

The Unesco Convention on Cultural Diversity: A Treaty That Comes Too Late?

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- *The Convention on the Protection and Promotion of the Diversity of Cultural Expressions, approved by Unesco in October 2005, recognises the specific nature of cultural goods and services beyond their trade value. Despite returning to Unesco in 2003, the US was not able to stop the Convention, conceived as a counterweight to the WTO agreements and its neoliberal logic, from being approved. The new Unesco agreement is a shake-up of international law and the legal doctrine it could generate is worth looking at. Also, the Convention, together with the new proposed Statute of Autonomy approved by the Parliament, opens the door to the application of cultural policies and Catalonia's international projection (such as participation in particular Unesco spheres) that should be taken advantage of. Finally, this article analyses the US strategy in the audiovisual sector following this diplomatic setback at Unesco. In this sense, the assessment is not very encouraging for the supporters of cultural diversity.*

Key words

Unesco, cultural diversity, Convention, cultural policies, international trade, new Statute of Catalonia, Motion Pictures Association of America (MPAA), online film, e-commerce.

The 33rd general conference of the United Nations Educational, Scientific and Cultural Organisation (Unesco) approved the **Convention on the Protection and Promotion of the Diversity of Cultural Expressions**¹. Following a process of negotiations that began in November 2001, the definitive voting took place at Unesco headquarters in Paris on 20 October 2005 at 19:13 local time. The Convention had the favourable votes of 148 Unesco member states, while the US and Israel voted against it, and Australia, Honduras, Nicaragua and Liberia abstained. With the approval of the Convention text, a process of ratification by the different states then began. The Convention will enter into force in the states that have ratified it when there is a minimum of 30. In this regard, the European Parliament adopted a report that recommended its ratification in the 25 EU² member states. However, it should be said that six months after the Convention was approved, only two countries have ratified it: Canada and Mauritius.³

The convention establishes, within the sphere of international law, the legitimacy of States to apply cultural policies. Its main bases are:

- The recognition that the specific nature of cultural goods and services means they cannot be treated in terms of their commercial value only, but also as bearers of values, identity and meaning.
- The right of States to apply preservation and development measures to all their own cultural expressions.
- Aid for the cultural industries of developing countries.
- The non-subordination of the convention to other international agreements and treaties, such as the World Trade Organization (WTO)
- The creation of a conciliation mechanism for conflict resolution which does not have the authority to set penalties but does open the door to the creation of a legal

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doctrine and jurisprudence on cultural policy at the international level⁴.

The approval of the convention on cultural diversity marks a turning point in the confrontation between France and the US that began in the mid-1980s and which has ultimately seen America left out in the cold.

The 'diplomatic battle' over the legal treatment that culture should be accorded began with the 1986 Uruguay Round, i.e., the round of negotiations over the GATT (General Agreement on Tariffs and Trade), which ended in 1993 and gave rise to the WTO. Countries like France and Canada held that culture should be excluded from the liberalisation of international trade because it was a fundamental activity for society, like tax collection or the preservation of the environment. This defence gave way to an expression that quickly took hold in the media, i.e., 'cultural exception'. For its part, the European Commission (under the leadership of the EU Trade Commissioner at the time, the UK's Leon Brittan) said it should be included in international trade agreements but 'with a specific treatment', given that culture (and the audiovisual industry) generated an important trade exchange that ought to be regulated (here we could talk about 'cultural specificity'). Finally, the US held that culture was a commercial activity like any other and that state intervention was not legitimate because it could distort proper market operation.

In terms of 'winners' and 'losers', it could be said that the liberalising position of the US 'won' by getting culture included in WTO treaties. As the lesser of two evils, the level of commitment in liberalising the culture sector accepted by the European Community and its member states is currently low and enables us to preserve the existing legislation (even though in some cases it is not definitive). But culture is included in the general agreement on free trade and therefore there is no cultural exception (in the same way that we talk about the *air exception* with WTO agreements). This means, in particular, that the cultural sector is included within the liberalisation negotiations under way at the WTO and within those which could be carried out in the future. The supports of the cultural exception were thus the 'losers'.

That is why it has been necessary to reformulate the strategy of the sectors that oppose the marketing of culture. The discourse has evolved on the basis of the new context:

if the approach adopted during the Uruguay Round was 'defensive', now the discourse was 'constructive'; from the cultural exception we have moved on to promoting cultural diversity. And this new leitmotiv led to the Unesco Convention.

In any case, the adaptation of the new Convention to the international legal system is certainly ambiguous. Article 20 establishes the Convention with the same legal value as other international treaties, but the way it is drawn up is ambivalent, as it mentions 'non-subordination' but also 'complementarity', and makes it clear that nothing in the convention can be interpreted as modifying the rights and obligations that the parties have agreed to under any other treaties to which they are signatories. This point has already been the object of opposing interpretations by the signatories to the convention: while the UK said it did not permit the exclusion of cultural goods and services from WTO agreements (thus restoring the cultural exception), France said that it did⁵.

