

ARTICLE 20 OF THE UNESCO CONVENTION ON CULTURAL DIVERSITY: ITS USE FOR PROMOTING RESPECT FOR CULTURAL DIVERSITY IN WTO LAW*

BEATRIZ BARREIRO CARRIL

*Lecturer of International Law and International Relations
Rey Juan Carlos University*

Recibido: 06.12.2013 / Aceptado: 12.12.2013

Abstract: This article deals with the “conflict clause” in the UNESCO Convention for the Promotion and Protection of the Diversity of Cultural Expressions. The relationship to WTO Law is clear, since one of the purposes of this Convention is to reaffirm the States’ “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 to achieve the purposes of [the Convention] (art. 5.1) which are, among others, to give “recognition to the distinctive nature of cultural ...goods and services as vehicles of identity, values and meaning” (art. 1.(g)). The commerce of such goods and services is the object of WTO Law. In order to reaffirm the cultural sovereignty of States, the Convention refers to possible measures that States may adopt, such as “regulatory measures aimed at protecting and promoting diversity of cultural expressions” (art. 6.2.(a)). Among these measures are the well-known quotas reserving a space for domestic audiovisual products, which would normally breach the general principles of WTO Law.

This article explores how the “conflict clause” set out in Article 20 of the UNESCO Convention may be successfully invoked, and where that is the case, whether the UNESCO Convention would be the applicable law. Since there is no precedent yet for successfully invoking Article 20 to apply the UNESCO Convention instead of, or as a complement to, WTO Law, this article speculates on some options opened up by interpreting international law in a way that is favourable to cultural diversity claims.

Key words: UNESCO Convention for the protection and promotion of the diversity of cultural expressions; WTO Law, Cultural Products, Audiovisual sector, “conflict clauses” in International Treaties, conflicts of treaties in International Law, Interpretation of Treaties.

Resumen: Este artículo se centra la cláusula de solución de conflictos entre tratados contenida en la Convención de la UNESCO para la protección y la promoción de la diversidad de expresiones culturales. La relación con el Derecho de la OMC es clara, ya que uno de los objetivos de la Convención es reafirmar el derecho soberano de los Estados para implementar sus propias políticas culturales de apoyo a sus productos culturales. El principal foro donde se negocia el comercio de tales productos es la propia OMC.

* This article has its origins in a paper presented at the Postgraduate and Early Professionals/Academics Network of the Society of International Economic Law (PEPA/SIEL) Conference at the Georg-August-Universität Göttingen which took place on 25-26 January 2013. I would like to thank the senior commentators on my paper at that Conference, Markus Gehring (University of Cambridge) and Anne Trebilcock (ILO [retired]/ Centre de droit international de Nanterre, Université de Paris 10). Their comments were very useful and have been taken into account in this article, which is part of a work in progress dealing with the analysis of the state of the “conflict clauses” introduced into several treaties that interact with WTO Law. I started this project during my research stay at the Institute of International and European Law at the Georg-August-Universität Göttingen in July 2012. I would like to thank Professor Peter-Tobias Stoll (Göttingen University) for his guidance in the subject of this work in progress. I am grateful to the Journal’s anonymous reviewers for their helpful comments. All errors are, of course, mine alone. I am grateful as well to Monica Sandor and Kyle Thomson for their invaluable help in revising the English for this article.

Este artículo explora como el artículo 20 de la Convención de la UNESCO puede ser invocado con éxito para favorecer la aplicación de la Convención. Dado que no hay un precedente similar, este artículo considera algunas opciones que la interpretación del Derecho Internacional permite para obtener un resultado favorable a las demandas de la diversidad cultural.

Palabras clave: Convención de la UNESCO para la protección y la promoción de la diversidad de las expresiones culturales; Derecho de la OMC; productos culturales, sector audiovisual; normas de solución de conflictos contenidas en tratados internacionales, conflictos entre tratados en Derecho Internacional, Interpretación de Tratados.

