax: 00 91 11 23063418  
Email: a.khatua@nic.in

\*\*\*\*  
7

(i) **Duty Free List :** On 85% of the tariff lines (at 6-digit India would gradually remove its duties over a period

(ii) **Positive List:** In addition to the 85% of its tariff lines, I grant preferential market access on 468 products (at 6-digit as per the prescribed margin of preference (MoP) (with MoP of 48%). The MoP would be available on the app duty as on date of imports. The MoP ranges from 10% different items.

These tariff preferences would be available from the beg of this Scheme.

**Product & Trade Coverage:**

The product coverage in different categories is as follows:

Category	No. of items at 6-digit HS level	Percentag total tariff (at 6-digit)
Duty Free List	4430	
Positive List	468	
Exclusion List	326	
Total	5224	

4

The Beneficiary Countries are required to submit the names and addresses of their respective issuing authorities well in advance so that their export consignments can enjoy tariff preferences upon imports to India.

**Technical Assistance:**

The Scheme states that the Government of India would provide technical assistance to the beneficiary countries, as appropriate, for effective implementation of this Scheme.

**National Nodal Points:**

Each Beneficiary Country is required to designate a National Nodal Point to facilitate communications between the Government of India and the Beneficiary Country on any matter covered by the Scheme and such nodal points are to be notified to the Government of India.

**Effectivity of the Scheme:**

The Scheme will be available to only those LDC Members who will submit their Letter of Intent to the Department of Commerce, Government of India. An indicative sample of the Letter of Intent is placed at Annex-II.

6

**Annex - I**

**LEAST DEVELOPED COUNTRIES**

**Africa**

- |                             |                         |                     |
|-----------------------------|-------------------------|---------------------|
| 1. Angola                   | 20. Mali                | 38. East Timor      |
| 2. Benin                    | 21. Mauritania          | 39. Kiribati        |
| 3. Burkina Faso             | 22. Mozambique          | 40. Lao PDR         |
| 4. Burundi                  | 23. Niger               | 41. Maldives        |
| 5. Central African Republic | 24. Rwanda              | 42. Myanmar         |
| 6. Chad                     | 25. Sao Tome & Principe | 43. Nepal           |
| 7. Comoros                  | 26. Senegal             | 44. Samoa           |
| 8. DR of Congo              | 27. Sierra Leone        | 45. Solomon Islands |
| 9. Djibouti                 | 28. Somalia             | 46. Tuvalu          |
| 10. Equatorial Guinea       | 29. Sudan               | 47. Vanuatu         |
| 11. Eritrea                 | 30. Togo                | 48. Yemen           |
| 12. Ethiopia                | 31. Uganda              | <b>Americas</b>     |
| 13. Gambia                  | 32. Tanzania            | 49. Haiti           |
| 14. Guinea                  | 33. Zambia              |                     |
| 15. Guinea-Bissau           | <b>Asia</b>             |                     |
| 16. Lesotho                 | 34. Afghanistan         |                     |
| 17. Liberia                 | 35. Bangladesh          |                     |
| 18. Madagascar              | 36. Bhutan              |                     |
| 19. Malawi                  | 37. Cambodia            |                     |

9



**Annex – II**

**Letter of Intent  
(Indicative Sample)**

To,

The Department of Commerce  
Government of India  
New Delhi-110011

This is with reference to India's Duty Free Tariff Preference Scheme for Least Developed Countries, which prescribes that in order to enjoy the tariff preference under this Scheme the individual LDC member is required to give a Letter of Intent to the Government of India for becoming a Beneficiary Country.

In pursuant to Article 15 of the Scheme the Government of \_\_\_\_\_ (name of the beneficiary country) submits this Letter of Intent for being covered under this Scheme.

The Government of \_\_\_\_\_ ( name of the beneficiary country) also undertakes that it would comply with the provisions of the Duty Free Tariff Preference Scheme for Least Developed Countries.

(Seal of the Government of the beneficiary country)

Date:

Place:

## Annex 14

### Annex F of the Hong Kong Ministerial Declaration

The portions highlighted below provided the conditions for the Indian DFTP given at Annex 11.

#### Annex F

#### Special and Differential Treatment

#### LDC Agreement-specific Proposals

#### 23) Understanding in Respect of Waivers of Obligations under the GATT 1994

- (i) We agree that requests for waivers by least-developed country Members under Article IX of the WTO Agreement and the Understanding in respect of Waivers of Obligations under the GATT 1994 shall be given positive consideration and a decision taken within 60 days.
- (ii) When considering requests for waivers by other Members exclusively in favour of least-developed country Members, we agree that a decision shall be taken within 60 days or in exceptional circumstances as expeditiously as possible thereafter, without prejudice to the rights of other Members.

#### 36) Decision on Measures in Favour of Least-Developed Countries

We agree that developed-country Members shall, and developing-country Members declaring themselves in a position to do so should:

- (a) (i) Provide duty-free and quota-free market access on a lasting basis, for all products originating from all LDCs by 2008 or no later than the start of the implementation period in a manner that ensures stability, security and predictability.
  - (ii) Members facing difficulties at this time to provide market access as set out above shall provide duty-free and quota-free market access for at least 97 per cent of products originating from LDCs, defined at the tariff line level, by 2008 or no later than the start of the implementation period. In addition, these Members shall take steps to progressively achieve compliance with the obligations set out above, taking into account the impact on other developing countries at similar levels of development, and, as appropriate, by incrementally building on the initial list of covered products.
  - (iii) Developing-country Members shall be permitted to phase in their commitments and shall enjoy appropriate flexibility in coverage.
- (b) Ensure that preferential rules of origin applicable to imports from LDCs are transparent and simple, and contribute to facilitating market access.

Members shall notify the implementation of the schemes adopted under this decision every year to the Committee on Trade and Development. The Committee on Trade and Development shall annually review the steps taken to provide duty-free and quota-free market access to the LDCs and report to the General Council for appropriate action.

We urge all donors and relevant international institutions to increase financial and technical support aimed at the diversification of LDC economies, while providing additional financial and technical assistance through appropriate delivery mechanisms to meet their implementation obligations, including fulfilling SPS and TBT requirements, and to assist them in managing their

adjustment processes, including those necessary to face the results of MFN multilateral trade liberalisation.

### **38) Decision on Measures in Favour of Least-Developed Countries**

It is reaffirmed that least-developed country Members will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial or trade needs, or their administrative and institutional capacities.

Within the context of coherence arrangements with other international institutions, we urge donors, multilateral agencies and international financial institutions to coordinate their work to ensure that LDCs are not subjected to conditionalities on loans, grants and official development assistance that are inconsistent with their rights and obligations under the WTO Agreements.

### **84) Agreement on Trade-Related Investment Measures**

LDCs shall be allowed to maintain on a temporary basis existing measures that deviate from their obligations under the TRIMs Agreement. For this purpose, LDCs shall notify the Council for Trade in Goods (CTG) of such measures within two years, starting 30 days after the date of this declaration. LDCs will be allowed to maintain these existing measures until the end of a new transition period, lasting seven years. This transition period may be extended by the CTG under the existing procedures set out in the TRIMs Agreement, taking into account the individual financial, trade, and development needs of the Member in question.

LDCs shall also be allowed to introduce new measures that deviate from their obligations under the TRIMs Agreement. These new TRIMs shall be notified to the CTG no later than six months after their adoption. The CTG shall give positive consideration to such notifications, taking into account the individual financial, trade, and development needs of the Member in question. The duration of these measures will not exceed five years, renewable subject to review and decision by the CTG.

Any measures incompatible with the TRIMs Agreement and adopted under this decision shall be phased out by year 2020.

### **88) Decision on Measures in Favour of Least-Developed Countries–Paragraph 1**

Least-developed country Members, whilst reaffirming their commitment to the fundamental principles of the WTO and relevant provisions of GATT 1994, and while complying with the general rules set out in the aforesaid instruments, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, and their administrative and institutional capabilities. Should a least-developed country Member find that it is not in a position to comply with a specific obligation or commitment on these grounds, it shall bring the matter to the attention of the General Council for examination and appropriate action.

We agree that the implementation by LDCs of their obligations or commitments will require further technical and financial support directly related to the nature and scope of such obligations or commitments, and direct the WTO to coordinate its efforts with donors and relevant agencies to significantly increase aid for trade-related technical assistance and capacity building.

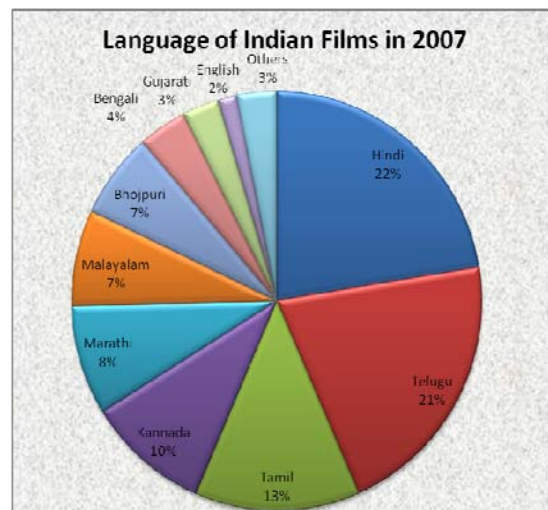
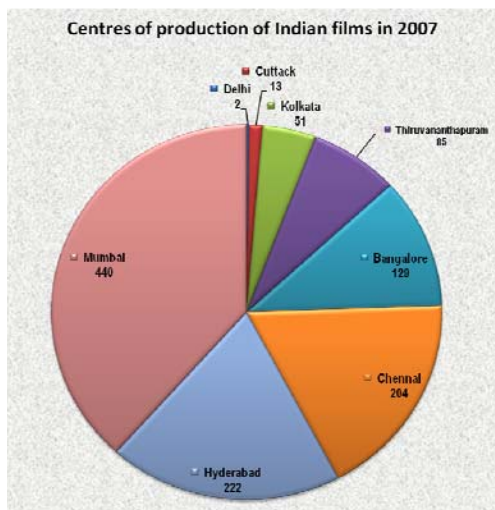
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## Annex 15 Centre-wise, language wise distribution of films released in 2007<sup>101</sup>

Number of films released in 2007

Language	Mumbai	Kolkatta	Chennai	Bangalore	Thiruvananthapuram	Hyderabad	Delhi	Cuttack	Total
Hindi	186		18	5	1	45	2		257
Tamil	4		131	2	2	10			149
Telugu	17		53	8	13	150			241
Malayalam			1	2	67	15			86
Kannada				111					111
Benagali	3	39						2	44
Gujarati	33								33
Marathi	97								97
English	12		1		1	2			16
Oriya		6						11	17
Chattisgarh									0
Rajasthani	2								2
Bhojpuri	75	1							76
Punjabi	5								5
Harayanvi	2								2
Angika	1								1
Kortha	1	1							2
Manipuri		1							1
Santhali		3							3
Maithili	1								1
Nepali	1			1					2
Tulu					1				1
<b>Total</b>	<b>440</b>	<b>51</b>	<b>204</b>	<b>129</b>	<b>85</b>	<b>222</b>	<b>2</b>	<b>13</b>	<b>1146</b>

The charts below attempt to show the same information differently.



The interesting point to be noted in this regard is that though as a single centre, Mumbai is the largest producer of films in all languages taken together, the five other major centres of Chennai (Madras), Hyderabad, Bangalore, Thiruvananthapuram and Kolkata together produced 60% of the total feature films produced in 2007. Mumbai has also become the home of a new genre of films in the language Bhojpuri, which is spoken the largest set of migrant population in Mumbai itself. In addition, it is also the home of both Marathi and Gujarati <sup>102</sup>cinema.

<sup>101</sup> Page 103 of the PwC – FICCI Report of 2008

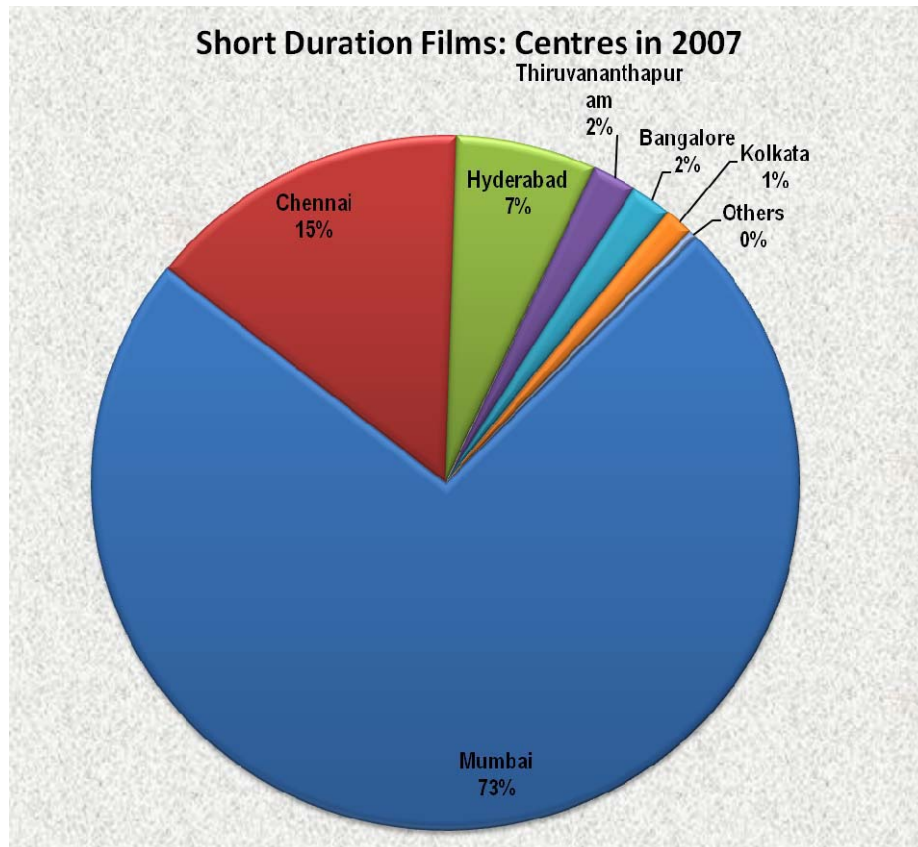
<sup>102</sup> These are languages spoken in the Western states of Maharashtra and Gujarat