The press has helped increase confusion over the issue. For example, on 17 October (three days before the Convention was approved), the French daily *Le Monde* published an article under the headline 'Government Satisfied with Unesco Text on Cultural Exception'. It is important to observe the inappropriateness of this statement, because 'cultural exception' is a term used in the context of the WTO, not Unesco. Also, culture was included in (and not excluded from) WTO free trade agreements, which have promoted progressive liberalisation since they first began. This means that first the GATT and later the other WTO agreements, might well evolve slowly, but they would never be regressive. In terms of international law (and also cultural and trade policy), it is therefore a serious mistake to uphold the validity of the concept of 'cultural exception'.⁶

Arguments in Favour of the Convention: French Mobilisation

Given the growing social and economic importance of the audiovisual sector, diverse countries, international organisations and professional and social sectors mobilised to achieve a legal framework favourable to cultural diversity⁷.

In this regard, one highlight was a speech by the secretary-general of the International Organisation of the Francophone (OIF), Senegal's Abdou Diouf, on 11 October 2005, on the occasion of the 20th anniversary of the Association pour la Diffusion Internationale Francophone de Livres, Ouvrages et Revues (ADIFLOR): "We have seen that growth in the communications, information and audiovisual industries has been accompanied by the massive and uninterrupted dissemination of cultural products in an almost single direction. If we fail to act, this will inevitably lead to the disappearance of numerous cultural expressions, or their frightened withdrawal into communities cut off from the world."⁸

In fact, the movement for the promotion of cultural diversity was conceived and led by the OIF. Its promoters argue that it is the necessary response to the standardising globalisation led by the major Anglo-Saxon countries. France's Minister for Culture and Communication, Renaud Donnedieu de Vabres, said in a speech at the 33rd Unesco general conference: "One of the fundamental responses to the challenge of modern terrorism and violence resides in culture and in the preservation of cultural identities. [...] It is up to our generation today to inscribe in international law that works of art and the mind cannot be treated as mere goods. It is up to our generation to decide that in our age of all-encompassing trade, where anything can be bought and sold, we must reserve a special place for culture, one in keeping with the dignity of human beings [...] This is not a message of withdrawal, it is not a surrender to close-mindedness and idiosyncrasies that would justify acts of violence or fanaticism. This message is one of the values that form the basis of the Declaration on Human Rights."⁹

In any case, however, other, states that do not have the French language and culture have supported cultural diversity in the terms set out under the Unesco Convention. Let us review the most noteworthy:

- **International Meeting of Culture Ministers, Madrid, 11-12 June 2005**¹⁰

This meeting, promoted by France, Brazil and Spain, ratified each State's right to "adopt measures for the protection and promotion of the diversity of cultural expressions" and insisted that the Convention had to "have an adequate and legitimate place in the inter-

national legal system that does not involve a hierarchical submission with respect to other international instruments".¹¹

- **2nd Meeting of ASEM (Asia-Europe Meeting) Culture Ministers, Paris, 7-8 June 2005. "Cultural Diversity: Opportunities and Challenges – ASEM's Long Term Action Plan"**¹²

The first informal meeting of ASEM culture ministers was held in 1996 at the joint initiative of France and Thailand. The 2005 meeting brought together the 25 States of the European Union, the European Commission, the 10 Member States of the Association of Southeast Asian Nations (ASEAN), the People's Republic of China, the Republic of Korea and Japan.

The Action Plan approved at the meeting aimed to contribute toward the adoption of the Convention at the 33rd UNESCO General Conference.

- **Message by Pope Benedict XVI at the "Culture, Reason and Freedom" meeting, UNESCO, 3 June 2005**¹³

In this message given at the Unesco headquarters, the Pope said: "In a world which is both multiple and divided, and often submissive to the strong demands of globalization of economic relations and, even more, of information, it is important at the highest levels to mobilize the energies of intelligence so that man's rights to education and culture are recognized, especially in the poorest countries."

- **Meeting entitled "Cultural Diversity: Dialogues Between Filmmakers of the South", Cannes Film Festival, 27 May 2005**

(Summary by Olivier Barlet, from the organisation Africultures.¹⁴)

As Miguel Necochea from the Mexican Coalition for Cultural Diversity¹⁵ said, Mexican film production has dropped by 72% due to the invasion of the market by US products as a result of the North American Free Trade Agreement. 280 films were released in 2004, of which 166 came from the US. Moreover, the US controls 2,500 of the 3,000 cinemas in Mexico. Necochea feels that the relationship between the Mexican film industry and the Mexican public has broken down because the US ideology has come to prevail. Consequently, production houses have closed, industry unemployment risen and

film exports fallen. A very different situation is occurring in Canada, which did not include culture in NAFTA and which can apply measures to promote its sector. Mexican filmmakers are therefore lobbying for an amendment to the free trade agreement and asking for the Convention to have retroactive effects to remedy the situation.