Summary: Introduction. II. Does Article 20 Work as a “Conflict Clause”? 1. The question of the Same Subject Matter. 2. A Narrow or a Broad Definition of Conflict? 3. A Case Before the WTO Panels. How to Apply Article 20 of UNESCO Convention. III. The Role of the UNESCO Convention in the Interpretation and Application of WTO Law. 1. The Non-subordination of the Convention. 2. The “Taking into Account” Obligation. 3. How to Interpret the Second Paragraph of Article 20. IV. Final remarks.

I. Introduction

1. Many treaties that interfere with WTO Law contain “conflict of norms” clauses aiming to solve the conflicts which may arise between them and WTO Law. This is the case for the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous Chemicals and Pesticides in international trade (1998), the Cartagena Protocol on biosafety to the Convention on Biological Diversity (2000) and the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions (2005). The main question raised in this article can be formulated as follows: does the trend consisting of introducing “conflict of norms” provisions into international treaties provide something more than the classic provisions of international law contained in the 1969 Vienna Convention on the Law of Treaties (VCLT69), or on the contrary, is this simply a “fashion” in contemporary international law without real legal effects?

2. In order to shed some light on this question, this article takes as an example the case of the UNESCO Convention for the Promotion and Protection of the Diversity of Cultural Expressions (Convention on Cultural Diversity or CCD). The relationship to WTO Law is clear, since one of the purposes of this Convention is to reaffirm the States’ “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 to achieve the purposes of this Convention (Art. 5.),” which are, among others, to give “recognition to the distinctive nature of cultural... goods and services as vehicles of identity, values and meaning (Art. 1.g)” The commerce of such goods and services is the object of WTO Law. With a view to reaffirming the cultural sovereignty of States, the Convention refers to possible measures that States may adopt, such as “regulatory measures aimed at protecting and promoting diversity of cultural expressions (Art. 6.2.a)”. Among these measures are the well-known quotas reserving a space for domestic audiovisual products, which would normally breach the general principles of WTO Law. But the measures which might compromise WTO obligations are not limited to such quotas. In addition, financial programmes supporting audiovisual products in a specific language or representing a specific culture might breach WTO obligations as well.¹

3. The UNESCO Convention on Cultural Diversity continues the *cultural exception regime* under WTO Law. Such a regime is a very complex solution between, on the one hand, States - such as Canada - which in the Uruguay Round in 1993 argued for the complete exclusion of the audiovisual sector from the WTO Law, on the grounds that they are not products “as the others” but representations

¹ Such measures will be covered by article 6.2 (d) referring to “measures aimed at providing public financial assistance.”

of cultural identities, and on the other hand those States which wanted this sector to be governed by the general norms of WTO Law (United States). In the end, a compromise was reached whereby the Market Access and National Treatment commitments would be applied to the audiovisual sector only if such obligations are included in a State's schedule of commitments. Thus, a State which wants to preserve or introduce a quota for its audiovisual sector can opt not to list it. In addition, exemptions to the Most Favoured Nation Principle must be established explicitly. Among the measures that fall within the cultural exception regime are, for instance, the measures granting benefits through programs for the support of audiovisual products respecting certain origin criteria (the MEDIA Programme of European Union falls under this category of measures). States could opt to use this complex regime to preserve their cultural sovereignty regarding their audiovisual sector.

4. Since the existence of the "cultural exception" regime came under threat by the Doha Round of negotiations undertaken in 2001, the States most favourable to the "cultural exception" regime undertook a campaign to establish a culturally oriented instrument which could be used as a counterbalance to WTO Law and assume a special regime for cultural products. Thus, in 2005 the UNESCO Convention for the Promotion and Protection of the Diversity of Cultural Expressions (Convention on Cultural Diversity) was adopted. It safeguards States' sovereignty in cultural matters and gives examples of measures for protecting and promoting culture, including measures within the framework of the production and international commercialization of cultural products.

5. Even if the Convention is an instrument that is complementary rather than conflicting with other treaties², and if certain situations which might seem to involve conflict can in fact be seen in terms of complementarity, there are some situations which quite clearly might call for the application of both the UNESCO Convention and WTO Law in a way that brings them into conflict. This is the case, for example, if a State A introduces a quota measure for an audiovisual product regarding which it has already accepted the Market Access and National Treatment commitments. Such a State would be invoking Article 6.2(a) of the UNESCO Convention in order to justify the quota³ while State B would be claiming the violation of its WTO rights.