Annex 16

**Centre-wise, genre-wise number of short films released in India in 2007<sup>103</sup>**

Number of short films released in 2007

Classification	Mumbai	Kolkatta	Chennai	Bangalore	Thiruvananthapuram	Hyderabad	Delhi	Cuttack	Guwahati	Total
Trailer	305	14	64	7	6	35		3		434
Advertisement	900	5	202	22	25	44				1198
Others	53									55
Documentary	99	2			4	38				143
News Reel	4					3				7
News Magazine	3									3
Educational	5			6				3		7
Short Feature		4	12		2					18
Children's Film			1		1					2
Promo							1			1
<b>Total</b>	<b>1369</b>	<b>25</b>	<b>279</b>	<b>35</b>	<b>38</b>	<b>120</b>	<b>1</b>	<b>6</b>	<b>-</b>	<b>1873</b>

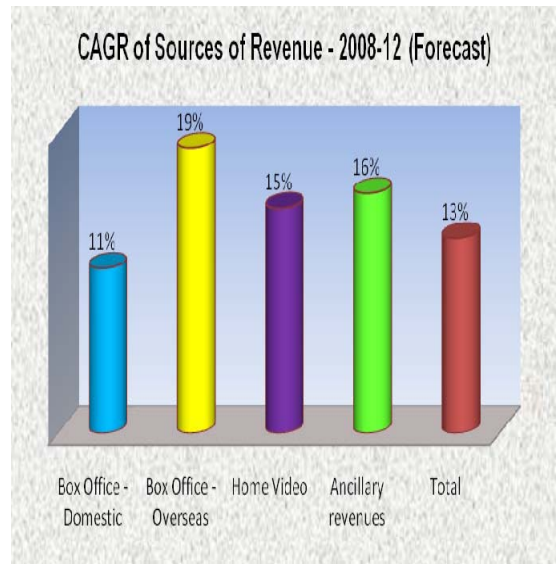
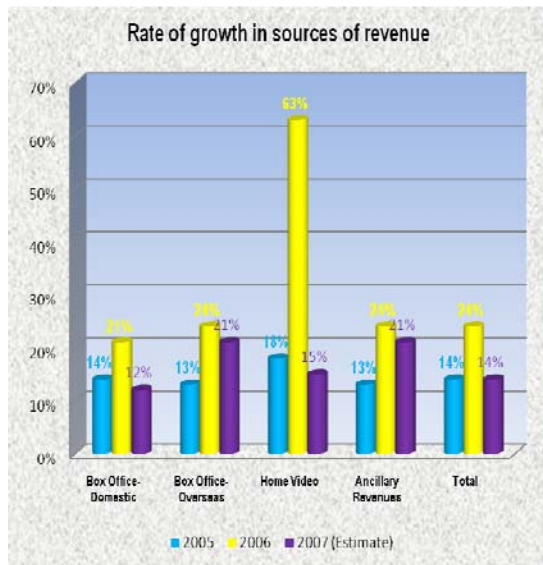
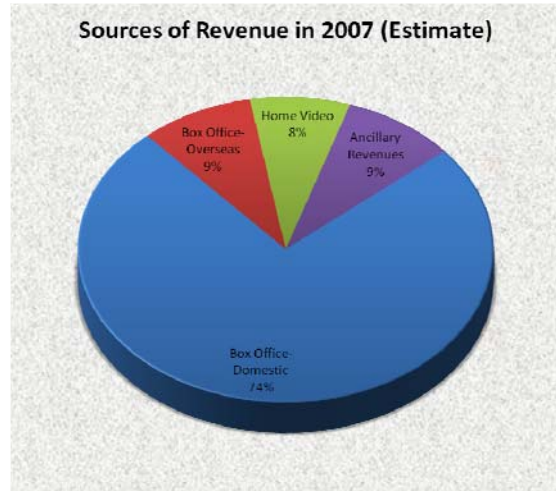
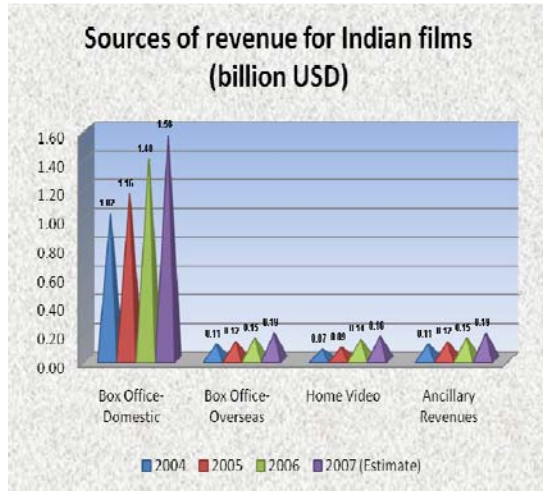


The predominance of Mumbai in this genre of films is substantially explained by the fact that the largest sub-genre is that of advertisement films would draw its clientele from business activity and Mumbai is the financial and business capital of India. In addition, with the largest film industry in the country being based out of Mumbai, the sub-genre of Trailers would also be a natural corollary.

<sup>103</sup> Page 105 of the PwC – FICCI Report of 2008

Annex 17

Sources of Revenue and Growth trends

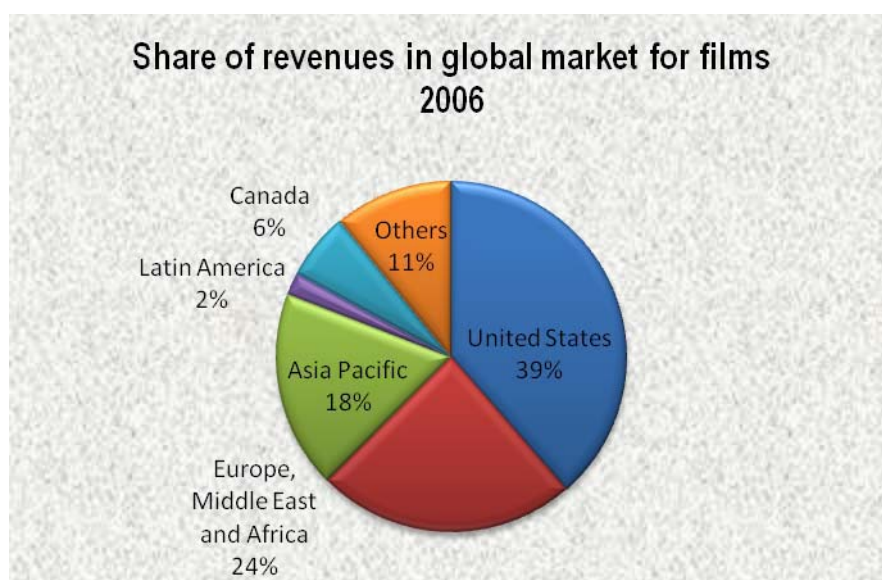


Annex 18

Global filmed entertainment market<sup>104</sup>

Region	2002	2003	2004	2005	2006p	2007	2008	2009	2010	2011	2007-11 CAGR
United States	31,703	32,297	34,971	34,235	35,195	35,731	39,257	29,999	41,877	44,000	
% Change	9.5	5.0	5.0	-2.1	2.8	4.4	4.2	4.3	5.0	5.1	4.6
EMEA	19,789	21,278	23,228	21,944	21,874	22,128	22,895	23,992	25,318	26,677	
% Change	16.9	7.6	9.2	-5.5	-0.3	1.2	3.4	4.9	5.5	5.4	4.0
Asia Pacific	13,614	14,537	15,528	15,498	16,864	17,604	18,765	20,167	21,808	23,145	
% Change	4.7	6.9	6.9	-0.2	7.5	5.8	8.8	7.5	7.1	7.1	6.8
Latin America	1,443	1,549	1,765	1,741	1,871	1,994	2,125	2,271	2,420	2,574	
% Change	9.7	7.3	13.9	-1.4	7.5	6.8	6.8	6.9	6.8	6.4	6.6
Canada	4,160	4,925	5,519	5,507	5,845	5,928	8,088	6,328	6,597	6,967	
% Change	33.3	18.0	14.4	-0.2	2.5	3.2	4.2	4.3	4.1	4.3	4.0
Total	70,639	75,498	81,009	79,923	91,239	84,291	88,110	92,645	97,910	103,213	
% Change	11.6	6.9	7.3	-2.6	2.9	3.9	4.5	5.1	5.8	5.8	4.9

(In million USD)



<sup>104</sup> Page 111 of the PwC – FICCI Report of 2008

## Annex 19

### *New trends in the Indian Film industry*

The Indian film industry is not a static or inward looking industry. In fact, it is constantly seeking to find its own solutions to its problems, be it piracy or financial constraints or whatever. There are many forward looking approaches adopted by the industry over the years. On the technology front, adoption of digital cinema technology makes for an opportunity to make high technical quality cinema. The financing innovations have included co-branding and merchandising with fashion, furniture, jewellery and other consumer brands. Market for more rights has been explored and now Re-make rights, merchandising rights and Internet rights offer more varied revenue streams. Market for music rights, under constant threat of piracy, has been seeing resurgence of late. The market for film rentals is also seeing entry of organised business in addition to the corner and neighbourhood rental shops.

One of the most prominent innovations has been adoption of a slew of strategies to counter piracy. First and foremost has been the adoption of multi-screen releases of new films. The effort to seek Silver Jubilee (25 weeks) and Golden Jubilee (50 weeks) runs, which had ended due to piracy, has been well and truly consigned to the backburner. What is now attempted is a blockbuster release with most of the box-office collections being made in the first week if not the first weekend. Integral to this strategy are the increasing number of multiple screen movie complexes. If such cinema houses are located in shopping malls, the synergies created include shopping, eating out and cinema and draws families back to cinema houses. DVD/VCD releases come quickly enough followed by TV premiers within 3-4 months of the screen release.

An added feature is addition of editor's cuts in DVD/VCD releases as well as on TV. Further to this is the emergence of a sell-through market which has brought about reduction in price of DVDs and VCDs to only a small margin above the price charged by the pirate. At less than 1 USD, it is today possible to buy legitimate copies of good, albeit a bit old, movie titles. In addition to this tactic, the 'Long Tail' is also being targeted through online sales by many of the large owners of film titles.



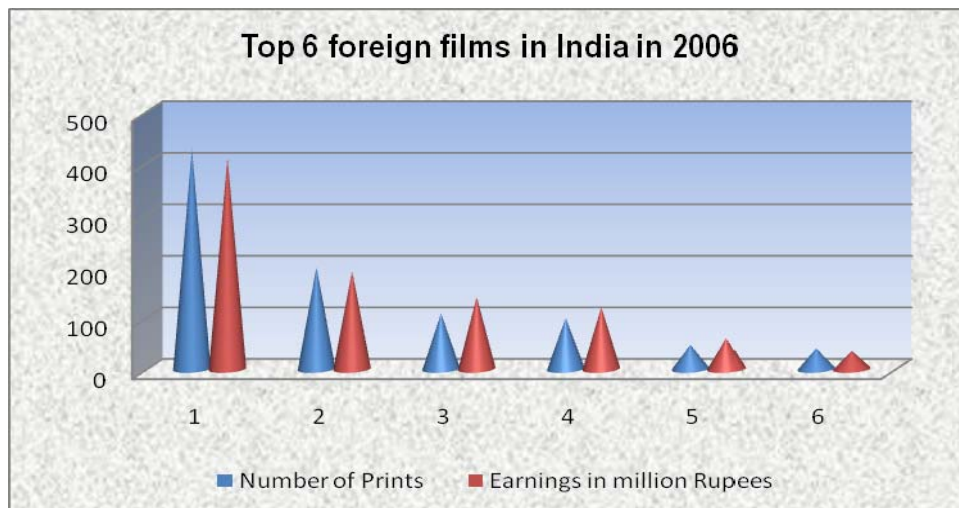
## Annex 20 Top foreign film earners in India in 2006<sup>105</sup>

Another interesting detail relates to the 2006 top grossing foreign films. The figures quoted by the PwC report for 2007<sup>106</sup> are as follows:

### Top Foreign Films in 2006

Title	No. of Prints	Release Date	Estimated Gross Box Office Collections (Rs. million)
Casino Royale	427	17-Nov-06	410
Pirates of the Caribbean-2	198	21-Jul-06	190
The Da Vinci Code	108	26-May-06	140
The Chronicles of Narnia	99	26-Jan-06	120
Underworld Evolution	47	7-Apr-06	60
House of Flying Daggers	40	8-sep-2006	35

Source: Industry estimates



The collection by the top-grosser, with an average ticket price of Rs. 100 per ticket, translates into 4.1 million viewers – a very large number. The foreign competition is not likely to reduce as the number of English speaking people increases and as awareness of cultural goods from the West also increases. Thus, the inroad into the Indian market by foreign films, especially the Hollywood movies, is on the rise. The earning from the Indian market for the top-grossing foreign film of 2006 is more than most of the Indian movies which were declared 'Hits' during the year. However, if the earnings per print are considered then the smallest earner in the list with the smallest number of prints released earned the highest at INR 1.14 million per print. This may be an indication that the ease of cultural identification scores over the overall glitz. Another aspect of interest is that the top grossing film had chosen to release more than 400 prints in the Indian market, which is not a top earner for this genre, whereas Indian films do not exceed 250 prints by most counts in the overseas markets.

<sup>105</sup> Page 80 of the PwC – FICCI Report of 2007

<sup>106</sup> The Indian Entertainment and Media Industries – A growth story unfolds, 2007, PricewaterhouseCoopers-FICCI Report, 2007, See Annex 14 B

## E&Y taxonomy of the texture of global market for Indian content<sup>107</sup>

Table 2 – The texture of the global market for Indian content

	Market 1	Market 2	Market 3
Markets	US, Canada	UK, Ireland	Middle East(Dubai, UAE) Middle East(Dubai, UAE)
Major Target Audiences	Diaspora	Diaspora	Diaspora (mainly from Kerala, Tamil Nadu) and some locals for Hindi content
Issues	Unknown markets, Niche markets, Expensive to launch, distribute and market	Unknown markets, Niche markets, Expensive to launch, distribute and market	Piracy, Strict laws for content
Why they like Indian content?	Cultural connect	Cultural connect	Cultural connect
Preferred Languages	English, Telugu, Tamil, Hindi	Hindi, English	Malayalam, Hindi, Tamil
Past Successes	<i>Kabhie Alvida Na Kehna, Kabhie Khushie Kabhie Gham, Veer Zaara</i> have been the 3 biggest revenue earners amongst Hindi films . Zee TV, Sony TV ETV, Sun TV	<i>Kabhi Alvida Naa Kehna</i> in films. Zee TV and Sony TV	Asianet

	Market 4	Market 5	Market 6
Markets	South Asian countries I (Pakistan, Bangladesh, Afghanistan)	South Asian countries II Sri Lanka, Singapore, Malaysia	Other European nations like France, Spain, Poland, Germany and rest of the world like Japan, Korea, China, Brazil
Major Target Audiences	Locals	Locals, Diaspora, Tamil natives	Locals
Issues	Piracy, Unorganised markets	Piracy Unorganised markets	Unknown market potential, Fewer numbers of target audiences Unknown markets, Expensive distribution and marketing
Why they like Indian content?	Socio- economic relevance, cultural closeness, lack of a robust local industry	Socio- economic relevance, cultural closeness, lack of a robust local industry	Exotica, Entertainment, Songs and Dance
Preferred Languages	Hindi	Tamil, Hindi and other languages have to be dubbed	Hindi, Tamil and other languages also Subtitles required.
Past Successes	Serials <i>Heena</i> and <i>Jassi Jaisi Koi Nahin</i> in Afghanistan, Almost all the box office hits from India	Most Tamil box office hits, Balaji Telefilms' serials in Sri Lanka, Radaan's <i>Chiti</i> .	<i>Kabhie Khushi Kabhie Gham</i> in Poland, Rajnikant's movies in Japan

Source – E&Y analysis based on interviews

<sup>107</sup> Page 8 of the E&Y – FICCI Report "Indian Content On The Move".