Barlet goes on to discuss the speech given by Nabil Ayouch from the Moroccan Coalition for Cultural Diversity. Ayouch said that two or three years ago, the US accelerated bilateral agreement negotiations with around 30 countries. The negotiations for trade liberalisation were established in packages that included all economic sectors, greatly weakening the negotiating ability of the countries involved. Morocco is one example of a country that can no longer apply policies to promote its national culture because of the liberalisation agreement with the US.

For his part, Kim Hong-Joon (Korean Coalition for Cultural Diversity) said his country represented a unique case, with a screen quota system that requires big screens in Korea to show 40% local films. However, the US asked Korea to abolish its quotas in 1999 as a precondition to signing the bilateral treaty on US-Korean investments. This opened the eyes of both the domestic industry and the public. Hong-Joon concluded that US pressure continues today and that, "for the rebirth of Korean cinema, we need the UNESCO convention as a weapon."

Arguments Against the Convention: the United States

With regard to the US, its position has also changed over time. America withdrew from Unesco in 1984 because of a falling out with the then director-general, Senegal's Amadou-Mahtar M'Bow¹⁶. But nearly 20 years later, on 29 September 2003, First Lady Laura Bush gave a speech at the Unesco plenary session as a symbolic gesture of the US returning to the table¹⁷. The country's reincorporation took place gradually and the latest intergovernmental conference was the first at which it was present with full rights. The US's attitude at the meeting took the form of making contacts and observing, as can be seen at the website that reports on the

work done in the lead-up to the delegation's presence: *Re-entering and Looking Ahead*.¹⁸

Indeed, it was at that moment two years ago when Unesco was debating the draft Convention on Cultural Diversity. The posture of the US delegation in the re-entry was formally conciliatory, but it made it clear that it opposed the Convention as a barrier to the free circulation of information and ideas and could be an attack on the freedom of expression. Indeed, the strategy of the US delegation aimed to deactivate the process or at least cool it down. IN all its statements, the US said it did not understand the speed with which others wanted to adopt the agreement.

In fact, however, the trajectory for the approval of the Convention began in November 2001 at the 31st Unesco general conference, when the Universal Declaration on Cultural Diversity¹⁹ was approved to applause. This declaration was accompanied by an action plan that proposed an international instrument of a binding nature and with force of law. This instrument is in fact the Convention. After various work meetings between the delegations of the member states, the draft Convention reached the Intergovernmental Conference of May-June 2005. This conference had to be (and eventually was) fundamental in the approval process. It was also, as I said before, the first meeting that had involved a US delegation in 20 years.

The debate at the Intergovernmental Conference began from an internal document that set out, on the one hand, all the previous works and, on the other, the proposal made by the conference president, Kader Asmal²⁰. Asmal had received a mandate from the Unesco director-general Koïchiro Matsuura to present a document to speed up the decision-making process. The second part of the document therefore represented a boost to the process and included the participation of Mounir Bouchenaki, assistant director-general for culture at UNESCO, Katerina Stenou, the director of the division of cultural policies and intercultural dialogue, Jukka Liede of Finland and president of the drafting committee and Artur Wilczynski of Canada and rapporteur of the Convention negotiations²¹.

The Intergovernmental Conference therefore arrived with the 'dirty work' already done. But this policy of *fait accompli* deeply bothered the head of the US delegation, Robert S. Martin. The final declaration from the US published on 3

June (one day before the end of the conference) included a firm complaint about the fact that the conference president had given instructions to agree on a definitive text. “The rules of procedure – as well as Unesco’s normal practices – have been inconsistently applied and at times completely ignored (...) What we have done here in the past week has undermined the spirit of consensus that normally characterizes the work of Unesco. It will surely weaken Unesco’s reputation as a responsible, thoughtful international organization.”²²

In fact, one of the effects of the Convention is the ‘principle of non-subordination’, giving it a status under international law equivalent to other international treaties such as trade agreements. That was the basis of the US’s beef at the last Unesco conference: the meeting was not dealing with culture, but trade. In the complaint mentioned previously, the US said that, “because it is about trade, this convention clearly exceeds the mandate of UNESCO. Moreover, it could impair rights and obligations under other international agreements and adversely impact prospects for successful completion of the Doha Development Round negotiations [of the WTO]. In so doing, it will set back progress toward the economic liberalization that has done so much to increase prosperity throughout the world, particularly in developing countries, where culture plays such an important role in development.”

In any case, the obstruction by the US did not achieve its goal and the draft Convention reached the general Conference with a very broad consensus. After the agreement at the Intergovernmental Conference, the General Conference (the maximum organ of government at Unesco) had the voting of the Convention on the agenda. Given the importance of the event, none other than Condoleezza Rice, the US Secretary of State, wrote to her foreign-affairs counterparts, urging them to withdraw support for a project that had already been signed and blessed. Faced with diplomatic isolation, the Department of State argued that the text to be voted on was deeply flawed and contradictory. It called (in a single version written in French) for the preparation of a new draft convention that could not be erroneously interpreted to say that States had the power to take protectionist trade measures under the pretext of protecting culture.²³ The problems with the text, according to the US, lay in the following areas:

- A vague definition of the convention’s field of action.
- Provisions susceptible to being radical in reference to the measures parties could take to defend poorly defined cultural objectives.
- An ambiguous relationship between the Convention and other international agreements, especially those relating to trade.