6. This article explores how the "conflict clause" set out in Article 20 of the UNESCO Convention may be successfully invoked, and where that is the case, whether the UNESCO Convention would be the applicable law. Of course, the possibilities of Article 20 will differ depending on the case.

7. Since there is no precedent yet for successfully invoking Article 20 to apply the UNESCO Convention instead of, or as a complement to, WTO Law, this article speculates on some options opened up by interpreting international law in a way that is favourable to cultural diversity claims. The author is conscious that some of the options explained below are not very likely to happen given the current state of international relations and that WTO can be seen as falling within the category of self-contained regimes in international law. However, exploration of this area is of interest since both the unity of international law and the growing consideration of cultural diversity as an interest that deserves protection and promotion in international law require a clear assessment of the normative value of Article 20 of the UNESCO Convention and its relation with WTO Law.⁴

² In the same vein, it must be noted that the expression "conflict clause" in this article corresponds to the common trend in international law to refer this way to clauses in treaties dealing with their relationship to other treaties rather than to mean that the treaties which the clauses deal with – in this case the WTO agreements and the UNESCO Convention – are essentially in conflict. In fact, the UNESCO Convention is intended to be a complementary treaty.

³ Article 6.2(b) can also be invoked in this case. It refers to "measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services".

⁴ For an approach of article 20 going beyond the relation of the Convention with WTO Law see A. CALVO CARAVACA, & C. CAAMIÑA DOMÍNGUEZ, *La relación de la Convención con otros instrumentos internacionales* in J. PRIETO DE PEDRO AND H. VELASCO MAILLO, *Comentario al articulado de la Convención para la protección y la promoción de la diversidad de las expresiones*

8. The interpretation of Article 20 is not at all an easy task. In fact, it has been seen as an article which goes “both ways”⁵ [in the sense of claiming priority of the Convention while giving preference to other treaties at the same time] and therefore it has been suggested that it simply be ignored and that the Vienna Convention rules be given direct application instead.⁶ This article tries, however, to study this article with the objective of finding ways to make the application of the normative content of the Convention possible. In what follows I examine some arguments which in my view allow the applicability of the Convention and anticipate answers for eventual counter-arguments. Article 20 has been the most difficult one to negotiate.⁷ One may well ask whether the literal wording of Article 20 expresses the absolute and pure will of States, or more realistically, whether it does not also reflect the contingent elements in the negotiations, such as the rush to conclude them, the need to arrive at a compromise text, and so on. Such external factors might certainly be the reason for such a seemingly obscure and contradictory text.

II. Does Article 20 Work as a “Conflict Clause”?

9. Under the title of “relationship to other treaties: mutual supportiveness, complementarity and non-subordination”, Article 20 reads as follows:

- “1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,
- (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and
 - (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.
2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”

10. As Professor Stoll notes regarding conflict clauses: “some of [these] provisions aim at promoting coherence within treaty systems. Others reflect the intention that the agreement at hand assumes a somewhat superior role.” This is the case of Article 103 of the Charter of United Nations. “In a much more limited way, Article 311 of the United Nations Convention on the Law of the Sea (UNCLOS) or Article 22 of the Convention on Biological Diversity (CBD) reflect the idea that its provisions or objectives deserve some degree of priority.”⁸

11. By contrast, the Rotterdam Convention and the Cartagena Protocol contain provisions expressing “the desire that the Convention’s relationship to other agreements be one of mutual support and that no subordination be created.”⁹ It is not clear whether the UNESCO Convention fits in this group.

culturales (forthcoming publication in the frame of the Research Project DER2010-18064 “El nuevo orden de la cooperación internacional para la preservación de la diversidad cultural a la luz del Convenio de la Unesco de 2005. Referencia particular a España”).