Annex 22

**Exemptions on Most Favoured Nation condition taken and Schedule of Commitments made by a sample of developing and developed countries including India**

**MFN Exemptions in Audio-Visual Services**

**India**

Sector or subsector	Description of measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Audio-Visual Services	Measures which define norms for co-production of motion pictures and television programmes with foreign countries and grant national treatment to motion pictures and television programmes co-produced with foreign countries which maintain a co-production agreement with India.	All countries	Indefinite	The agreements aim at the promotion of cultural exchange.

**Australia – MFN Exemptions**

Sector Sub Sector	Description / inconsistency with Art. II	Countries to which measures applies	Intended Duration	Conditions Creating need for exemption
Audio-Visual Services	Under the Australian Government co-production programme, Australia maintains preferential co-production arrangements for film and television productions. Official co-production status, which may be granted to a co-production produced under these co-production arrangements, confers national treatment on works covered by these arrangements, including in respect to finance and tax concessions and simplified requirements for the temporary entry of skilled personnel into Australia for the purposes of the co-production.	Italy, U.K., Canada, France and any other country where cultural cooperation might be desirable and which is prepared to exchange preferential treatment on the terms and conditions specified in the Australian co-production programme.	Indefinite	To promote collaborative efforts between Australia and foreign film producers and general cultural links.

**Brazil – MFN Exemptions**

Sector Sub Sector	Description / inconsistency with Art. II	Countries to which measure applies	Intended Duration	Condition Creating need for exemption
Audio-Visual/ motion pictures and video tape production	Measures which define norms for co-production of motion pictures with foreign countries and grant national treatment to motion pictures co-produced with foreign countries which maintain a co-production agreement with Brazil. <i>Motion pictures produced outside the scope of such agreements are not entitled to national treatment.</i>	All countries	Indefinite	These agreements aim at the promotion of cultural exchange and the establishment of mechanisms to facilitate access to financial resources.

**Canada – MFN Exemptions**

<b>Sector</b>	<b>Sub Sector</b>	<b>Description / inconsistency with Art. II</b>	<b>Countries to which measure applies</b>	<b>Intended Duration</b>	<b>Condition Creating need for exemption</b>
<b>Films, Video and Television programming</b>	<b>Co. production</b>	Differential treatment is accorded to works co-produced with person of other countries with which Canada may have arrangements or arrangements, as well as to natural persons engaged in such co production.	All Countries	Indeterminate	For reasons of cultural policy, including to improve the availability of Canadian audio-visual productions in Canada, <i>to promote greater diversity among foreign audio-visual works on the Canadian market</i> , as well as to promote the international exchange of audio-visual works.
<b>Films Video and Television programming</b>	<b>Co. production and Distribution</b>	Differential treatment is accorded to works co-produced with persons of other countries with which Quebec may have co-production agreements or arrangements and to natural and juridical persons engaged in film and video production and distribution pursuant to bilateral arrangements for the distribution of film, video and television programming in its territory.	All Countries	Indeterminate	For reasons of cultural policy, including to improve the availability of Quebecois audio-visual productions in Quebec, to promote greater diversity among foreign audio-visual works on the Quebec market, and to promote the international exchange of audio-visual works, as well as ensure that Quebec distributors have improved access to films originating from all parts of the world, while allowing partners in film distribution arrangements to continue to distribute in Quebec films for which they are recognized as the producers of the holders of the world distribution rights.

**China, Japan and Singapore have no exemptions in Audiovisual Film Sector**

## Schedule of Commitments the Audiovisual Services

### India- Schedule of Commitments

Sector / Sub-sector	Limitations on National Treatment	Limitations on Market Access
02.D. Audiovisual Services a) Motion picture or video tape distribution services (CPC 96113)	1) Unbound	1) Unbound
	2) Unbound	2) Unbound
	3) Subject to the prescribed authority having certified that the motion picture has: a) won an award in any of the international film festivals notified by the Ministry of Information & Broadcasting, Government of India; or b) participated in any of the official sections of the notified international film festivals; or c) received good reviews in prestigious film journals notified by the Ministry of Information & Broadcasting, Government of India.	3) i) Only through representative offices which will be allowed to function as branches of companies incorporated outside India ii) Import of titles restricted to 100 per year
	4) Unbound except as indicated in the horizontal section	4) Unbound except as indicated in the horizontal section

### China – Schedule of Commitments

AV Sector / Sub Sector	Limitations on National Treatment	Limitations on Market Access
Videos including entertainment software (CPC 83202) and distribution services	1) None 2) None 3) Upon accession, foreign services suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in distribution of audio-visual products, <i>excluding motion pictures</i> , without prejudice to China's right to examine the content of audio and video products. 4) Unbound except as indicated in horizontal commitments.	1) None 2) None 3) None 4) Unbound except as indicated in horizontal commitments. Without prejudice to compliance with China's regulations on the administration of films, upon accession China will allow the importation of motion pictures for theatrical release on a revenue sharing basis and the number of such imports shall be 20 on an annual basis.
Cinema Theatre Services	1) None 2) None 3) Upon accession, foreign services suppliers will be permitted to construct and / or renovate cinema theatres with foreign investment no more than 49% 4) Unbound except as indicated in horizontal commitments.	1) None 2) None 3) None 4) Unbound except as indicated in horizontal commitments.

### Japan – Schedule of Commitments

AV Sector / Sub Sector	Limitations on National Treatment	Limitations on Market Access
Motion Pictures & Video Tape Production & Distribution Services	1) None 2) None 3) None except as indicated in Horizontal Commitments. 4) Unbound except as indicated in Horizontal Commitments	1) None 2) None 3) None 4) Unbound except as indicated in Horizontal Commitments.
Motion Picture Projection Services	1) Unbound 2) None 3) None except as indicated in Horizontal Commitments. 4) Unbound except as indicated in Horizontal Commitments.	1) Unbound 2) None 3) None 4) Unbound except as indicated in Horizontal Commitments.

### Singapore – Schedule of Commitments

AV Sector / Sub Sector	Limitations on National Treatment	Limitations on Market Access
i) The services covered are production, distribution, and public display of motion pictures, video recordings, except where excluded under ii) ii) All Broadcast Services and AV Services and materials that are broadcast are <b>excluded</b> , examples being free to air broadcasting, Cable and Play Television, Direct Broadcasting by satellite, Teletext, Value Added Network.	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section.	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section.

*Australia, Brazil and Canada have no commitments*

### The US Schedule of Commitments in Audiovisual Sector:

AV Sector/ Sub Sector	Limitations National Treatment	Limitations Market Access
Motion Picture & Video Tape Production & Distribution Services.	1) Grants from the National Endowment for the Arts are only available for US citizens or permanent residence alien status and non profit organizations. 2) None 3) Grants from the National Endowment for the Arts are only available for US citizens or permanent residence alien status and non profit organizations. 4) None	1) None 2) None 3) None 4) Unbound except as indicated in Horizontal Commitments.
Motion Picture Projection Services	1) None 2) None 3) None 4) None	1) None 2) None 3) None 4) Unbound except as indicated in Horizontal Commitments.

Despite its avowed liberal setup, the NT limitation of grants from the National Endowment of Arts only to US citizens or permanent residence aliens reveals an inbuilt bias in favour of non-commercial films in the said commitments. Such a provision also seems to be against the grain of the Convention in so far as the limitations do not seem to encourage any exercise in plurality and diversity.

**Annex 23**

**Brief analysis of requests made on India and made by India in GATS**

Since requests are made bilaterally, in interest of trade relations, the names of the countries involved have not been revealed. The details are authentic though.

<b>Sr. no.</b>	<b>Requests on India</b>	<b>Comments</b>	<b>Requests by India</b>	<b>Comments</b>
1.	Commitments to the current level of market opening in Modes 1-3	<i>This would leave no trade defence mechanisms left. The predominantly domestic orientation of the industry has not allowed development of institutions capable of managing the sector in face of commercial competition and cultural inflow. In addition the regulatory structures have not yet been tested under free trade regime.</i>	Liberal visa system to allow for meeting horizontal commitments as well as greater Mode 4 access	<i>Though visa systems are outside the realm of GATS, this is a very strong regulatory barrier and introduces major market access barriers.</i>
2.	Redefine the sector more broadly to include home entertainment	<i>The issue is not very clear. After all trade in optical disc medium is included for the purpose of defining the sector</i>	Take full commitments in respect of independent professionals delinking from Mode 3	<i>The proclivity to not allowing independent professionals access outside Mode 4 introduces inhibitions even to an otherwise open regime</i>
3.	Removal of MFN exemptions	<i>The co-production partners would lose the charm of Indian partnership. Also, the exemptions are not peculiar to India,</i>	Where existing, removal of mandatory requirement of local printing of films for distribution	<i>An unnecessary condition which might impose unwarranted cost on the film industry</i>

Sr. no.	Requests on India	Comments	Requests by India	Comments
		<i>rather they are echoed by a number of countries</i>		
4.	Removal of limit of 100 titles	<i>Under review by India. 300 titles in video format have been proposed to be allowed.</i>	Where existing, removal of mandatory requirement of commercial presence for distribution of motion pictures in celluloid and video formats	<i>Normally directed at unbound smaller developing country markets with interest in Indian films</i>
5.	Removal of restriction of office in India	<i>More commitment by the foreign company in the industry is sought by this condition. A reasonable concern for a developing country.</i>	Where existing, removal of requirement of hiring of local professional whenever a foreign professional is required for film-based activity in the host country	<i>Indian professionals have reasonable expertise, understand their industry better and are economical overall to hire.</i>
6.	Removal of the limitation of award winning films only	<i>This is to be tested under autonomous liberalisation regimes and should not be committed upfront.</i>	Greater horizontal commitments under Mode 4	<i>An area of interest to India with its large manpower of technical staff.</i>

The above table shows that the negotiation under a full market access, reciprocal system does not yield any significant benefits to India in view of the general reluctance on part of most countries to take commitments in the sector.



Annex 24

Taxonomy of Co-production Agreements of India with other countries

Countries		United Kingdom	Germany	Italian Republic	Brazil	France
Type of agreement		Approved Co-production Status	Audio-Visual Co-production	Audio-Visual Co-production	Audio-Visual Co-production	Co-operation in the field of Cinematography
Items						
1	<b>Objective</b>	Status granted to a film which grants appropriate film-making and cultural benefits to India and UK	Development of film industry and intensification of cultural and economic exchange between two countries. Good relations in co-production of films, TV and video productions	Development of audio-visual relations particularly for films, TV and video productions, expansion of film, TV and video production and develop better relations between the countries.	Enhance cooperation in audio-visual area, Expanding and facilitating co-production of audio-visual works for expansion of film, TV and video production and develop better relations between the countries.	Desirable for respective Cinematography industries, to encourage co-production of films and to develop exchange of films between two countries on commercial basis.
2	<b>Definition of the material produced</b>	Film includes any record, however made, of a sequence of visual images, with an expectation for theatrical release and public exhibition.	A project, irrespective of length, including animation and documentary productions, produced in any format, for exploitation in theatres, on TV, videocassette, videodisc, CD-ROM, DVD or any other form of distribution.	A project, including feature films, animation, documentary productions, science films, commercials, irrespective of length, for exploitation in cinemas, on TV, videocassette, or videodisc.	Any record, irrespective of length, made as a moving image, regardless of medium, for public exhibition. Includes films and video recordings, animation and documentary productions, for exploitation in theatres, on TV, DVD or any other form of distribution.	
3	<b>Coverage</b>	UK, India and EEA State (a State other than UK which is a contracting party to the Agreement on the European Economic Area)				
4	<b>Competent Authority</b>	Ministry of Information and Broadcasting in India and the Department for Culture, Media and Sport in UK	Ministry of Information and Broadcasting in India and Federal Office of Economics and Export Control (BAFA) in Germany	Ministry of Information and Broadcasting in India and Department of Entertainment and Sports, General Management of Cinema in Italy.	Ministry of Information and Broadcasting in India and Ministry of Culture in Brazil.	

Countries		United Kingdom	Germany	Italian Republic	Brazil	France
Type of agreement		Approved Co-production Status	Audio-Visual Co-production	Audio-Visual Co-production	Audio-Visual Co-production	Co-operation in the field of Cinematography
Items						
5	<b>Completion of production of a film</b>	When a film is first in a form in which copies can be made and distributed for presentation to the general public.				
	<b>Eligibility</b>	Must be approved by the Competent Authorities. Co-productions which have no finance-only contributions. Other criteria are listed below (No. 6 to 15)	Must be approved by the Competent Authorities. Other criteria are listed below ( No. 6 to 15)	Must be approved by the Competent Authorities. Other criteria are listed below ( No. 6 to 15)	Must be approved by the Competent Authorities. Other criteria are listed below ( No. 6 to 15)	Must be approved by the Competent Authorities. Other criteria are listed below ( No. 6 to 15)
6	<b>Nature of co-producers</b>	At least one UK and at least one Indian co-producer. Maximum number of co-producers is four unless otherwise agreed upon. No links between co-producers by common ownership. Offices and staff should be in the country where the co-producer is established. Third party co-producers (co-producers established in another State with which UK or India has entered into a co-production agreement) also need to meet these requirements.	Co-producers of a film shall have their principal office in the territory of one of the contracting party. No links between co-producers by common ownership, management or control. They must satisfy each other about competence, financial backing and professional reputation. Primary business of the company should be audio-visual.	They must satisfy each other about capability, financial backing and professional reputation.	Must be a National/ Citizen/ permanent resident of India or Brazil or entities which are established and/ or incorporated in India or Brazil. No links between co-producers by common ownership, management or control.	