The major American dailies pedalled the same line. On 14 October 2005, a week before the voting, the *Wall Street Journal* set out its doubts about the convention’s validity: it legitimised State intervention in creative affairs, and said that “China and other repressive countries are keen on the Convention”.

However, not all the US press shared this view. On 12 October, the *New York Times* published an article by Alan Riding, where he underlined the United Kingdom’s support for the Convention and said the British delegation had asked Washington to accept it. “The Convention will be adopted and, once ratified by 30 countries, it will go into effect. The United States will not sign it and, as with the Kyoto Protocol climate treaty and the treaty creating the International Criminal Court, will likely remain a critical - and perhaps obstructionist – outsider”²⁴.

The Convention and the Role of Catalonia

Besides these details of the *realpolitik* that surrounded the approval of the Convention, it is important to analyse the effects the treaty could have on designing cultural policies in Catalonia, because international agreements related both with the trade of cultural goods and services, and with the promotion of diversity, affect the Catalan government’s ability to manoeuvre in this area. But contrary to what people might think, it is not true that in the face of the negotiation and signing of these treaties “there is nothing we can do”. Both the Unesco Convention and the WTO agreements do not only take into account nation states but also cultural and linguistic communities that do not have a state to defend their personality in international forums.

This is the case, for example, of the different treatment that Quebec receives in terms of cultural and audiovisual industries in the WTO’s General Agreement on Trade in

Services (GATS). During the Uruguay Round, the Canadian delegation defended Canada's federal nature and managed to get it included in the final agreement - in the list of GATS Article II exemptions for Canada, as well as the exemptions valid for the whole of the country, there are provisions that refer only to Quebec. The case of Catalonia is similar. In the words of Ramon Torrent, the former director of international economic relations at the Council of the European Union's Legal Service, "there is no legal obstacle to Spain (or the European Community in the sphere of its own authority) giving a different treatment to Catalonia in relation to particular aspects of GATS, such as the audiovisual industry"²⁵. As can be seen, the Spanish and Catalan authorities have a certain degree of manoeuvre in this field. Complete fatalism before a type of globalisation that falls outside the sphere of Catalonia is therefore a grave political error.

The same thing applies to the Convention on cultural diversity. That a state signs an agreement, warns Torrent, does not mean it assumes uniform commitments for all its sub-central government levels²⁶. The party that signs an international agreement is one thing, while the territorial sphere of the obligations assumed by the signatory, in states with a decentralised structure, is something else entirely. Torrent goes further and underlines the importance of article 30 of the Convention, referring to states with "federal or non-unitary constitutional systems". This article establishes that, in those provisions of the Convention that are up to the constituent units of the signatory state (such as states [of a federation], counties, provinces or cantons), the signatory state shall inform the sub-central governments with a recommendation for its adoption²⁷. In federal or non-unitary states, therefore, the role of the sub-central government authorities is certainly decisive in terms of the assumption of international obligations. In this regard, it is worth pointing out that some of these communities have already ratified the Convention. This is the case of Quebec, which on 10 November 2005 became 'the first state' (in the words of prime minister Jean Charest) to approve the Convention, and by the unanimous vote of the National Assembly.²⁸

However, it should be observed that the wording of article 30 is quite confusing and even the official English and French versions do not say the same thing. The non-official

Catalan version has translation problems, as already mentioned in note 28.²⁹

In any case, it is important to say that with the 1979 Statute of Autonomy³⁰ to hand, this provision that gives a certain role to sub-central governments is not applicable to Catalonia. Article 27 of the Statute mentions "the execution of international agreements" but nothing about negotiation or celebration. To date, the Generalitat has therefore only had the ability to use agreements of this nature, signed by the central government. Let's see the Statute valdi until 2006.

Article 27

3. The Generalitat of Catalonia shall adopt the measures necessary for the execution of international treaties and agreements in the areas that affect the matters attributed to its power, according to the present Statute.
4. To ensure Catalan is the heritage of other territories and communities, the links and correspondence maintained by the academic and cultural institutions are maximised. The Generalitat may ask the Government to sign and present (if necessary) treaties and agreements that enable the establishment of cultural relations with States in which these territories and communities are included or reside, to the Spanish Parliament for its authorisation.
5. The Generalitat shall be informed, in the drawing up of treaties and agreements, as well as customs bills, of points that affect issues of its specific interest.