⁵ J. PAUWELYN, ‘The UNESCO Convention on Cultural Diversity and the WTO: Diversity in International Law-Making?’. *ASIL Insights*, 2005, available at <http://www.asil.org/insights/2005/11/insights051115.html> (last visited 28 August 2013).

⁶ *Ibid.*

⁷ B. BARREIRO CARRIL, *La diversidad Cultural en el Derecho Internacional: La Convención de la UNESCO*, Madrid, Iustel, 2011. pp. 174-198

⁸ P.-T. STOLL, ‘Article 20. Relationship to Other Treaties: Mutual Supportiveness’, in SABINE VON SCHORLEMER & PETER-TOBIAS STOLL (eds), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Explanatory Notes*. Heidelberg, Springer, 2012, p. 521.

⁹ *Ibid.*

Even if there are a lot of similarities, Article 20 of the Convention is somehow different, since, as has already been suggested, it is difficult to interpret the degree to which it claims the non-subordination of the Convention, given Article 20, paragraph 2.

12. For a conflict to exist, international law requires that the parties to the dispute be bound by both treaties. This would be the case in a dispute between State A and State B, where both States are parties to the Convention, and where A defends a conduct, based on Article 6 CCD, that is in breach of a WTO right on the part of B.

13. Besides the requirement that both parties be bound by both treaties, the treaties also “have to deal with the same subject matter.”¹⁰

1. The question of the Same Subject Matter

14. Even a study of the negotiation process of Article 30 of the 1969 Vienna Convention on the Law of Treaties (CV69), which deals with the application of successive treaties relating to the same subject matter, is not sufficient to determine the meaning of the term “same subject matter”.¹¹ When can one be said to be dealing with a case of same subject matter? As regards quotas, do these in fact concern a cultural matter which thus falls under the UNESCO Convention, or is it a commercial matter falling under WTO Law? To what extent is the conflict here of a cultural or of a commercial nature? “Should it be deemed that, [when the] subject-matter differs, there is no conflict?”¹²

15. Contrary to the opinion of a few internationalists, Article 30 of the Vienna Convention applies “even when the subject matter of the treaties may not be identical. It is enough for both treaties to deal with the same subject –even if only in part.”¹³ The best definition of sameness of subject matter in a broad sense is the one provided by Vierdag: a same subject matter conflict arises when “a course of conduct is such as to attract the application of two different treaties”.¹⁴ The UNESCO Convention offers a very clear assessment of the fact that “cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value”¹⁵. Hence, it is clear that “quota measures”, to continue with the example used in this article, are subject to WTO Law as well as to the UNESCO Convention.

¹⁰ A. DAHRENDORF, ‘Trade Meets Culture. The Legal Relationship between WTO Rules and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions’, *Maastricht Working Papers*, 2006/11, p. 7, available at working.papers@law.unimaas.nl.

¹¹ F. PALOLILLO, ‘Comments on Article 30’, in O. CORTEN & P. KLEIN., *Les Conventions de Vienne sur le Droits de Traités. Commentaire article par article*, Bruxelles, Bruylant, 2006, p. 1283.

¹² P. ZAPATERO, “Modern International Law and the Advent of Special Legal Systems”. *23 Arizona Journal of International & Comparative Law*, 2005, p. 1.

¹³ L. GÓMEZ BUSTOS & P. SAUVÉ, ‘A Tale of Two Studies? Assessing the Effects of the UNESCO Convention on Cultural Diversity on WTO Law’, in *Contribution to the Conference: “The New Agenda for International Trade Relations as the Doha Draws to an End”*. OBREAL/EULARO specialist papers. Barcelona, 2007, p. 45.