Countries		United Kingdom	Germany	Italian Republic	Brazil	France
Type of agreement		Approved Co-production Status	Audio-Visual Co-production	Audio-Visual Co-production	Audio-Visual Co-production	Co-operation in the field of Cinematography
Items						
7	<b>Financial Contributions of co-producers</b>	Total financial contributions in both countries shall not be less than 20% and not more than 80%. Involvement of Third Party Co-producer is subject to different criteria.	Investment of finance, material, and management including creative and other inputs should not be below 20% of the total cost coming from the co-producer of one country. Promotional expenditures to be compensated within 2 years of completion of the project.	Investment of finance, material, and management including creative and other inputs should not be below 20% of the total cost coming from the co-producer of one country or as jointly decided by the co-producers. Co-producers shall pay any balance outstanding on his contribution to the other co-producer within sixty days of delivery of the material.	Investment of finance, material, and management including creative and other inputs should not be below 20% of the total cost coming from the co-producer of one country or as jointly decided by the co-producers.	Proportion of the contribution of both countries respectively may range from 30% to 70%, however with permission of the competent authorities, the part of the minor co-producer might be reduced to 20%.
8	<b>Film making contributions of co-producers</b>	Film making contribution benefiting a country shall be in proportion to the financial contribution of the co-producer established in that country.				
9	<b>Rights, revenues and receipts</b>	To be shared between the Party Co-producers in a manner previously agreed upon.		Sharing of revenues in proportion to the respective contributions and specified in the agreement between co-producers.		Distribution of receipts will be proportionate to the total amount paid by each of the co-producers.
10	<b>Content</b>	At least 90% of footage must have been specially shot for that film, unless agreed upon otherwise. Must not advocate violence, or be pornographic or offend human dignity.				

Countries		United Kingdom	Germany	Italian Republic	Brazil	France
Type of agreement		Approved Co-production Status	Audio-Visual Co-production	Audio-Visual Co-production	Audio-Visual Co-production	Co-operation in the field of Cinematography
Items						
11	<b>Language</b>	English, or any dialect in UK or any language or dialect of India, or an official language of a state in which co-producer is established. Subtitled or dubbed version in English or any Indian language or dialect.	Original soundtrack to be made in Hindi or any other Indian language or dialect, in English or German. A combination of languages is permitted. Dubbing or subtitling into one of the permitted languages.	Original soundtrack in English or Italian or Indian language or dialect, which can be dubbed/ sub-titled in any other of these languages.	Original soundtrack shall be made in Hindi or any other Indian language or dialect, or English or Portuguese or combination of the permitted languages. Dialogue in any other language can be included depending on script requirement. Dubbing or sub-titling into one of the permanent languages shall be carried out in India or Brazil.	
12	<b>Screen and Publicity Credits</b>	To be credited on screen as an Indian/ UK co-production or UK/India/Third Party/ Non-party Co-production	To be credited as "official Indian-German co-production" or "an official German-Indian co-production.	To be credited as "Italy-India Co-production" or "India-Italy Co-production".	To be credited as "Official Indian-Brazilian Co-production" or "Official Brazilian-Indian Co-production.	Credits, trailers and advertisement material of the jointly produced work must bear the mention of Indo-French Co-production.
13	<b>Location</b>	Where Party or Third Party Co-producers are established or jointly decide the proportion of the film to be made in the country of the co-producers establishment.	To be shot in India or Germany or as otherwise agreed upon.	Live action shooting and animation works, laboratory work, dubbing/ subtitling must be carried out in India or Italy. Location shooting in other countries is subject to prior agreement.	Competent Authorities may approve location shooting in a country other than the participating country.	Shooting should be preferably in the country of the major co-producer.
14	<b>Participants</b>	Individuals participating in the making of the film shall be nationals of UK or EEA or India or the country of establishment of the Third Party and must retain the status during the making of the film.	Nationals/ citizens/ permanent residents of India; Germans (within the meaning of Basic Law), persons rooted in German culture with legal residency in Federal Republic of Germany, nationals of EU, nationals of another party of EEA. Participants must retain the status during the making of the film.	Citizens or permanent residents of India and Italy; or European Union. If required persons other than citizens can be taken without losing the character of the co-production.	Nationals/ citizens/ permanent residents of India or Brazil or the third country co-producer. Participants must retain the status during the making of the film.	French or Indian Nationals, or people of other nationals if the script demands it with the approval of the competent authorities.

Countries		United Kingdom	Germany	Italian Republic	Brazil	France
Type of agreement		Approved Co-production Status	Audio-Visual Co-production	Audio-Visual Co-production	Audio-Visual Co-production	Co-operation in the field of Cinematography
Items						
15	<b>Other matters</b>	Specify dates about financial contributions, make provision for over-spending or under-spending, Respective copyrights entitlements, provisions for distribution of rights and revenues, make divisions between co-producers regarding territories and/or receipts from exploitation of the film (including export markets). Co-producers to be joint owners of the material and the first completed version of the film.	Two negatives, or at least one negative and one duplicate negative shall be made of each co-produced film. Further duplicates can be made by co-producers.	Two negatives, or at least one negative and one duplicate negative, with two international soundtracks for making copies shall be made of each co-produced film. With approval of other co-producers, either co-producer may use footage from the film for other purposes.	At least one negative and one duplicate negative shall be made of each co-produced film. Further duplicates can be made by co-producers.	Each co-producer is a co-proprietor of the master film print-cum-sound track and can inter-negative its own version.
16	<b>Benefits</b>	Each party shall permit temporary import and export, free import or export duties and taxes, of any equipment necessary for production of an Approved Co-production; entry and stay in Indian and UK during making or promotion of the film.	Entry into and temporary residence in the country for technical and artistic personnel of the other contracting party. Import into and export from its territory of technical and other film making equipment and materials by producers.	Entry into and short stay in the country for technical and artistic personnel of the other contracting party and importing of equipments in accordance with the applicable laws. No restrictions to be placed on import, distribution and exhibition of Indian film, Television and Video productions in Italy or vice-versa.	Entry into and temporary residence in the country for technical and artistic personnel of the other contracting party. Import into and export from its territory of technical and other film making equipment and materials by producers, transfer of funds destined for payments related to audio-visual co-productions.	Arrangements for the facilitation of travel and stay of the artistic and technical personnel. Import into and export from its territory of technical and other film making equipment and materials for production and distribution by producers.
17	<b>National Films Treatment</b>	Approved Co-production Films to be treated as National Films for the purpose of any benefits afforded in that country to national films.	Films produced under the agreement to be treated as National Films for the purpose of any benefits afforded in that country to national films.	Films produced under the agreement to be treated as National Films for the purpose of any benefits afforded in that country to national films.	An audio-visual co-production shall be treated as National Audio-visual work by both contracting parties and be entitled to benefits by respective national laws.	Full benefits reserved for national films to be accorded to the joint productions.

Countries		United Kingdom	Germany	Italian Republic	Brazil	France
Type of agreement		Approved Co-production Status	Audio-Visual Co-production	Audio-Visual Co-production	Audio-Visual Co-production	Co-operation in the field of Cinematography
Items				Benefits accrue to the producer from the country which grants them.		
18	<b>Entry in International Festivals</b>	Which party may claim credits at an international film festival will depend on the total financial contribution made by the co-producer, or that being equal, the nationality of the director of the film.	Majority of co-produced films to enter international film festivals. Films with equal contributions shall enter as a film of which director is a national, unless from EEA (in which case the leading actor's nationality will be considered).	Unless otherwise agreed, the majority investment co-producer shall present the film at international film festivals. Prizes will be shared by the co-producers.	Co-producers may enter the work into international film festivals. Works produced on the basis of equal contributions shall be entered as an Audiovisual work of the country from which the director is from.	Films will be entered as a co-production unless otherwise specified.
	<b>Exchange of films</b>					The Ministry of Information and Broadcasting will allow the yearly import of 20 French Films, dubbed or sub-titled in English or any Indian language. The French authorities will similarly allow the import of 20 Indian Films.

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

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

*Prepared by:*

**PROF. VERA THORSTENSEN**

*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.*

This report has been prepared in October 2008 at the request of UNESCO Secretariat for the second session of the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions. The author is responsible for the choice and the presentation of the facts contained in this Report and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization.



## Executive Summary

Article 16 provides that “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”.

The question to be analyzed is how to implement these preferential mechanisms in a way to facilitate cultural exchanges of people, goods and services. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter called “the Convention”), is a new international treaty with its rights and obligations, and is establishing new rules for cultural purposes in the international arena. However, the Convention can not be used in pure isolation. At the moment it claims for facilitation of cultural exchange, it enters into the domain of trade which has a system of rules negotiated in the last six decades.

In implementing its provisions related to preferential treatment, members of the Convention can opt between two different approaches. One is to negotiate its own rules for preferential treatment, disregarding limitations raised by the multilateral trading system. If conflicts arise, members can bring the case to WTO dispute settlement mechanism and, if necessary, solve the question in political terms, since the case involves conflict of international laws. The second approach is to negotiate cultural preferential treatment exploring all trade options already opened by developing countries in the trading system, and use all benefits already negotiated in the special and differential treatment for goods, services and people. But the Convention’s preferential treatment must not be limited by the WTO rules. There are many options to explore in areas where no international rules exist, or where WTO members decided to make no compromises. This is the case of services in the audiovisual and music sectors. A complementary alternative is to define the scope to be given to the Convention’s preferential treatment, and then bring the claims of the Convention to the WTO with the objective of negotiating a special waiver for trade of cultural goods and services. The waiver will offer the necessary certainty to traders and service suppliers that activities under this treatment will not be challenged in the trading system. This second alternative is the one chosen in this report.

Chapter B will examine the evolution of the concept of preferential treatment in the context of the multilateral trading system for goods and services, and how it evolves to the broader concept of special and differential treatment. It analyzes the specificities of preferential arrangements and regional agreements and the central issue of reciprocity. As all preferential treatment, it presents five features that are essential to the granting system: who can profit from the treatment (eligibility), what should be given in return (reciprocity), when beneficiaries have to leave the treatment (graduation), how to define the origin of goods and services contemplated (rules of origin), and what are the conditions required to receive the treatment (conditionality). One objective of this chapter is to show how cultural goods and services can profit from the existing mechanisms of the trading system to protect and promote cultural expressions. Other important objective is to show how cultural goods and services can profit either from the non existence of trade rules in some areas or from the existence of flexibilities in others to delimit the necessary space to make cultural exchanges. The conclusion of this analysis is clear: there are many mechanisms to be explored and a lot of space to make policy.

Chapter C will analyze the legal and institutional framework of a preferential arrangement among developing countries – Aladi and Mercosul. The idea is to explore how preferential treatment is granted, and to analyze the evolution of both regional trade policy and regional cultural policy, and how one benefits from the other.

Chapter D will examine the evolution of the most important cultural sector of the region - that of audiovisuals. The objective is to demonstrate how a regional policy is being developed for the sector and how preferential treatment is given to partners of the region or received from third partners abroad. The examples of co-production agreements on cinema in Mercosul and the cooperation agreement in negotiation with the EU are chosen to explore features of mechanisms that can be generalized by the Convention.

Chapter E will present some conclusions on how the Convention can explore the significant space given in the trading system to delimit its preferential mechanisms. It will also present how the Convention can explore the space created in some areas where trade rules are not yet defined.

### **Recommendations**

Recommendations are offered in different levels: i) mechanisms compatible with the rules of the WTO, also exploring the available space in areas where WTO has not yet defined rules; ii) mechanisms to be negotiated under regional or bilateral agreements, where parties can agree on rules for areas not covered by the WTO, exploring alternatives of cooperation and partnership.

**A. Introduction**

Preferential treatment, development cooperation and cultural diversity

**B. The concept of preferential treatment**

From preferential treatment to special and differential treatment

**C. The legal and institutional framework concerning preferential treatment granted to/by Brazil and to/by Mercosul**

**D. Analysis of existing agreements and preferential treatment mechanisms –**

A case study of the audiovisual sector in Brazil

**E. Conclusions and recommendations**

## **A. Introduction:**

### **Preferential treatment, development cooperation and cultural diversity**

It is important to stress some of the objectives of the Convention before exploring preferential mechanisms as instruments of cultural policy. These objectives are: to protect and promote the diversity of cultural expressions; to create conditions for cultures to flourish and to freely interact in a mutually beneficial manner; to encourage dialogue among cultures ensuring a balanced cultural exchange; to reaffirm the link between culture and development; and to reaffirm the sovereign right of states to maintain and implement policies for the protection and promotion of the diversity (Article 1). The Convention also reaffirms the sovereign right of the parties to formulate and implement their cultural policies and to adapt measures to protect and promote the diversity of cultural expressions (Article 5).

It is within this framework that Article 16 must be interpreted. Article 16 provides that: “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”.

The question to be analyzed here is how to implement these preferential mechanisms in a way to facilitate cultural exchanges of people, goods and services. The Convention is a new international treaty with its rights and obligations, and is establishing new rules for cultural purposes in the international arena. However, the Convention can not be used in pure isolation. At the moment it claims for facilitation of cultural exchange, it enters into the domain of trade which has a system of rules negotiated in the last six decades.

In implementing its provisions related to preferential treatment, members of the Convention can opt between two different approaches. One is to negotiate its own rules for preferential treatment, disregarding limitations raised by the multilateral trading system. If conflicts arise, members can bring the case to WTO dispute settlement mechanism and, if necessary, solve the question in political terms, since the case involves conflict of international laws. The second approach is to negotiate cultural preferential treatment exploring all trade options already opened by developing countries in the trading system, and use all benefits already negotiated in the special and differential treatment for goods, services and people. But the Convention’s preferential treatment must not be limited by the WTO rules. There are many options to explore in areas where no international rules exist, or where WTO members decided to make no compromises. This is the case of services in the audiovisual and music sectors. A complementary alternative is to define the scope to be given to the Convention’s preferential treatment, and then, bring the claims of the Convention to the WTO with the objective to negotiate a special waiver for the trade of cultural goods and services. The waiver will offer the necessary certainty to traders and service suppliers that activities under this treatment will not be challenged in the trading system. This second alternative is the one chosen in this report.

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services contemplated (rules of origin), and what are the conditions required to receive the treatment (conditionality). One objective of this chapter is to show how cultural goods and services can profit from the existing mechanisms of the trading system to protect and promote cultural expressions. Other important objective is to show how cultural goods and services can profit either from the non existence of trade rules in some areas or from the existence of flexibilities in others to delimit the necessary space to make cultural exchanges. The conclusion of this analysis is clear: there are many mechanisms to be explored and a lot of space to make policy.

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Chapter E will present some conclusions on how the Convention can explore the significant space given in the trading system to delimit its preferential mechanisms. It will also present how the Convention can explore the space created in some areas where trade rules are not yet defined.