Leaving aside the 1979 Statute, article 30 of the Convention is not applicable for many in Spain because with the current constitutional system, it is a unitary State. Unlike Germany (a federal state in which the constituent units are the *Länders*), the 1978 Spanish Constitution establishes that the constituent unit of Spain is popular sovereignty³¹. On the other hand, in section III "On the Spanish Parliament", chapter three "On International Treaties" (articles 93 to 96) the Constitution says that the 'signing' of treaties is up to the Spanish Parliament or Government, depending on the case. Further on, when it defines the territorial organisation of the State and, in particular, the autonomous communities (section VIII, chapter three), it lays down in article 149.3 that the State has exclusive powers in inter-

national relations. But independently of the validity of this thesis, which other constitutionalists would argue about, what the constitutional text does not impede in any way is that the state should assume differential international obligations for its autonomous communities. If in treaties of an economic nature, like the European Community treaty, there is a differentiation in the rights and obligations for the Canary Islands, why is there no differentiation in favour of Catalonia and other autonomous communities with their own cultural characteristics in agreements involving cultural content?

Whatever the case, the draft Statute of Autonomy approved by the Parliament of Catalonia on 30 September 2005 draws a new framework of relations between Catalonia, Spain and international organisations³². Thus, chapter III, "Actions of the Generalitat Abroad" of the draft statute includes a series of articles that set out a new political and power structure in the area of culture and international agreements. Article 199, "Participation in International Organisations" was quite explicit when it said "the Generalitat must participate in international organisations with powers in areas of interest relevant to Catalonia, particularly Unesco and other organisations of a culture nature, *in an autonomous fashion if the corresponding regulations allow, or, in any case, forming part of the Spanish delegation*". After the negotiation and subsequent voting in the Lower House of the Spanish Parliament, this article was left practically intact, although the fragment marked in italics was replaced by a more ambiguous formula: "*in the form established by the corresponding regulation*".³³

It is clear that this section takes as a reference point Quebec's capacity to manage particular areas of its foreign relations (in fact, this federal province of Canada has the support of its own Ministry of International Affairs³⁴). The latest challenge in the projection of Quebec has been gaining a permanent presence in the Canadian delegation to Unesco. On 5 May, Canada's president Stephen Harper announced this before the Quebec primer minister Jean Charest.³⁵

However, the draft Statute of Catalonia did not end here and, in article 197, "International Treaties and Agreements" awarded a leading role to the Generalitat in this area:

1. The Generalitat must be previously informed by the

State Government about the negotiation processes of international treaties and agreements, if they affect the powers or interests of Catalonia. The Government of the Generalitat and the Parliament may direct to the State Government and the Parliament the observations they consider pertinent in this regard.

2. *The Generalitat must participate in the negotiation process of the international treaties and agreements that affects its powers. This participation involves, in all cases, the incorporation of a representative of the Generalitat in the negotiating delegation and the final report of the Catalan Parliament when the matter involves exclusive powers.*
3. *The Generalitat can ask the State Government to sign international agreements and treaties, or for it to request authorisation from the Parliament to sign them, in matters of interest to Catalonia. In the case of exclusive powers, the Generalitat can conclude international preliminary agreements which require the authorisation of the State.*
4. *The Generalitat can request the State's authorisation to sign, on behalf of the Catalan Government, international treaties and agreements in the area of its powers.*
5. The Generalitat must adopt the measures needed to execute the obligations based on international treaties or agreements ratified by Spain or which bind the State, in the area of its powers.

Again, the draft statute was cut during negotiations. The three points of the article (italicised) were modified and point 4 was removed. The article was left as follows (this version is not official in English):

1. The State Government shall previously inform the Generalitat of the signing of treaties that directly and singularly affect the powers of Catalonia. The Generalitat and the Catalan Parliament can put to the Government the observations they consider appropriate.
2. When it involves treaties that directly and singularly affect Catalonia, the Generalitat may ask the Government to join the negotiating delegations in representation of the Generalitat.
3. The Generalitat may ask the Government to sign international treaties in issues of its power.
4. *(Previously point 5. No changes to the text).*

As can be seen, the 'spirit' of the article is substantially modified and opts for a wording that can fit within the Constitution without modifying it. From here on, after the Statute approval, it will be important to see how chapter III is interpreted after it is analysed, and which attitude the central Government will take with regards requests from the Generalitat to participate in the negotiation and signing of international treaties.

To return to the Unesco Convention, the fact is that the Government of the Generalitat has shown interest. This was shown in a speech by Caterina Mieres, the then Minister for Culture, at the 4th International Meeting of Cultural Professional Organisations, held in Madrid from 9 to 11 May 2005³⁶. One of Miere's proposals was the creation of the Observatory on Cultural Diversity to monitor the Convention. For this analysis instrument to be really an international reference point, it would have to have top-rate experts, such as Ivan Bernier, professor at the university of Laval (Quebec), or Ramon Torrent himself. It will also be important to see whether the new Culture minister, Ferran Mascarell, maintains interest in this area.

The Unesco Convention: An Agreement That No Longer Has Any Purpose?