¹⁴ A. RAMANUJAN, ‘Conflicts Over “Conflict”’: Preventing Fragmentation of International Law’, *1 Trade, Law and Development*, 1, p. 177, citing VIERDAG. ODENDAHL’S assessment of the expression “same subject matter” in the heading of article 30 of VC69 expresses a similar idea:

“The exact delimitation of the formulation ‘relating to the same subject matter’ [...] may [...] be left aside since the notion of (in)compatibility remains the issue of crucial importance. Even though it has been eliminated from the heading of Art. 30, it is still to be found in the wording of paragraphs 2-5, thus governing the application of large parts of the provision. The explanation is obvious: if two treaties are not incompatible, *ie* if they are compatible with each other (and just regulate the same subject matter differently), there is no necessity of deciding on the priority to be given to one of them”. See KERSTIN ODENDAHL, ‘Article 30. Application of successive treaties relating to the same subject matter’, in O. DÖRR & K. SCHMALENBACH (EDS), *Vienna Convention on the Law of Treaties. A Commentary*, 2012, p. 505.

¹⁵ See the Preamble of the Convention. A similar idea is reflected in principle 5 enunciated in Article 2 establishing the complementarity of economic and cultural aspects of development.

2. A Narrow or a Broad Definition of Conflict?

16. The potential conflicts between the UNESCO Convention and WTO Law are mostly conflicts between obligations and rights, and this is a subject which international law has not dealt with sufficiently.¹⁶ Negotiators of the UNESCO Convention didn't address this issue either.¹⁷ Is the use of a "narrow definition of conflict" – which would exclude the existence of a conflict in such a case – adequate in this instance? Would the use of this definition mean "that permissions [would] have to give way"? WTO panels normally use Jenks' narrow definition¹⁸; the Appellate Body's report *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (adopted on 19 January 2010), in which China invoked the UNESCO Convention, appears to have been a lost opportunity to clarify the question of the scope of the definition of "conflict" between WTO Law and the UNESCO Convention.

17. In order for the UNESCO Convention to have any chance of being considered in "conflict" with WTO Law, it is necessary to use a broad definition of conflict such as the one proposed by Joost Pauwelyn: "a situation where one norm breaches, has led to or may lead to breach of, another norm".¹⁹ In a similar way, J.-A. Salmon defines "antinomie" as "l'existence, dans un système juridique déterminé, de règles de droit incompatibles; de telle sorte que l'interprète ne peut appliquer les deux règles en même temps, qu'il doit choisir ('the existence of incompatible legal rules in a given legal system; which has the consequence that the interpreter cannot apply both rules at the same time, that he has to make a choice')."²⁰

18. Indeed, in the context of Multilateral Environment Agreements, Pauwelyn argues that "for the new environmental rule to have any effect, it should be recognized that in these circumstances as well there is conflict, namely, conflict between an obligation in the WTO and an explicit right granted elsewhere".²¹ Such an approach would be useful regarding the Cultural Diversity Convention.²²

3. A Case before the WTO Panels. How to Apply Article 20 of UNESCO Convention

19. If a WTO Panel is faced with the "quota measures" presented in this article, it must apply the "conflict rules of international law." Since "the WTO treaty agreements do not contract out from [them],"²³ and "the agreements of WTO Law do not include a provision that is aimed at the relationship of the WTO Agreement [...] with other international agreements,"²⁴ one may well ask whether the Panel would take Article 20 as a "conflict clause" in terms of Article 30.2 of the Vienna Convention in order to determine which law (WTO or UNESCO) would apply. In fact, Article 30.2 of VC69 specifies that "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."

20. The possibility of the Panel doing so is quite unlikely. WTO treaties have a vocation of permanence which does not fit well with the application of "conflict clauses" established in treaties. It is

¹⁶ E. VRANES, 'The Definition of "Norm Conflict" in International Law and Legal Theory', 17 *The European Journal of International Law*, 2006, 2, p. 395. C. GERMANN, 'Towards a Global Cultural Contract to Counter Trade-related Cultural Discrimination', in N. OBULJEN & J. SMIERS, *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making it work*. Zagreb, Culturelink, 2006.

¹⁷ As can be deduced from the reading of the different drafts and explanatory notes during the process of negotiating the Convention.

¹⁸ VRANES, *supra* note 16, 395-399.

¹⁹ Quoted in *ibid.*, pp. 406-407.

²⁰ Quoted in *ibid.*

²¹ DAHRENDORF, *supra* note 10, p. 9, citing PAUWELYN.