## **B. The concept of preferential treatment:**

The concept of preferential treatment is one of the most complex concepts of the trading system. In the area of goods, it is related to the trade mechanism of tariff and tariff compromises and reflects development concerns. It can be applied among developed countries in a regional agreement (GATT Article XXIV), among developing countries (Enabling Clause) or granted by a developed country to a developing country (Enabling Clause). It can be negotiated as a reciprocal agreement among the parties (same rights and obligations) or granted as a non-reciprocal arrangement (unilateral approach). Historically, in the area of goods, the treatment to developing countries evolved to include flexibilities in the implementation of the rules, technical cooperation and capacity building granted by developed countries under the concept of special and differential treatment. In the Doha Round, members are negotiating another preferential scheme, the elimination of all tariffs and quotas on exports from LDCs.

In the area of services, concerns with development are included in the concept of increasing participation of developing countries (GATS Article IV) and economic integration involving developing countries (Article V). This treatment can be considered as the special and differential treatment of the services area. There is no concept of preferences for services. Agreements on services among parties are considered reciprocal ones, even when the conditions of liberalization are different. A proposal to grant non-reciprocal treatment to LDCs, as a special priority, is being discussed in the Doha Round.

In the context of Article 16 of the Convention, the concept of preferential treatment is a compromise from developed countries toward developing ones. In the present report, this orientation is preserved. The possibility of a developed country negotiating a preferential treatment to other developed country is not analyzed here.

Our task is to review the framework of the trade area, searching for mechanisms dealing with preferential treatment. The next step is to raise the question whether they can be applied as cultural preference mechanisms and how they have to be applied in a manner consistent with WTO rules. Another step is to identify areas where there are no trade rules to examine whether cultural preference mechanisms can be developed for these areas. A final question is whether it will be necessary to ask for a waiver in the WTO to apply preferences to trade on cultural goods and services.

## **1 - From preferential treatment to special and differential treatment**

The concept of preferential treatment in the multilateral system can be considered as a part of a broader concept, the concept of trade and development and the concept of special and differential treatment (S&D) granted by developed countries to developing countries. The first point introduced was related to infant industry. Article XVIII of GATT allows protective measures in the tariff structure for the establishment of a new industry in a developing country. In 1965, Part IV – Trade and Development was negotiated, reaffirming the need for a sustained expansion of export earnings for developing parties, and the need to provide more favorable conditions of access for manufactured products. The principle of non-reciprocity was established, with developed parties not expecting reciprocity for commitments made by developing parties in trade negotiations to reduce or remove tariffs and other barriers to trade. In 1979 a new legal framework was established to define and codify the rights and obligations of developing countries with the Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries - the Enabling Clause.

The Decision established that, notwithstanding the provision of Article I of the GATT (non-discrimination among nations), contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties. These provisions apply to: preferential tariff treatment by developed parties to products originating from developing countries, in accordance with the Generalized System of Preferences (generalized, non-reciprocal and non-discriminatory preferences); differential and more favorable treatment concerning non-tariff measures under the GATT; regional or global arrangement amongst developing parties for the reduction or elimination of tariffs and non-tariff measures on products imported from one another; special treatment of the least developed countries in the context of any general or specific measures in favour of developing countries. Developed countries do not expect reciprocity for commitments made by them in trade negotiations which are inconsistent with their individual, financial and trade needs.

In the 1980s, the concept of preference based on tariff reduction or elimination was expanded to include flexibilities in the implementation of the new non-tariff rules negotiated in the Tokyo Round. The debate about special and differential treatment (S&D) evolved as developing countries assume higher level of commitments within the system. During the Uruguay Round, with the inclusion of agriculture, services and intellectual property in the new organization, the WTO, a new set of S&D clauses was negotiated, again based in the best endeavored approach. However, the single undertaking principle forced developing countries to accept new commitments not only related to tariff bidding, but also new rules for several trade mechanisms.

Before the launching of the Doha Round, developing members engaged in a discussion about two important points: one on the implementation of the agreements already negotiated and the difficulties to implement new obligations including administrative and human costs; and second, the needed modifications to make these agreements more supportive of development.

The Doha Round, launched in the end of 2001, incorporated these discussions and its mandate included a review of the S&D provisions with the objective to strengthening them and making them more precise, effective and operational. The main proposal on the table is the negotiation of a new agreement to aggregate and to enforce all provisions related to S&D, with the transformation of the voluntary approach to a mandatory one. The Doha Mandate is clear in emphasizing S&D measures for all issues in negotiations.

In 2005, the Hong Kong Ministerial Declaration adopted a proposal granting to LDCs a quota-free and duty-free access to at least 97% of tariff lines. The Aid for Trade Initiative was also created to fully exploit the benefits of trade, with the understanding that developing countries also need to remove supply-side constraints and address structural weakness (domestic reform, trade facilitation, customs capacity, infrastructure, productive capacity and enlargement of domestic and regional markets).

In summary, inside the WTO, S&D measures include: provisions to increase trade opportunities to developing countries; provisions that require developed countries to safeguard the interests of developing countries; flexibility of commitments; action or use of policy mechanisms; longer transitional time periods; and technical assistance and special measures to assist least developed countries. They consist of 145 provisions, 107 already adopted in the Uruguay Round (WTO Secretariat, WT/COMTD/W/77, 2000).

### **Subsidies**

In the area of goods, S&D in the Agreement on Subsidies has an important role to play in the discussion of preferential treatment in the multilateral system and in the cultural diversity area. WTO Agreement on Subsidies provides rules to regulate the granting of subsidies to the production of goods in a way not to distort trade among members. Subsidies include financial contributions, grants, loans and revenue forgone from governments and conferring a benefit to the recipient. It classifies subsidies as prohibited (contingent on exports) and actionable (subject to a countervailing measure) and the remedies to be applied if applied subsidies are considered not complying with the rules. It is important to emphasize that non-actionable subsidies (green subsidies) are no longer permitted. Article 27 establishes provisions on special and differential treatment for developing countries, accepting that subsidies may play an important role in economic development.

The discussion on the application of WTO subsidies rules to the cultural area is relevant, since subsidies are common mechanism of support in the production and distribution of cultural goods. However, it is important to evaluate that as soon as they reach the trade area, WTO rules could be applied, limiting the scope of the cultural mechanisms. It must be also mentioned that if there are limitations in the goods area, subsidies in the service area are not yet negotiated, offering more flexibility to preferential treatment.

### **S&D in the Agreement on Services**

The multilateral negotiation of rules in services is today the most important area impacting the cultural diversity discussion. Article II of GATS establishes that each member shall accord immediately and unconditionally to services and services suppliers of any other member treatment no less favorable than that it accords to like services and services suppliers of any other country on the four modes of supply: cross border (mode 1), consumption abroad (mode 2), commercial presence (mode 3) and natural persons (mode 4). But a member may maintain a measure inconsistent with this paragraph provided that such a measure is listed in, and meets the condition of, the Annex on Article II Exemptions.

Article IV presents provisions for developing countries, establishing that the increasing participation of these countries in world trade shall be facilitated through negotiated specific

commitments by different members following the rules of market access, national treatment and progressive liberalization (Part III and IV), with the objectives of: strengthening their domestic service capacity, efficiency and competitiveness through access to technology on commercial basis; improvement of their access to distribution channels and information network; and liberalization of market access in sectors and modes of supply of export interest to them. Developed members shall establish contact points to facilitate the access of developing members' service suppliers to information related to their respective markets (commercial and technical aspects, registration and recognition of professional qualifications and availability of services technology). Special priority shall be given to the least developed countries in the implementation to achieve these goals, and particular account shall be taken of the serious difficulty of the LDCs in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

Article XVI establishes the provisions for the commitments on market access to give treatment no less favorable than that provided in members' schedule, including the elimination of: limitations on the number of suppliers, on the total value of transactions, total number of operations, specific types of legal entities and participation of foreign capital. Article XVII establishes the provisions for the commitments on national treatment specified in the schedule, meaning treatment no less favorable than that accorded to its own like sectors.

Because GATS was negotiated on a positive list approach, members schedule their commitments by sector and have the flexibility to determine the degree of the liberalization desired on each of the four modes of service supplies through the listing of market access and national treatment commitments. The language is clear: what is "unbound" is not liberalized; what has a "none" as condition is because it is fully liberalized.

Despite GATS Article II, discrimination among members, in favour of some parties, but within certain limits, is permitted. This is done through the Annex on Article II Exemptions where members can list where MFN treatment is not agreed. More than 70 countries presented the Annex II on Exemptions including more than 400 exemptions and notified their list to the WTO. This annex was supposed to last until the end of 2004, but they are still there, since the scope and timeframe were not clearly defined. These exemptions permit more favorable treatment to selected members and are related to bilateral agreements, reciprocal recognition of qualification and service standards. Agreements on co-production of audiovisuals are also included. The consequence of this situation is that members can use market access limitations and national treatment restrictions to allow the development of policies and the preservation of policy mechanisms not only for specific areas of services but also for cultural services.

Negotiation of rules to regulate the granting of subsidies in the services area (Article XV) is not yet accomplished and is included in the rules agenda together with safeguard and government procurement. Rules on subsidies involve provisions to regulate grants, loans and tax preferences to service sectors and must be related to the provisions against discrimination of national treatment treated before.

A kind of preferential treatment for services is being negotiated in the Doha Round for LDCs, to parallel the Quota-free and Duty-free Initiative for goods. Members are negotiating the terms to be given to Article IV Para. 3, related to the special priority that shall be given to LDCs in the implementation of the provisions related to increasing participation of developing countries. Zambia, on behalf of the LDCs, proposed that non-reciprocal special priority shall be accorded to LDCs in sectors and modes of supply of interest to them (TN/S/59). On the other side, developed countries are offering only commitments in sectors and modes of their own interests. The chairman's draft includes a waiver for Article II (MFN) to be used as a framework to this initiative. Some measures can be included in this special priority action:



access to technology, access to distribution channels, access to markets in all modes of supplies.

In summary, in comparison with the goods area, the area of services has more degrees of freedom to use market access limitations and subsidies as a mechanism of cultural policy. The question to be raised here is the interface between goods and services, that is, the point where a service, to be distributed, is transformed in a good (CDs and DVDs) and which trade rules must be followed – that of goods (more restrictive) or that of services (more flexible).

### **Regional or preferential arrangements**

The literature on trade issues is presenting, sometimes, regional agreements and preferential arrangements as the same subject. However, in the history of the multilateral system, preferential arrangements are identified with non-reciprocity and are examined in the Committee on Trade and Development under the Enabling Clause. Regional agreements are reciprocal ones and are analyzed under the Committee of Regional Trade Agreements. The question is that several agreements have been negotiated with no regional contiguity, what is creating a serious identification problem. Regional agreements are identified with reciprocal free trade zones or customs unions following the rules of Article XXIV of GATT or Article V of GATS. These arrangements and agreements are also relevant to the discussion of preferential treatment and the rules for cultural diversity.

GATT Article XXIV recognizes the desirability of freedom to trade on goods by closer integration of countries through voluntary agreements, and that the purpose of customs union or free trade areas should be to facilitate trade between parties and not to raise barriers to the trade of other parties. Article XXIV establishes the rules to be followed by the parties with relation to third parties (Para. 5), such as, that duties and other regulations prior to the agreement shall not be higher than the ones after the agreement. There are also rules for the relation among the parties involved (Para.8), such as, that duties and other regulations are to be eliminated with respect to substantially all the trade between the parties. Members of the WTO had never decided an objective criterion for the concept of a substantial trade.

GATS Article V recognizes that the Agreement on Services shall not prevent any member from being a party or entering into an agreement liberalizing trade in services between or among the parties provided that such agreement: has substantial sectoral coverage, and provides for the elimination of substantially all discrimination among the parties.

When developing countries are parties, flexibility shall be provided for these conditions, in accordance with the level of development of the countries concerned. In the case of an agreement involving only developing countries more favorable treatment may be granted to enterprises owned or controlled by natural persons of the parties to such an agreement.

In summary, regional agreements can offer a special window of opportunity in the negotiation of the cultural diversity area. In the case of goods, new market access opportunities can be raised with the elimination or reduction of tariffs to the parties of the agreement. In the case of services and professionals mobility, GATS rules are quite flexible to allow several initiatives to support the promotion of cultural diversity.

## **2 - Definition of the concept of preferential treatment for trade and cultural purposes**

After examining the framework of the trade area, it is clear that the trading system has developed a large list of mechanisms to deal with preferential treatment for goods and services. The next step is to analyze whether they can be applied as cultural preference mechanisms.

The notion of preferential treatment in the area of culture is introduced in the Convention by Article 16 that establishes that developed countries shall facilitate cultural exchanges with developing countries by granting preferential treatment to artists or professionals as well as cultural goods and services from developing countries.

To understand Article 16, a careful reading of Articles 14 and 15 is essential. Article 14 introduces the concept of cooperation for sustainable development in order to foster the emergence of a dynamic cultural sector by: i) supporting the creation of the cultural industries in developing countries by the strengthening of cultural production and distribution capacity, facilitating access to the global market and international distribution network, facilitating access to developed countries, providing support for creative work and facilitating the mobility of artists, and encouraging collaboration between developed and developing countries in the area of music and films; ii) supporting capacity building through the exchange of information, experience and expertise by training in strategic and management capacities, policy development, promotion and distribution of cultural expressions; iii) supporting technology transfer through incentive measures; and iv) financial support.

Article 15 introduces the notion of collaborative arrangements, when parties are encouraged to develop partnerships in order to cooperate with developing countries in the enhancement of their capacities to protect and promote the diversity of cultural expressions.

In this context, the concept of preferential exchange among developed countries and developing countries can be better understood. The exchange shall be interpreted not merely in terms of trade but in terms of cooperation and partnership, enlarging the scope to fulfill the cultural objectives. In terms of trade in goods, special treatment for developing countries can include developed countries preferential market access through tariff reduction (GSP type). In terms of trade for services, special treatment for developing countries can include specific commitments, access to technology on commercial basis, access to distribution channels and information networks and market access to sectors of developing countries interests, also including commitments on mode 4 on professional services. However, if the concept of preferential exchange is enlarged from the concept of trade to include cooperation and partnership, it should include, for example, technical capacity and transfer of technology, special fiscal incentives, joint production, joint investment, joint distribution, training of professionals, exchange of artists and other professionals, among other points. The space to make cultural policy can then be significantly enlarged.

### **3 – Special features on preferential treatment for cultural diversity purposes: eligibility, reciprocity, graduation, rules of origin, conditionality**

With the objective of granting preferential treatment to developing countries, members of the Convention should negotiate a mechanism including some concepts developed to preserve preferences only for the chosen countries and to avoid circumvention.