Finally, and for the first time in history, a multilateral organisation approved a treaty with force of law that established cultural diversity as an inalienable human right. However, Ivan Bernier warns that any pleasure gained from David's victory over Goliath may be brief. According to the Canadian expert: "The free trade agreements concluded by the United States with Chile³⁷ (December 2002) and Singapore³⁸ (February 2003) mark a new development in the way the United States envisages the treatment of cultural goods and services in trade agreements"³⁹.

Up until the year 2000, Bernier said, America's official position had been that cultural products should not be differentiated from other ones. The US then changed position, as evidenced by a communiqué on audiovisual and related services in the WTO in December 2000⁴⁰, in which it admitted that the audiovisual sector had changed radically since the Uruguay Round, when discussions had focused mainly on film production and distribution and the te-

restrial broadcasting of audiovisual goods and services. The communiqué concluded by saying that the US would "con-sider developing an understanding on subsidies that (would) respect each nation's need to foster its cultural identity by creating an environment to nurture local culture".

This was the position also taken up by the Motion Picture Association of America (MPAA) in an appearance before US Congress in May 2001: "Many countries around the world have a reasonable desire to ensure that their citizens can see films and TV programs that reflect their history, their cultures, and their languages."

In other words, the Hollywood lobby in Washington supported other countries' arguments about aid and quotas for local content. During the same appearance before Congress, MPAA representative Bonnie Richardson made an interesting turnaround. She said the concession did not represent any problem for her organisation's interests, because there was no point supporting protectionist intervention by the State in a digital environment where distribution would be over broadband networks. The MPAA was optimistic on the subject: "Fortunately, to date, we haven't seen any country adopt this form of market-closing measure for digitally delivered content. We hope this market will remain unfettered – and hope we can count on your support as we work with our international trade partners to keep digital networks free of cultural protectionism". It must be admitted that the MPAA is right: what is the point of applying a quota policy to the internet?

This was the position the US Government adopted in July 2002 in the documentation it brought to the new GATS negotiations. The North American administration did not call for further liberalisation of conventional audiovisual services, but insisted on the need to uphold barrier-free trade for audiovisual products distributed electronically⁴¹.

However, it was not until the agreements with Chile and Singapore that this approach would take a legal form for the first time and be set out in detail in legal rights and obligations. An in-depth analysis of the implications of the two bilateral agreements on the cultural sector speaks to the radical change in America's strategy on the regulation of the international trade of the audiovisual sector. Jack Valenti, the then-president of the MPAA, said in a press release following the signing of the free-trade agreement between the US and Chile: "In stark contrast to some earlier trade

agreements, this Agreement avoids the ‘cultural exception’ approach). In these bilateral treaties, the US has deactivated the possibility of Chile and Singapore being able to apply measures to promote their domestic audiovisual sectors.

But it does not end here. Ivan Bernier, in a new study prepared for the Quebec Ministry for Culture and Communications, warned that the US has used this strategy on the quiet in treaties with the Central American states, Australia and Morocco.⁴² The neo-liberal terrain is expanding via bilateral agreements.

So, after the joy at the approval of the Unesco Convention on Cultural Diversity, we may well be surprised to find it has arrived 20 or 30 years too late, and that our ‘analogue joy’ counts for nothing in a broadband world. It is important to keep the alarms connected.

Note at the close of the edition of *Quaderns del CAC*:

At the close of the present article, something happened that was important enough to mention in the body of the text and not the footnotes. In the first months of 2006, the MPAA redesigned its website, eliminating corporate information prior to 2004.⁴³ I searched for the term “Jack Valenti” (president of the MPAA for 38 years until 2004) but got no result. Neither could I find the MPAA press releases mentioned in this article, as they were all prior to 2004. These references have therefore ‘been lost’. Before making a judgment on this matter, I would refer readers to the two studies by Ivan Bernier analysed here (see notes 38 and 41):

- *A Comparative Analysis of the Chile – US and Singapore - US Free Trade Agreements with Particular Reference to Their Impact in the Cultural Sector*
- *Los recientes tratados de libre comercio de Estados Unidos como muestra de su nueva estrategia en el sector audiovisual* (The Recent Free Trade Agreements of the United States as Illustrations of Their New Strategy Regarding the Audiovisual Sector)

Bernier quotes these press releases and I accept his authority to guarantee the veracity of the information taken from cyberspace. I would also add my (obviously more modest) own testimony and say that I had access to them for a number of months before the MPAA changed its site.]

Notes

Note: All the websites referred to in this article were consulted, in a final revision, at the close of *Quaderns del CAC* double issue 23-24, on 26 April 2006. See the note that closes the article, within the text, in this regard.