²² *Ibid.*

²³ Cited by *ibid.*, p 17. DAHRENDORF notes, "This has been determined by the Korea – Procurement Panel." *Korea – Measures Affecting Government Procurement*, WT/DS/163/R, adopted June 19, 2000.

²⁴ *Ibid.*, 22.

very unlikely that the Dispute Settlement Body (DSB) would look to non-WTO Law to solve a conflict between its law and external law in such a way that it overrules its own law.²⁵

21. However, as Ivan Bernier observes:

“The possibility of a reference to Article 20 cannot be ruled out inasmuch as the Dispute Settlement Body has recognized that non-WTO legal instruments could, in some cases, play a role in the interpretation of the organization’s agreements. The scope of this overture must yet be defined, as it is far from clear. For the moment, the least we can say is that the Dispute Settlement Body’s jurisprudence on the subject lacks consistency”.²⁶

22. At any rate, taking into account Article 20.2, which forbids the interpretation of the UNESCO Convention in such a way as to result in the modification of obligations established in other treaties, the role of art. 20 in determining the applicability of the UNESCO Convention will be limited only to cases where the existence of a breach of WTO Law on the grounds of the application of CCD is not clear. In such cases, interpretation could orient WTO Law in a way that is respectful of cultural diversity. In fact, “whereas the GATT was largely inward-looking, one of the major transformations that occurred with the establishment of the WTO was the openness of the [Appellate Body] to other rules of international law.”²⁷

23. Another way for WTO Panels to apply UNESCO Convention over WTO Law is to take the argumentation that Article 20 “would not fall under Article 30 (2) of the Vienna Convention”²⁸ as starting point. The literal meaning of such an article refers only to “clauses conceding priority to other treaties.”²⁹ As has been pointed out above, Article 20 seems to go “both ways”.³⁰ For these reasons it might be considered more reasonable to go directly to the conflict rules of international law, and in particular the rule of *lex posterior* contained in Article 30 (3)³¹, which states that “when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty”. Since the UNESCO Convention is the latter treaty, it would have, following such an argumentation, a “formal” chance of being applied: in the case of a quota set by State A which is incompatible with State B’s rights under WTO Law, the DSB might declare that the UNESCO Convention is the law that applies to the case at hand, rather than WTO Law.

24. However, there is little likelihood that such a situation would arise. First of all, it must be noted that it is necessary for the DSB to apply the UNESCO Convention’s “conflict clause” – Article 20 – to resolve the conflict, and then, in a second step, to decide that, since the Article is not clear enough (i.e., it “goes in both ways”³²), the DSB will apply the *lex posterior* rule.

²⁵ P. ZAPATERO MIGUEL, *Derecho del Comercio Global*, Madrid, Civitas, 2003, p. 358. See in the same vein, I. Bernier, ‘The Relationship between the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and Other International Instruments: the Emergence of a New Balance in the Interface between Commerce and Culture’, *Cultural Diversity/Diversité culturelle*, 2009.

²⁶ *Ibid.*, p. 13. Such was the case of *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, which severely restricts the use of asbestos, where the Appellate Body of the WTO found that “under Article XX (b) of GATT, a French decree prohibiting Asbestos and Products Containing Asbestos was necessary to protect human life... or health”.

²⁷ JOOST PAUWELYN & MANFRED ELSIG, ‘The Politics of Treaty Interpretation’, in Jeffrey E. Dunoff & Mark A. Pollack, *Interdisciplinary Perspectives of International Law and International Relations. The State of the Art* (2013), 457.

²⁸ DAHRENDORF, *supra* note 10, p. 21.

²⁹ ODEDAHL, *supra* note 16, p. 512.

³⁰ PAUWELYN, ‘The UNESCO Convention on Cultural Diversity and the WTO’, *supra* note 5. For an enumeration of the different kinds of “conflict clauses” (subordination clauses, clauses claiming priority, etc.), see Odenahl, *supra* note 14, p. 512.

³¹ DAHRENDORF, *supra* note 10, 21.

³² PAUWELYN, ‘The UNESCO Convention on Cultural Diversity and the WTO’, *supra* note 5.