**i) - Eligibility** - The first point is to define a criterion to include or to exclude countries into the mechanism. Should the criterion include all developing countries or some portion of them? There is no definition of what is a developing country in the trade system. Several international organizations attempted to create objective criteria to this definition, but the result was elusive.

For WTO purposes, developing countries are self defined. Even some countries belonging to OECD, considered a club of developed countries, consider themselves as developing countries in the WTO. Historically the WTO accepts three categories of countries: developed, developing and least developed countries. For the LDCs categorization, the WTO accepts the criteria established by the UN (ECOSOC). The World Bank and the OECD have

developed a classification of countries based on income per capita by the purchasing power parity method.

The question here in discussion is a political choice. Should the Convention negotiate an objective criterion to differentiate among the developing countries which ones should receive the treatment? A possible consequence is to lose the support of the excluded ones for the implementation of its objectives. Or should the Convention grant to all self-defined developing countries the preferential treatment? The choice is whether the objectives of the Convention will be better achieved with the differentiation of the developing countries or whether it will be strengthened with a single definition of countries eligible to receive the preference, following the tradition of the WTO. Certainly the differentiation of LDCs must be preserved.

If one of the objectives of the Convention is to reaffirm the importance of the link between culture and development, a distinction among countries could be counter producing to the Convention success. A political solution would be to have developed countries granting identical preferential treatment to all developing countries and allow developing countries in condition to do so and also grant preferential treatment to LDCs.

**ii) - Reciprocity** - In historical terms, the concept of preferential treatment for goods was based on the notion of non-reciprocity, since it was assumed that developing countries were in a disadvantage position in their participation in the international trade. GATT Part IV and the Enabling Clause reaffirm this notion. All preferential arrangements were based on the same basis. In terms of trade, only regional agreements created through free trade zones and customs unions have to accept the notion of reciprocal treatment.

In terms of services, the concept of reciprocity is not clearly expelled. The GATS National Treatment (non-discrimination between domestic and foreign services/suppliers) establishes not identical conditions but competitive conditions. Regional agreements can negotiate different positive or negative lists among the parties. However, between two parties in the same liberalized sector, reciprocity is always presumed. Preferential treatment is provided only by provisions on increasing participation of developing countries (Article IV), and flexibilities granted to developing countries to participate in agreements of economic integration (Article V). The notion of reciprocity is also included in many co-production agreements in the area of audiovisuals. However, the issue is being negotiated in the Doha Round in relation to the concept of special priority to be given to LDCs. The proposal of the Chair of the negotiating group is to give this treatment through a waiver.

In summary, for goods, non-reciprocity is a common feature of preferential arrangements. But preferences can also be given in bilateral or regional agreements where reciprocal treatment is negotiated. In the service area, reciprocity under committed sectors is the rule. However, non-reciprocity is being negotiated in the Doha Round only for LDCs.

**iii) - Graduation** - Preferential treatment mechanisms can present provisions to phase out the preferences as the beneficiary countries reach a certain level of economic development. In the area of goods, developed countries establish objective criteria based on export ratio or import ratio or even growth rate to graduate countries from the most favorable treatment, as is the case of the GSP type schemes.

A question should be raised about the need to negotiate such objective criteria to graduate countries in the context of the Convention. Is graduation relevant to treat cultural goods, services and artists? If the objectives of the Convention are to facilitate cultural exchanges between developed and developing countries and to reaffirm the link between culture and development, any burden created with a provision on graduation in the early years of the Convention will be highly counter producing and will jeopardize the process of strengthening

of the Convention. For this reason, a political decision to give preferential treatment to all developing countries without time restrictions should be discussed by the members of the Convention.

**iv) - Rules of origin** - Preferential treatment mechanisms usually include specific criteria for the definition of the origin of the product to be beneficiary of the treatment. They include requirements to ensure that goods, services or activities receiving preferences are produced by the beneficiary countries and to impede circumvention of non-beneficiaries through the beneficiary ones.

Rules of origin for goods are based in two criteria: value added or tariff shift of classification. Both have advantage and costs, and both are heavy to administrate. Some flexibility is used in several systems as the cumulation rule, where donors accept the origin of parts and inputs as originated in the producing country in order to promote development and regional cooperation. Another one is the de minimis rule, where the value of inputs or parts is disregarded in the calculation of the origin, when less than a certain amount.

In the area of services, rules of origin are being negotiated among parties of preferential and regional agreements but the difficulties are much more significant. The origin of the supplier's capital is one criterion used. Many countries are creating and using comprehensive criterion to determine national origin for audiovisuals based in the origin of the producer, or director or funds involved.

A question should be raised about the necessity to negotiate rules of origin for cultural goods, services and professionals and to include these rules in the preferential mechanisms. Despite all the critics against these rules, it seems that there is no alternative to prevent the circumvention to the mechanism. Some criteria are already available in the trading system. The first one is to use the same rules of origin negotiated in preferential arrangements. For services and services providers, there are some examples of preferential rules in use. Special clauses will be necessary to allow the inclusion of cultural services and professionals. The second alternative will be the negotiation of a new system with all political and economic costs involved with this initiative. The third alternative can be the negotiation of a simplified system of origin, based on the existing experiences, but with the objective to harmonize and simplify the systems in use.

**v) - Conditionality** - Conditionality is being used in some preferential arrangements. It evolves through the years and now is based in human rights, environment and labor standards, and good governance principles.

WTO rules applicable to GSP are based in the Enabling Clause and preferences must be granted in a "generalized, non-reciprocal and non-discriminatory" way. The EC Drug mechanism was challenged by India against the preferences given to Pakistan by the EC on the argument that the mechanism was discriminatory among the developing countries. WTO Appellate Body rejected the argument and stated that non-discrimination does not required identical treatment of all developing countries and that additional preferences may be made available to countries that share the same development, financial or trade need. These conditions must be identified by objective standards, recognized by WTO or international organizations, addressed by tariff preferences, and present a nexus between the preferences and the alleviation of the relevant need.

Following this interpretation, it can be considered that preferential treatment for cultural goods from developing countries can be conditional upon the Guiding Principles of the Convention if these conditions follow the provisions of the Enabling Clause as interpreted by the Appellate Body. There is no similar provision for the trade in services or exchange of

professionals. Only MFN exemptions and conditions listed in the schedules can provide the needed flexibility to allow some sort of conditionality.

In summary, the granting of preferential treatment in the area of trade is based on some criteria to prevent circumvention of the benefit: eligibility, reciprocity, graduation, rules of origin and conditionality. Despite its common use in the trade system, negotiators of the cultural system must reflect about the costs and benefits to develop such criteria. The objectives of the Convention are clear and the exclusion of some countries could jeopardize the whole political support to the cultural diversity system. For this reason, a political decision should be discussed by all Convention members whether preferential treatment should be restricted to some developing countries, or whether it would be a better solution to give the treatment to all developing countries.

### **C. The legal and institutional framework concerning preferential treatment granted to/by Brazil and to/by Mercosul**

The main objective of this chapter is to offer an overview of the regulatory framework of preferential treatment granted or received by Brazil. Two of the most relevant preferential arrangements were chosen: Aladi and Mercosul. The main purpose is to analyze the impacts of trade policy on cultural policy and how preferential treatment from one area can affect the other.

The choice to analyze Aladi and Mercosul can be explained for different reasons: Aladi and Mercosul are the two most important regional agreements to Brazil; they are the only agreements including Brazil, where culture plays an important part; the other preferential arrangements of Brazil, GSP programs with EC, US and Japan, involve only trade preferences on goods, with no provisions on services and no reference to culture.

Brazil's Trade Policy has evolved through the years, according to the priorities established by the Brazilian External Policy, on two different levels. One is the integration of its economy in the South American region and the second is the participation of Brazil in the global market and in the international global system. Brazil is a founding party of the GATT and a founding member of the WTO. Its regional integration program was initiated by the creation of Aladi in Latin America and later deepened by the negotiation of Mercosul.

## **1 – Aladi**

Aladi – The Latin American Integration Association was created in 1980 by a framework agreement, the Treaty of Montevideo, with the objective of integrating its twelve members into an economic preference area aiming a future Latin American common market. Its general principles are: political and economic pluralism, progressive convergence by partial actions to a common market, flexibility, differential treatment to the least developed countries in the region (Bolivia, Paraguay and Ecuador), and multiplicity of forms applied to trade mechanisms.

The integration mechanisms negotiated are: preferential tariffs among the parties against third parties, regional agreements applied to all parties and partial (bilateral or plurilateral) agreements involving different Latin American countries or economic areas of integration, according to the development level of the parties.

Partial or regional agreements are being negotiated in different subjects: tariff preference, trade promotion, economic complementarity, agro-business, finance, customs, taxation, sanitary, environment, technological and scientific cooperation, tourism, technical standards, among others. New issues are being negotiated: services, competition, investment, intellectual property, public procurement and traditional knowledge. All these agreements are based on international obligations negotiated by the parties, mainly WTO Agreements.

Aladi was created as a network of preferential arrangements between and among the parties, with the necessary flexibility to take in account the different levels of development (least developed, intermediary and others). It includes integration agreements of diverse formats: sub-regional, plurilateral or bilateral, as the Comunidad Andina and the Mercosul. All trade agreements under Aladi have been notified to the GATT Committee on Trade and Development under the Enabling Clause.

### **Cultural area**

In the cultural area, the main mechanism is the Regional Agreement No. 7 on Cooperation and Exchange of Goods in the Cultural, Educational and Scientific Areas, signed in 1989. Its objective is the promotion of activities to increase the common knowledge among the members of common values, cultural creations, and development of education and science by the free exchange of works and materials on culture, education and science. It also encourages joint activities in terms of information, programming and co-production. Its aim is the formation of a common market of cultural goods and services in the region and the support for a reciprocal knowledge of its peoples.

The Agreement includes the free circulation of goods listed in the annexes, and importation of books free of tariffs, with copyright protection to authors of the region (national treatment). The compromise is to facilitate the transit and visits of persons in cultural activities, facilitation of imports of goods, mechanisms, scenic material and also equipments destined to cultural activities. The compromise is to facilitate the emission of informative programs and co-productions of common interests. In the audiovisual sector, three different agreements were signed under the Ibero-American framework at the end of the 1980s, and will be examined in the next chapter.

## **2 - MERCOSUL**

MERCOSUL – The Southern Common Market was created in 1991 by the Treaty of Asuncion with the objective of integrating its parties in a common market: Argentina, Brazil, Paraguay and Uruguay. The process includes free circulation of goods, services and production factors as capital and workers; the establishment of a common external tariff and

a common trade policy. Its first step was the implementation of a customs union until 1995. Bolivia and Chile became associated parties in 1996, Peru in 2003, Colombia and Ecuador in 2004. Venezuela signed its Protocol of Accession in 2006. The goods area was notified to the GATT in 1992 under the Enabling Clause.

## **Cultural area**

In the area of culture, the evolution of some initiatives demonstrated the relevance attached to this area in Mercosul.

### **- Special Meetings on Culture**

In 1992 the Common Market Group decides to create a special meeting about culture to promote the diffusion of cultures of the parties, to stimulate the common knowledge of values and traditions, and to promote cultural activities and events (GMC/RES. No. 34/92). In 1995 the Common Market Council decides to create the Ministerial Meetings on Culture to promote the diffusion and the knowledge of cultural values and knowledge of the parties and to present to the Council proposals of cooperation and coordination in the cultural area (CMC/DEC No. 2/95).

### **- Protocol on Cultural Integration**

In 1996 the Common Market Council approved the most important mechanism related to culture, the Protocol on Cultural Integration (CMC/DEC. No. 11/96). Mercosul parties agreed to promote the cooperation and exchange among its cultural institutions and agents with the objective to enrich and disseminate programs of cultural and artistic expression in Mercosul, by joint programs and projects. The parties agreed to facilitate the creation of cultural spaces, promote cultural events with priority in co-production, expressing historic traditions, common values and the diversities of the parties. These events contemplate the exchange of artists, writers, researches, artistic groups and public and private entities concerned with cultural areas.

The parties agreed to support the productions to cinema, video, television, radio and multimedia, in production or co-production regimes, in all areas of cultural manifestation. The parties also agreed to promote the formation of human resources in the cultural area by the exchange of cultural agents and managers in different specialization areas.

### **- Special Meeting of Cinematographic and Video Authorities**

In 2003 the Common Market Council created special meetings with films and audios authorities RECAM. Its aim is the establishment of a forum to promote and to exchange mechanisms for the production of goods, services and artistic and technical personnel from the cinema and audio sectors in Mercosul. The objectives are to analyze, develop and implement mechanisms to support complementarity and integration of the regional industries, the harmonization of public policies and the promotion of the free circulation of goods and services in the region and the harmonization of legislative aspects.

## **Preferential treatment for trade and for culture**

The evolution of Mercosul towards a common market has created a privileged space to the free circulation of cultural goods. Since 1995, with few exceptions (sugar and automobiles), the process of elimination of tariffs among the parties and the creation of a common tariff against third parties are almost achieved. As a result, there are no more tariff barriers against the free circulation of goods. The integration process created special mechanisms to support

the liberalization of goods, such as the system of rules of origin based on value added and a non-centralized certification system.

In the services area, the liberalization process started in a later stage, with the Protocol of Montevideo signed in 1997. Since then, important activities are already integrated. There are special conditions for the audiovisual sector that will be presented on the following pages.

The Protocol on Cultural Integration was an important step further, to support the development of cultural activities and cultural services. Besides the promotion of joint events, the Protocol offers the legal basis to enhance the exchange of goods and services in the cultural area, including the movement of artists and professionals.

#### **D. Analysis of existing agreements and preferential treatment mechanisms** **A case study of the audiovisual sector in Brazil**

The main objective of this Section is to analyze some examples of preferential mechanisms, and to illustrate how these schemes can support the negotiation of preferential treatment in the area of culture, under the Convention.

Because Brazil, in the present time, is not a party of any specific preferential arrangement with developed countries including a cultural clause, and because preferential arrangements with these developed countries include only goods and not services, a choice was made to analyze preferential arrangements granted in the audiovisual sector, the most significant area of the regional cultural policy.

The study will contrast the evolution of the audiovisual policy in Brazil in three different levels: multilateral, regional and national, to show how the different policy spaces can be used in the context of culture. The audiovisual sector is an important example of how developing countries are negotiating preferential mechanisms at the multilateral, regional, bilateral and national levels, and at the same time implementing a specific policy to develop the sector.