- 1 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*
English version available at: http://www.unesco.org/culture/culturaldiversity/convention_en.pdf
French version available at: http://www.unesco.org/culture/culturaldiversity/convention_fr.pdf
Non-official Catalan version available at: http://cultura.gen-cat.net/diversitat/docs/conveni_diversitat.pdf
See note no. 28 for further information on the Catalan translation.
- 2 http://www.europarl.eu.int/news/expert/infopress_page/037-7660-117-04-17-906-20060425IPR07607-27-04-2006-2006-false/default_fr.htm
- 3 <http://portal.unesco.org/la/convention.asp?language=E&KO=31038>
- 4 Systems of conflict conciliation are common in international agreements and organisations. Under the previous GATT system of 1947, controversies were basically settled using a conciliation system (with non-binding ad-hoc panel reports) that created doctrine or jurisprudence. Other examples would be the consultative opinions of the International Court of Justice, not legally binding but which also generate jurisprudence, and Human Rights Committee reports, not binding, but which everyone refers to as the promoters of a doctrine about the 1966 International Covenant on Civil and Political Rights. However, it is worth observing that international jurisprudence does not have, according to the majority doctrine, a binding precedent effect for subsequent issues, but essentially a persuasive value.
- 5 See *La Vanguardia*, 20 October 2005
- 6 On this matter, see: TORRENT, Ramon. "The 'Cultural Ex-ception' in the World Trade Organisation: The Basis of the Audiovisual Policy in Catalonia" in: *Quaderns del CAC*, no. 14, Barcelona, September-December 2002.
Catalan version available at: <http://www.audiovisualcat.cat/publicacions/Q14torrent.pdf>
Spanish version available at: <http://www.audiovisualcat.cat/publicaciones/Q14torrent.pdf>
French version available at: <http://www.audiovisualcat.cat/publications/Q14torrent.pdf>
English version available at: <http://www.audiovisualcat.cat/publicationsing/Q14torrent.pdf>
- 7 For further information, see: PETIT, Martí. "The International Convention on Cultural Diversity (Unesco): Context, evolution and Perspectives" in: *Quaderns del CAC*, no. 18, Barcelona, January-April 2004.
Catalan version available at: <http://www.audiovisualcat.cat/publicacions/Q18petit.pdf>
Spanish version available at: <http://www.audiovisualcat.cat/publicaciones/Q18caspetit.pdf>
English version available at: <http://www.audiovisualcat.cat/publicationsing/q18angpetit.pdf>
- 8 http://www.francophonie.org/doc/dernieres/discours_sg_2005_10_11.pdf
- 9 <http://www.culture.gouv.fr/culture/actualites/conferen/donne-dieu/unesco.html>
- 10 <http://www.culture.gouv.fr/culture/actualites/communiq/donnedieu/diversite-mars2005.html>
- 11 [Original texts in Spanish, French and Portuguese.]
- 12 http://www.diplomatie.gouv.fr/fr/pays-zones-geo_833/asia_1057/evenements_5127/990.asec-culture-7-8-06-05_13615.html
- 13 Spanish version of the speech at: http://www.vatican.va/holy_father/benedict_xvi/letters/2005/documents/hf_ben-xvi_let_20050524_card-tauran_sp.html
French version of the speech at: http://www.vatican.va/holy_father/benedict_xvi/letters/2005/documents/hf_ben-xvi_let_20050524_card-tauran_fr.html

- 14 http://www.africultures.com/index.asp?menu=affiche_article&no=3856
- 15 <http://www.coalitionfrancaise.org/eng/cil/membres.php>
- 16 http://portal.unesco.org/en/ev.php-URL_ID=3387&URL_DO=DO_TOPIC&URL_SECTION=201.html
- 17 <http://usinfo.state.gov/products/pubs/unesco/priority.htm>
- 18 <http://www.state.gov/p/io/unesco/46933.htm>
- 19 <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>
- 20 English version: <http://unesdoc.unesco.org/images/0013/001392/139257e.pdf>
French version: <http://unesdoc.unesco.org/images/0013/001392/139257f.pdf>
- 21 For further information of the Convention negotiations process, see BERNIER, I. La troisième session de la réunion intergouvernementale d'experts sur l'Avant-projet de Convention sur la protection et la promotion de la diversité des expressions culturelles et l'examen du Projet de Convention par la Conférence générale de l'Unesco, disponible à <http://www.mcc.gouv.qc.ca/diversite-culturelle/pdf/chronique06-01.pdf>
- 22 <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=June&x=200506071629501CJsamohT0.2950403&t=xarchives/xarchitem.html>
- 23 <http://usinfo.state.gov/xarchives/display.html?p=washfile-french&y=2005&m=October&x=20051012165201AKllennocM0.3783991&t=livefeeds/wfr-latest.html>
- 24 The article is taken from the *International Herald Tribune* website, the international edition of the *NYT*: <http://www.iht.com/articles/2005/10/12/news/entracte.php>
- 25 <http://www.audiovisualcat.cat/publicacionsing/Q14torrent.pdf>
- 26 I leave this reflection to the interesting exchange of emails between Ramon Torrent and Laura Gómez Bustos, director and collaborator of the Globalisation Observatory at the University of Barcelona.
- 27 It is important to mention that the non-official Catalan version contained an error in the translation of the only official versions that exist to date (English and French): the English term 'counties' and the French term 'comtés', was translated for 'countries', a term that clearly does not correspond with the meaning of these terms in English and French.
- 28 Press release from the Quebec Ministry for Culture and Communications: <http://mcc.quebectel.qc.ca/sites/mcc/communiq.nsf/42e18349a0462c5185256b7200747b27/5535594aeb1332d7852570b5006f6e8a!OpenDocument>
Motion from the Government of Quebec to the National Assembly for the adoption of the Convention: http://www.assnat.qc.ca/fra/37legislature1/Debats/journal/ch/051110.htm#_Toc119488116
Final report from the parliamentary committee on the diversity of cultural expressions: http://www.assnat.qc.ca/fra/37legislature1/commissions/cc/expressionsculturelles/rapport_final.html
- 29 Below is the transcription of article 30b in the versions available to date: English (original version), French Spanish and Catalan:
"With regard to the provisions of the Convention, the implementation of which comes under the jurisdiction of individual constituent units such as States, counties, provinces, or cantons which are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform, as necessary, the competent authorities of constituent units such as States, counties, provinces or cantons of the said provisions, with its recommendation for their adoption."
"En ce qui concerne les dispositions de la présente Convention dont l'application relève de la compétence de chacune des unités constituantes telles que États, comtés, provinces ou cantons, qui ne sont pas, en vertu du régime constitutionnel de la fédération, tenus de prendre des mesures législatives, le gouvernement fédéral portera, si nécessaire, lesdites dispositions à la connaissance des autorités compétentes des unités constituantes telles que États, comtés, provinces ou cantons avec son avis favorable pour adoption."