25. Here, again, the solution depends on whether we are facing a situation in which a quota measure is clearly in breach of WTO Law (since Article 20.2 of the UNESCO Convention does not allow for the modification of existent obligations, as we will see later) or a situation in which a quota, even if at first glance forbidden under WTO Law, may be covered by an exception to the General Agreement on Trade and Services if it can be interpreted as falling under article XIV a) (to be discussed further below). Such a situation would offer a healthy opportunity for WTO Law to draw upon other external norms of international law which also bind many Member States of the WTO.

26. Another important issue in this regard is the fact that “Article 3.2 of the DSU [Dispute Settlement Understanding] requires the DSB Recommendations and rulings of the DSB *cannot add to or diminish* the rights and obligations provided in the covered agreements.”³³ The DSB would not, therefore, be competent to apply the Convention.

27. In fact, Pauwelyn has referred to cases where “the panel may ... decline jurisdiction on the ground that the dispute is in fact not genuinely a dispute under WTO rules, but raises rather claims under non-WTO rules for which it has no jurisdiction.” He has suggested that in such cases “the disputing can subsequently be brought before another court or tribunal”. It is important to emphasize that “in [such] case, any remaining WTO aspect of the dispute can then be referred back to a WTO panel, which should, in turn, take account of any rulings made under the other treaty.”³⁴ In a case where the WTO Panel does not know exactly how to interpret a quota measure, it could submit the case to the mechanism of Article 25 of the UNESCO Convention. This provision “has been made [...] to deal with any possible disagreements on the interpretation or application of particular rules or principles relating to the Convention from a strictly cultural perspective.”³⁵ A useful cooperation between WTO and the UNESCO mechanisms of dispute settlement could emerge. For example, in the aforementioned case of “China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products” before the WTO bodies, the issue of whether the exception on grounds of the necessity of protecting public morals, provided for in Article XX(a) of GATT³⁶, can be permitted or supported by Article 8 of the Universal Declaration on Cultural Diversity (whose text is included in the Preamble to the Convention) as invoked by China, was simply assumed without examination.³⁷ In fact, such a possibility is not at all clear from a cultural point of view. An excessive protection of public morals can in fact be contrary to the principle of openness and balance formulated in Article 2.8 of the UNESCO Convention, which states that “when States adopt measures to support the diversity of cultural expressions, they should seek to promote, in an appropriate manner, openness to other cultures of the world and to ensure that these measures are geared to the objectives pursued under the present Convention”. The mechanism of conciliation provided in Article 25 of the UNESCO Convention would be very useful for enriching WTO Law from a cultural perspective.

28. At any rate, following Pauwelyn’s description of the new Convention as a way “to refine the application and exceptions to free trade principles,” and emphasizing the fact that “International law is not made only at the WTO,”³⁸ one can argue that if States A and B were to agree on overruling the WTO provision at issue for the sake of cultural diversity, they could legitimately do so when they ratify the UNESCO Convention.

³³ *Ibid.* (emphasis added).

³⁴ J. PAUWELYN, ‘How to Win a WTO Dispute Based on Non-WTO Law?’ in *At the Crossroads: The World Trading System and the Doha Round.* (Schriftenreihe der Österreichischen Gesellschaft für Europaforschung Publication Series, 2008), 8, p. 48.

³⁵ UNESCO, *30 Frequently Asked Questions Concerning the Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, pp. 10-11.

³⁶ Since reading materials and finished audiovisual products fall under “cultural goods”, it is not the GATS which applies here but the GATT. Both treaties contain an article enumerating the General Exceptions to the provision of each agreement, which are quite similar. Both contain an exception regarding “public morals”.

³⁷ See Paragraph 7.751 of the Report of the Special Group.

³⁸ PAUWELYN, “The UNESCO Convention on Cultural Diversity and the WTO”, *supra* note 5.