#### **1 – The audiovisual sector in the WTO**

Services and services suppliers related to the area of audiovisuals were one of the most contentious issues of the Uruguay Round. The EC proposal was to negotiate a cultural exception clause in the GATS but this aim was not achieved, and only a general exception provision was included. The consequence is the use of the MFN exemption allowed in Annex II of GATS. Around 30 countries asked for this carve-out in the area of cinema and television, mainly for co-production and co-distribution agreements.

Market access and national treatment restrictions in the area of audiovisuals include measures to control access to film markets, screen quotas for cinemas, dubbing licenses, foreign investment restrictions, and ownership limitations. Domestic content requirements are also applied to this area, including radio and television regulation on broadcasting content and licensing restrictions.

When a country lists no commitment on market access and on national treatment in the area of audiovisuals, the result is that it has chosen not to liberalize the sector and to opt for the right to apply policy measures under all the modes of supply desired. Since there are no rules on subsidies, subsidies through grants, loans and tax incentives can be used for the production and co-production of cultural services, mainly audiovisuals.

In the sector of cinematograph films, there is another important rule to remember. Article IV of the GATT establishes special provisions related to cinematograph films negotiated in the beginning of the GATT. It determines that if any party establishes or maintains internal



quantitative regulations on exposed films, such regulations shall take the form of screen quotas. Such quotas may require the exhibition of films of national origin during a specified minimum proportion of the total screen time utilized over one year on the basis of per theatre per year. Screen quotas shall be subject to negotiation concerning limitation, liberalization or elimination. Television films were not included in the agreement. A Working Party was established in 1960 to negotiate the issue but some delegations took the position that TV programming was a service and not a good. For this reason it is considered outside the coverage of the GATT. With the conclusion of the GATS, films for cinema and TV are now under the rules of audiovisual services.

To understand the position of Brazil in the WTO negotiations, it is relevant to analyze the positions of the main groups of interest. In the Doha negotiation on audiovisual services, members are divided in two groups. One group defends that the audiovisual sector has both commercial and cultural components, and there is a key motivation to preserve the ability of each country to promote and to implement cultural policies. The other group sees no contradiction between progressive liberalization and the achievement of cultural objectives, considering that GATS provides appropriate flexibilities. During the Uruguay Round the sector had been debated as highly sensitive issue and all these contentious points are presented again in the Doha Round.

### **1.1 - Issues on negotiation**

After many years of negotiations on the audiovisual sector, the main issues under discussion are the following: the classification issue raised by new technologies that is creating uncertainties with scheduling; the scheduling issue raised by the need to preserve the desirable policy space; the regulatory issue raised by concerns with competition and abuse of dominant positions, antidumping and safeguards measures included in the negotiation mandate; the role of public service in the sector, funding and access to telecommunication; and the issue of the MFN exemptions and discrimination among foreign producers (JOB(05)/192).

In 2005, a joint request was tabled in the sectorial negotiations and signed by six members: HKC, Japan, Mexico, Chinese Taipei, Singapore and US, and it was presented to 28 recipient members. The group considers audiovisual as an integral part of the services negotiation, playing a valuable role in supporting national economies and international trade, especially in developing countries. It defends that transparency and stability rules can open regional and global opportunities for exchanges of audiovisuals and that benefits to domestic industry are related to new technologies, skills and business methods, use of network and investment in the digital networks, fostering creativity and innovation. They express their concern with some key participants to create an a priori exclusion for the sector, a measure that is inconsistent with the Guidelines for Service Negotiation. The group argues that GATS provides flexibility to make commitments in line with their national policy objective and that out of 61 initial/revised offers, 26 include offers in audiovisuals, mainly in motion picture and videotape production and distribution and projection services.

The plurilateral request includes: i) sector coverage - undertake commitments in: promotion or advertising, motion picture and videotape production, motion picture and videotape distribution, other related services, production and distribution, projection, sound recording; ii) level of commitment – on modes 1 and 2, on mode 3 (without quotas, foreign equity restrictions, number of suppliers, nationality requirements, economic needs tests, type of legal entity, discriminatory tax treatment, discriminatory licensing, discriminatory local production, employment and sponsorship requirements; iii) MFN exemptions – reduce the scope and number of MFN exemptions, clarify remaining MFN exemptions (scope of application and duration; and iv) flexibilities to be discussed – subsidies, co-production, phase-outs, etc.

In 2007, Mexico, as coordinator of a collective request in the audiovisual sector, presented a Communication (JOB(07)/195) reviewing the progress in the negotiation. Overall, the co-sponsors expressed disappointment with the responses provided and the absence of ambition after 6 bilateral clusters and 4 plurilateral meetings. In summary, 19 out of 28 recipients have no existing commitments in the sector. Only one has made an initial or revised offer. Two others have indicated their intention to undertake new or improved commitments in response. One recipient indicated improvement on promotion and advertising, and other on motion picture and video production, distribution and projection. From the total, 12 recipients signaled none or very little flexibility to improve commitments. No recipient has given any positive indication on reducing or clarifying their MFN exemptions on audiovisuals.

## **1.2 - Position of Brazil on audiovisuals in the GATS**

In the GATS, Brazil is not a *demandeur* of the audiovisual sector, and is among members considering that the liberalization of area must be done with care. Brazil is not including the sector in its offers, and is not negotiating commitments in the area in its Schedules.

Since the Uruguay Round, Brazil has negotiated exemptions for the audiovisual sector in its List of MFN Exemptions related to co-production agreements. In 2001, in the Doha Round, Brazil presented its proposal on audiovisual services (S/CSS/W/99). The main issue in consideration was how to promote the progressive liberalization of the sector in a way that creates opportunities of effective market access for exports of developing countries in this sector, without affecting the margin of flexibility of governments to achieve their cultural policy objectives.

Brazil made three proposals: i) That members make specific commitments in audiovisual services taking into account the objectives of Article IV of the GATS (Increasing Participation of Developing Countries). In that regard, special attention should be given to audiovisual services in which developing countries have greater potential such as (but not exclusively) television services; ii) That the Council on Trade on Services initiates a debate on subsidy schemes aimed at achieving national policy objectives of promotion and preservation of cultural identity and cultural diversity; and iii) That the CTS initiate a debate on trade defense and/or competition provisions necessary to address unfair trade practices and/or restrictive business practices.

## **2 - MERCOSUL**

In the Mercosul, the area of services is regulated by the Protocol of Montevideo, signed by the parties in 1997. Its list of specific commitments and annexes were adopted in 1998 and entered into force in 2005. It establishes a program for the liberalization of intra-trade services with an implementation period of 10 years. The Protocol may be revised taking in account trends and regulation in Mercosul and in WTO. Since 1997, six rounds of negotiation have been conducted. Its architecture is similar to one in the GATS, following a positive list approach. The MFN clause mirrors the provision of the GATS but does not provide the possibility of MFN exemptions. Activities or measures granted by a party to other party or third party are to be extended to services or suppliers of any other party. No derogation is provided in relation to concessions granted to third parties in the context of preferential arrangement. The Protocol includes provisions related to market access for the audiovisual sector in Mercosul.

The Protocol was notified to the Council for Trade in Services in 2006. Its objective is the liberalization of services under the rules of Article V of GATS. The Protocol was examined by the Committee of Regional Trade Agreements in September 2008 under the new transparency mechanism.

### **3 - Institutions and initiatives to support the audiovisual sector in Mercosul**

#### **3.1 - RECAM – Special Meeting of Cinematographic and Audiovisual Authorities**

In 2003, Mercosul created a special group of authorities in cinema and audio sectors, the RECAM (GMC/RES. N0. 49/03)). It establishes a forum to promote and to exchange mechanisms for the production of goods, services and artistic and technical personnel from the cinema and audio sectors in Mercosul. Its objectives are to analyze, develop and implement mechanisms to support the complementarity and integration of the regional industries, the harmonization of public policies, the promotion of the free circulation of goods and services and the harmonization of legislative aspects.

RECAM is a consultative body of Mercosul in the films and audiovisual areas. It is integrated by high governmental authorities in the field and is based on three main principles: reciprocity, complementarity and solidarity. Its working plan includes: to adopt concrete measures to integrate the industry; to reduce sectors asymmetries; to harmonize public policies in the area; to support free circulation of goods and services in these sectors; to support cultural diversity; to support the redistribution of this market in the region; and to guarantee the rights to a plurality of options. The implementation of the working plan is assured by the Secretariat in Montevideo.

#### **3.2 - Cinematographic Work Certification**

In 2006, Mercosul created the certification for cinematographic works, aiming to identify not only national works, but also tangible and intangible goods integrating the productive chain (GMC/RES. No. 27/06). A cinematographic work is considered a Mercosul work if it so declared by the competent authority in conformity with the national legislation of each Mercosul party and independently of its material support. Advertisement works are excluded. Criteria for the harmonization of nationality concession are to be negotiated among the parties. Mercosul works are to be considered as national to the effects of regional public policies applied by Mercosul. The national authorities in charge are the following: INCAA (Argentina), ANCINE (Brazil), Ministry of Culture (Paraguay), Ministry of Education and Culture (Uruguay).

#### **3.3 - Forum of Competitiveness of Cinematographic and Audiovisual Sectors**

In 2007, Mercosul created the Forum for the Competitiveness of Cinematographic and Audio Sectors (GMC/RES. No. 14/07). Its objective is to coordinate public and private policies in the area and to enhance the productive association and the complementarity of private sectors. Its aim is to enforce regional co-production as well as intra and extra zones circulation of national products from the parties, defend the cultural diversity of the peoples and also to construct a common identity as Mercosul citizens. The Forum is positioned under the RECAM.

### **4 - Institutions and initiatives to support the audiovisual sector in Brazil**

In Brazil, the policy to the audiovisual sector is coordinated by the Ministry of Culture. Important initiatives to develop and support the sector are: the special fund – PRONAC; the regulatory agency – Ancine; and a program to support independent production.

#### **4.1 - Ministry of Culture**

The Ministry of Culture was created in 1985 in the recognition that culture is a fundamental element in the construction of a national identity and an important sector in the national economy as a source of wealth and employment. The main support mechanism to culture in Brazil is the PRONAC - National Program to Culture, created in 1991 by the Rouanet Law (Lei 8313/91), to support the development of the cultural area, and to contribute that all interested parties have access to cultural resources. Its main objectives area: to stimulate the production, the distribution, and access to cultural products; to protect and to conserve the cultural heritage; to stimulate the diffusion of the Brazilian culture and the regional and ethnical diversity.

The PRONAC has as its main mechanisms of action: the FNC - National Fund for Culture; the FICART - Cultural and Artistic Investment Fund; and the Mecenato - fiscal incentives to private enterprises to invest in cultural projects.

#### **4.2 - Ancine**

Ancine is the main regulatory agency of the sector. Ancine - National Agency for Cinematographic Works was created in 2001 and is an official autarchy under the Ministry of Culture in charge of the regulation and supervision of the films and audio industries. Its structure is composed by a director-president and three other directors.

Its objective is to support the production, distribution, exhibition of films and audios and to promote the development of the national industry in all elements of the productive chain. It also supports the participation of national works in international events. Ancine is also responsible for the execution of the national policy to support the film industry, supervises the implementation of the legislation, combat piracy and gives the certification and the registration for Brazilian products.

#### **4.3 - Support to Independent Production**

The National Program to Promote the Association of Independent Production and the TV was created in 2008 to promote the association among independent producers and broadcasting enterprises (Resolution 19/2008 Ministry of Culture). Its aim is to enlarge the presence of independent works in open and paid TV, public or private, and to support the national industry. It is oriented to the national and international markets and also aims the implementation of regional capacity building actions.

### **5 - Preferential and cooperation mechanisms in the audiovisual sector**

Mercosul and Brazil are developing several initiatives in the audiovisual sector in the region and with third parties. Some are related to the area of production, through co-production agreements, with parties in the region and also with European ones. These agreements are important not only because they provide new sources of funding, but also new market access opportunities. Other initiative is related to the development of a regional policy to the sector, as provided by the new cooperation agreement in the final phase of negotiation with EU.

#### **5.1 - Ibero-American Agreements**

Historically, the first co-production agreements in the area were negotiated in the late 1980s, as part of a broader cultural cooperation agreement negotiated among the parties of the Ibero-American Agreements. Three initiatives are relevant:

#### - Agreement on Ibero-American Cinematographic Integration

The Agreement was signed in 1989, aiming the development of the cinematographic activities in the region and to contribute to the cultural identity of the region. The objectives are: to support cinematographic initiatives and the cultural development of the region; to harmonize cinematographic policies; to support production, distribution and exhibition in the region; to preserve and promote cinematographic products from the parties; and to enlarge the market for these products. The Agreement also includes financial mechanisms, and the creation of a multilateral fund. It establishes two bodies for coordination: the Conference of the Cinematographic Authorities (CACI) and the Secretariat of the Ibero-american Cinematography (SECI).

#### - Agreement on the Creation of the Cinematographic Ibero-american Common Market

The Agreement was signed in 1989 and has as objectives the creation of a multilateral system of participation in exhibition spaces for cinematographic works certified as national by the parties. Its aim is to enlarge the market for these products and to protect the cultural unity link among Ibero-America. It includes all audiovisual works registered, produced and diffused, or in process, and transfer of technology. Each participating work is also considered as national in each other party and receives all benefits and rights related to exhibition spaces, screen quotas, exhibition quotas and distribution quotas. Incentives given to national works are excluded. Each party has the right to participate with four works, but this number can be increased by the parties. All participating works must be registered in the Secretariat for Ibero-American Cinematography.

#### - Agreement on the Latin American Cinematographic Co-production

The agreement was signed in 1989 with the objective to support the development of the cinematographic activities of the region, recognizing the contribution of this area to the cultural development of the region and its identity. It includes works produced by different processes and formats, and works with any duration of time. Works must be made by two or more producers from two or more parties, and based on a contract registered with the competent authority of each party. All works are considered national by the authorities and can receive all benefits created by legislation in each of the co-producing parties.

The agreement establishes the minimum participation for each co-producer (20%) and the maximum participation for non-parties (30%). It also establishes: the number of directors, artists and technical professionals by party, and the conditions for nationality or residence of the personal, rules for the production of copies, and rules for the distribution and participation in foreign exhibitions. It also determines provisions to facilitate the concession of visa for artist and professional as well as imports of equipments.

### **5.3 - Co-production agreements of Brazil**

Brazil signed several agreements in the area of film and audio co-production. Co-produced works are important because they are considered as national work in each of its parties, receiving all existing benefits granted to local film and audio industries.

The agreements establish provisions for: the proportion of the contributions to the parties; the origin of the producers, writers, directors, artists and technicians; the places to realize the work; the origin of the laboratories to process the films; the language of the film; the place to make the dubbing and the subtitling; and the numbers of original copies to be produced.