“Por lo que respecta a las disposiciones de la presente Convención cuya aplicación sea de la competencia de cada una de las unidades constituyentes, ya sean Estados, condados, provincias o cantones que, en virtud del régimen constitucional de la federación, no estén facultados para tomar medidas legislativas, el gobierno federal comunicará con su dictamen favorable esas disposiciones, si fuere necesario, a las autoridades competentes de la unidades constituyentes, ya sean Estados, condados, provincias o cantones, para que las aprueben.”

“Pel que fa a les disposicions d'aquesta Convenció l'aplicació de les quals sigui competència de cadascuna de les unitats constituents, ja siguin dels estats, països, províncies o cantons que, en virtut del règim constitucional de la federació, no estiguin facultats per prendre mesures legislatives, el govern federal ha de comunicar aquestes disposicions, si escau amb el seu dictamen favorable, a les autoritats competents de les unitats constituents, ja siguin estats, països, províncies o cantons, per tal que aquestes les aprovin.”

30 1979 Statute of Autonomy of Catalonia.

Official name: Organic Law 4/1979 of 18 December, published in the Official State Gazette on 22 December 1979 and in the Official Diary of the Generalitat on 31 December the same year.

Available at: <http://www.gencat.cat/generalitat/cat/estatut/index.htm>

31 Official version of the Spanish Constitution available at: <http://www.congreso.es/funciones/constitucion/indice.htm>

32 Official version of the Draft Statute of Autonomy: <http://www.gencat.net/nouestatut/docs/proposta.pdf>

33 Statute of Autonomy. Text approved by the Lower House of the Spanish Parliament on 21 March 2006. <http://www.gencat.net/nouestatut/docs/estatutsenat.pdf>
Note: the translations from Spanish quoted here are not official.

34 Quebec, Ministère de Relations Internationales. Website: <http://www.mri.gouv.qc.ca/>

35 <http://www.radiocanada.ca/nouvelles/Politique/2006/05/04/009-Harper-Quebec-Unesco.shtml>

36 <http://www.coalicionedc.org>

37 Spanish version of the agreement at: <http://www.direcon.cl/documentos/TLC%20EEUU/version%20completa%20TLC%20Chile%20EEUU.pdf>
English version of the agreement at: http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html

38 http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html

39 BERNIER, I. *A Comparative Analysis of the Chile – US and Singapore - US Free Trade Agreements with particular Reference to Their Impact in the Cultural Sector* <http://www.screenquota.org/epage/upload/US%20Chile%20Singapore%20FTA%20&%20Culture%20by%20I.Bernier.pdf>

40 WTO, Council for Trade in Services, Communication from the United States, Audiovisual and Related Services, Paragraph 9, 18 December 2000 : Doc. S/CSS/W/21

41 <http://www.usmission.ch/press2002/0702liberalizing-trade.html>

42 BERNIER, I. *Los recientes tratados de libre comercio de Estados Unidos como muestra de su nueva estrategia en el sector audiovisual* (The Recent Free Trade Agreements of the United States as Illustrations of Their New Strategy Regarding the Audiovisual Sector)
Available at the website of the Quebec Ministry for Culture and Communications:
http://www.mcc.gouv.qc.ca/diversiteculturelle/esp/pdf/conf_seoul_esp_2004.pdf

43 MPAA. Press release archive: <http://www.mpa.org/PressReleases.asp?content=all>