The agreements also establish rules for the facilitation of visa permissions to artists and technicians contracted, and to the temporary admission of equipments. Finally the agreements determine income and profit distribution according to the financial contribution of each party, and also establish rules for the inclusion of the work in the existing screen quotas.

Brazil signed bilateral co-production agreements with developed and developing countries:

- Germany in 17/02/2005 (Presidential Decree N° 6.375, 19/02/2008)
- Canada in 27/01/1995 (Decree N° 2.976, 01/03/1999)
- Spain in 02/12/1963
- France in 08/03/1969
- Italy in 09/11/1970 9 (Decree N° 74.291, 16/07/1974)
- Portugal in 03/02/1981 (Decree N° 91.332, 14/06/1985)
- Argentina in 18/04/1988 (Decree N° 3.054, 07/05/1999)
- Chile in 18/03/1966 (Complementary Adjustment in 25/03/1996)
- Venezuela in 17/05/1988 (Decree N° 99.264, 25/05/1990)
- Colombia in 07/12/1983
- Angola in 11/06/1980
- Mozambique in 01/06/1989

### **Participation of Brazil in co-production agreements (1995-2007)**

- Number of co-productions finalized and in process      Total - 92
- Number of co-productions finalized (1995-2007)      Total - 56
- Brazilian participation in 56 co-productions:
  - major part – 31; equal parts – 4; minor part - 21
- Number of co-productions in process – 36
- Brazilian participation in these 36 co-productions:
  - major part – 20; equal parts – 3; minor part - 13
- Percentage of co-production agreements used:
  - In finalized works (56)  
Latin American 22, Portugal+Latin American 6, Chile+Latin American 1  
Portugal 21, Argentina 3, Canada 1, Italy 1  
Others (out of agreement) – France 1 (video)
  - In works in process (31)  
Latin American 13, Portugal+Latin American 7,  
Portugal 4, Argentina 2, Canada 1, Italy 1, France 2, Chile 1  
Others (out of agreements) - 5
  - In total (92)  
Latin American 35, Portugal+Latin American 13, Chile+Latin American 1  
Portugal 25, Argentina 5, Canada 2, Italy 2, France 2, Chile 1  
Others (out of agreements) - 6

Source: Ancine 2008

### **5.3 - The Cooperation Agreement EU - Mercosul on Audiovisual**

Formal relations between EU and Mercosul started in 1995 after the negotiation of the Framework Agreement on Cooperation aiming the preparation of the Inter-regional Association between EU and Mercosul.

The cooperation between the two parties started earlier in 1992, and the first program for the period 1992-2002 included the support to trade activities and the economic integration process. In July 2001 the parties signed a Memorandum of Understanding for the period 2002-2006, based on the Regional Strategy Document approved in 2002. Its main objective was to support the integration process of Mercosul. The program established three main areas and a budget of 48 million euros: i) to support the internal market integration and the intra-trade flows; ii) to support the creation of common institutions in Mercosul; iii) to support the civil society participation in Mercosul. Some concrete projects of support were oriented to: the Mercosul Secretariat, the Mercosul Parliament, Dispute Settlement, Statistics, Standards, Customs, Economic and Social Forum.

The Regional Strategy Document approved in 2007 to the period 2007-2013 defined as priorities (EC – Regional Strategy Document for Mercosul 902.08.2007(E/2007/1640)): i) to support the institutionalization of Mercosul and the incorporation of common norms in the national legislations, ii) to support the deepening process of Mercosul in the economic and commercial areas and preparation for the future association with the EU; and iii) to support civil society participation in the integration process, with a better understanding of the regional integration process between EU and Mercosul.

For this third priority – the support for civil society participation – , several actions are enumerated: i) creation of centers of study on EU-Mercosul relations and cooperation on intra-Mercosul education; ii) promotion of the regional identity by the support to the audiovisual and cinema sectors; iii) organization of workshops, seminars and activities to transmit the EU experience on regional integration.

The action on audiovisual and cinema has as objective to increase the knowledge about the regional identity and the integration process through the development, distribution access and promotion of Mercosul audiovisuales. The aim is the creation, in Mercosul, of a program related to the media, inspired in the Media Program of the EU. This includes incentives to the cooperation among sectorial agents to develop not only common productions but also common distribution and promotion activities in Mercosul.

Some proposed activities are: i) creation or aid to regional production centers; ii) elaboration of studies, data gathering and analysis; definition of standards for the sector, definition of common policies to the audiovisual sector through RECAM (Mercosul Authority on Audiovisual) and the Mercosul Audiovisual Observatory; iii) training of professionals in the sector; iv) support to the development and production of projects to promote the values and objectives of Mercosul.

Some projects to be included:

- Harmonization of the audiovisual legislation in a common framework based on the
- legislation in each Mercosul member.
- Analysis of the audiovisual chain - production, distribution and exhibition.
- Technical support to the Mercosul Audiovisual Observatory, aiming the supply of
- information to the elaboration of public policies.
- Creation of a network of movies in the region to present regional works.
- Support to the creation of the Mercosul Audiovisual Patrimony aiming the restoration,
- conservation and digitalization of audiovisual works.
- Technical support to professionals of the area including: production and financial
- administration, distribution, promotion, and development of the international market.
- The amount provided by the EC will be 1,5 million euros. The participation of
- Mercosul is being discussed.

## **6 - Evaluation of the preferential treatment granted to the audiovisual sector**

The evolution of the activities in the audiovisual sector in Mercosul and in Brazil can illustrate some important aspects of the preferential schemes in the cultural area. First, each member is developing a specific policy to the sector, not only involving public support, but also granting tax incentives to the private sector to invest in the cultural area. Second, each member is creating specific structure to the sector, including a regulatory agency and differentiated funds. With the regional agreement, Mercosul members are developing a regional policy to the sector that is coordinated by a forum of authorities, and is creating several mechanisms to support the activities in the area. With the broader regional agreement of Aladi, members can profit from an extended market. At the multilateral level, countries are negotiating the necessary space to make the chosen policy.

An important step to develop the sector is the negotiation of a network of co-production agreements not only in the region under the scope of Mercosul and Latin America, but also with European partners under the Ibero-American Agreement or under bilateral agreements with specific partners. All these initiatives allow the strengthening of the sector, mainly by the enlargement of the market and the funding offered by the parties.

The analyses of these mechanisms reveals a lot of similarities in terms of the conditions agreed: rules for participation (minor parts and third partners); rules for the nationality of producers, directors, artists and technical personals; rules for quotas (screen, distribution and exhibition); rules for the partition of revenues and profits; and rules for exportation of the products and exhibition in international markets.

The experience of these co-production agreements and the results achieved can offer some examples to the negotiation of preferential treatment mechanism under the Cultural Diversity Convention. The relevant aspects of the mechanisms are the following:

- They provide a diversification of sources for the funding of the production.
- The agreements include a national treatment clause, offering to co-produced works the same legal treatment given to national product.
- The agreements offer new market access, through participation in screen quotas, exhibition quotas and distribution quotas.
- The agreements include provision to facilitate the movement of artists and professionals.
- The agreements also include provisions to facilitate the temporary importation of goods related to the production activities.
- Regional agreements include the creation of networks of physical movies and digital movies to exhibit regional productions.
- Regional agreements provides for the creation of agencies to distribute regional production.

The cooperation agreement that is being finalized with the EU can provide specific support to the formulation of a common policy to the sector, based in the EU experience. It also allows technical support in the production phase, as well as in the promotion and distribution phases.

The results of the co-producing and cooperation initiatives are becoming more relevant with experience and time, and certainly they reveal the new awareness of civil society to the importance of the audiovisual sector in the economy and the impact it can play within the diffusion of the Brazilian and Regional cultures.



The co-production agreements and the cooperation agreement can be used as examples of preferential mechanisms to achieve the goals of Article 16 of the Cultural Diversity Convention.

## **E. Conclusions and recommendations**

After reviewing the literature, searching for examples of preferential mechanisms in the trade area, and consulting with trade and culture experts, some conclusions can be drawn from this study.

The first one is that there are many examples of preferential mechanisms granted by developed countries in the area of trade in goods. In the area of services, however, because of the MFN clause and reciprocity, there are no examples of preferential treatment. Examples of preferential mechanisms in the area of cultural goods and services can only be found in the EU new initiative towards ACP countries, but they are quite recent in the history of the trading system. There are no concerted efforts in negotiating the issue of cultural preferential treatment in the multilateral system, and the degree of information about this issue in Geneva is quite low.

The second conclusion is that the Convention can raise questions of conflict of international law. The Convention is an international treaty that creates rights and obligations to its members. However, one important component of Article 16 is the exchange of artists, professionals and practitioners, as well as the liberalization of trade for cultural goods and cultural services. As a consequence, there are some restrictions to be faced in the attainment of its objectives. The circulation of cultural persons is under rules imposed by the immigration law of each country. In the context of trade, exchange of cultural goods and services has no alternative but to follow trade rules negotiated in the multilateral trading system. More flexibility can be found in specific regional or bilateral agreements in relation to goods, services and the circulation of persons.

As a result, some options are opened to Convention' members when negotiating guidelines to implement Article 16.

- i) One option is to establish guidelines without taking in account the question of compatibility of cultural rules and trade rules. To defend this position, one can argue that the Cultural Convention is a specific treaty and above multilateral trading rules.

A possible consequence for exploring this option is to find some suggested measures challenged in WTO panels, and to wait for possible solutions in the Appellate Body decisions. An alternative for this impasse is to bring the measures negotiated for cultural purposes to be discussed in the WTO, and if necessary, to ask for a waiver for the cultural trading system.

- ii) Another option is to negotiate guidelines that are compatible with multilateral rules, using all space already created in preferential mechanisms and exploring all flexibilities given to developing countries. Moreover, negotiate guidelines exploring the existing space in areas where there is yet no multilateral rules. As a result, in the case of cultural goods, one possibility is to use existing rules on S&D treatment, mainly the ones related to preferential treatment, and all existing flexibilities in relation to developing countries. In the case of cultural services, because of the positive approach used in the GATS negotiation, many areas are still not bound, what gives a significant space to negotiations, mainly in the area of audiovisuals. More flexibility can also be found in bilateral and regional agreements, where the objectives of cooperation and partnership can be better included.

This option, which allows members to explore the existing space given in the multilateral system, can provide members of the Convention with several mechanisms to implement the objectives of the Convention. Since the negotiation of trade rules is a continuous process, the concerns expressed in the Convention can be included in the trading system. An important task ahead is to discuss the objectives of the Convention in the WTO, and explore how the two organizations can work together. It is relevant to remember that development is the first objective of the present Round.

This is the approach followed in this report. No confrontation with WTO rules, but full exploration of the space given by the WTO to create the necessary mechanisms in support of the objectives of the Convention.

The following recommendations are offered in different levels: one is to suggest mechanisms compatible with the rules of the WTO, also exploring the space existent in areas where WTO has not yet defined rules; the second, is to suggest mechanisms to be negotiated under regional or bilateral agreements, where parties can agree on rules for areas not covered by the WTO, exploring alternatives of cooperation and partnership.

They can serve as examples or suggestions in the negotiation of the guideless to implement Article 16 of the Convention.

#### I - Preferential mechanisms under multilateral rules

- i) Market access for cultural goods
  - to increase market access for cultural goods through tariff reduction under preferential
  - arrangements, introducing a clause on cultural goods in all non-reciprocal GSP schemes.
  - to increase market access for cultural goods through tariff reduction under regional
  - agreements (reciprocal bilateral or regional agreements under GATT Article XXIV).
  - to review the Harmonized System for the Classification of Goods to include a special
  - classification for cultural goods according to the UNESCO definition.
  - to use the DFQF initiative to improve market access for cultural goods from LDCs.
  - to allow Aid for Trade Initiative to support the production of cultural goods in LDCs.
- ii) Market access for cultural services
  - to increase market access for services and service suppliers of interest to developing countries by the liberalization of services in the WTO scheduling of developed countries.
  - to interpret and to extend the MFN exceptions that allow measures not consistent with MFN treatment to include agreements of co-production, co-distribution and co-emission on audiovisuals and music.
  - to give special priority for LDCs, including a treatment to facilitate access from LDCs through specific commitments in the developed countries market. Ways to implement this clause is being negotiated in the Doha Round to parallel DFQF in goods.
  - to increase market access for cultural services through better specific commitments in the cases of economic integration on services under negotiation of bilateral or regional agreements (GATS Art. V).
  - to increase market access for cultural services through flexibilities in the implementation of trade arrangements among developing countries (GATS Art. V).

- to negotiate special commitments from developed countries in relation to mode 4 – presence of natural persons from developing countries, to include special quotas and visas for artists, professionals and practitioners in the area of culture.
- to negotiate special screen quotas for audiovisual works produced by developing countries in the market of developed ones.
- to negotiate special music quotas to be transmitted by developed countries when composed and produced by artists from developing countries.

## II - Preferential mechanisms under bilateral or regional agreements, including areas not covered by the WTO

special visa for artists, professionals and practitioners from developing countries

- facilitation for temporary residence of artists, professionals and practitioners
- facilitation in the temporary imports of equipments
- special visa for training of professionals
- agreements on co-production, co-distribution and co-emission
- negotiation of screen quotas, distribution quotas and diffusion quotas to works from developing countries
- creation of exhibition spaces dedicated to works from developing countries
- access to distribution networks of developed countries (analogical and digital ones)
- creation of distribution network in developing countries under regional agreements
- creation of network of analogical movies and digital movies in developing countries
- transfer of technology and know-how
- investment agreements in the production of cultural goods
- investment agreements to supply cultural services
- special treatment for export of environment and cultural goods and services
- special treatment for export of cultural goods and services produced under social standards criteria established in international conventions.

## III - Specific proposals:

- to bring the discussion of the implementation of Article 16 to the WTO Committee of Trade and Development with the objective to raise the awareness of developing country members to the objectives of the Convention. In other words, to prepare delegates of countries that signed the Convention to defend the interests of their countries in the WTO.
- with the support of UNESCO to develop a central distribution agency, by internet, or virtual shops, with free access, to distribute music and audio produced by developing countries. Copyrights are to be paid by publicity. This agency of services on demand can solve one of the most significant problems faced by developing countries, that of distribution access and market access, in one area that is in the core of culture, audiovisuals and music. The objective is to use the phenomenon of the dematerialization of goods and services by the internet to make them available to a larger portion of consumers.

In summary, several mechanisms developed in the trading system can be applied to the cultural trading system in relation to preferential treatment to goods and services. There are also areas not regulated by the WTO that should be explored to accomplish the objectives of the Convention, mainly related to services. Finally there is the option of negotiating preferential arrangements or reciprocal bilateral or regional agreements with developing or developed countries, exploring mechanisms of cooperation and partnership in the area of cultural diversity.

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