29. Nevertheless, the example given here of a quota measure by one State breaching a right based on WTO Law of another State is very close to the situation described in Article 41 CV69. Indeed, the question of assessing, in the hypothetical case given as an example here, whether State A's quota would be in breach of WTO Law, or whether the UNESCO Convention must be seen as a "modification" of WTO Law allowing such a situation is not a straightforward one, and interpretation is essential. It has been argued by many scholars that a modification of the WTO obligations of States Parties to the UNESCO Convention is not possible since such a "modification" would fall under Article 41 CV69, which states that "two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if the modification in question is not prohibited by the treaty and does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations and does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole." For some scholars, the modification of their WTO obligations by States Parties to the Convention would be contrary to the "single undertaking" principle.³⁹ However, the viability of this principle in its current terms is increasingly being called into question.⁴⁰ Besides, as Carmody notes,

"while the protection of expectations is the [WTO] treaty's principal concern, this is not its *only* concern. The treaty's secondary purpose is to *promote the adjustment to realities*, by which I mean that the treaty gives some flexibility to governments to deal with situations encountered in the actual course of trade. These might involve unfair trade, or the need to protect the environment while engaging in trade."⁴¹

30. Is cultural diversity starting to be construed as a concern of the international community?⁴² It seems quite likely that this is the case, and WTO Law will likely be eventually adjusted to accommodate this common concern. The question of the possibility for some States to modify or "refine"⁴³ WTO Law is, therefore, still unresolved and quite open.

III. The Role of the UNESCO Convention in the Interpretation and Application of WTO Law

1. The Non-subordination of the Convention

31. The first paragraph of Article 20 refers to the spirit of the "*Pacta Sunt Servanda*" principle (Article 26 VC69). Hence, it could be considered superfluous.⁴⁴ However, some nuances can be identified. As Ruiz Fabri notes, "the first sentence of paragraph 1 ['Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties'] merely recalls an obligation that always exists even if not expressly stipulated". But "the second sentence ['without subordinating this Convention to any other treaty, they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties', 20.1(a)] can be broken down

³⁹ This principle means that "virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately [...] 'Nothing is agreed until everything is agreed'." See this definition at http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited 28 August 2013).

⁴⁰ For the future evolution of the single undertaking principle, see C. VANGRASSTEK & P. SAUVÉ, 'The Consistency of WTO Rules: Can the Single Undertaking Be Squared with Variable Geometry?' *Journal of International Economic Law*, 2006, 9, 4, p. 837.

⁴¹ C. CARMODY, 'A Theory of WTO Law' 2009, draft prepared for the ASIL International Economic Law Research Colloquium, UCLA Law School, p. 5.

⁴² See the discussion of this question in B. BARREIRO CARRIL, *La diversidad cultural en el Derecho Internacional: La Convención de la UNESCO*. Madrid: Iustel, 2011, pp. 316-318.

⁴³ Using Pauwelyn's expression. PAUWLEYN, 'The UNESCO Convention on Cultural Diversity and the WTO', *supra* note 5

⁴⁴ As Manero notes, following Hahn, in A. MANERO SALVADOR, "El Comercio de bienes culturales en la OMC", in C.R. FERNÁNDEZ LIESA & J. PRIETO DE PEDRO (eds), *Cultura y Comercio en la Comunidad Internacional*, Madrid, Escuela Diplomática, 2007, p. 70.

into several components. It proclaims the non-subordination of the Convention to other treaties and then clarifies two implications.”⁴⁵

32. According to Ruiz Fabri, the explicit “mutual supportiveness between this Convention and the other treaties” has some effects. Even if the inclusion of the obligation contained in Article 20.1(a) could be considered superfluous in Hahn’s view, it can serve to point out an implicit fact relevant to this UNESCO treaty, whose relations with WTO Law are not at all straightforward. This implicit fact is the non-contradiction between WTO Law and the UNESCO Convention, which can be relevant when interpreting WTO Law. In fact, as Ruiz Fabri notes, “to be mutually supportive” the two treaties must be “non-contradictory, which leads to a logic of conciliation and complementarity”.⁴⁶ Besides, one must interpret this implication in a way that is consistent with the entire sentence, and thus the obligation of “fostering” “should be read in the light of non-subordination.”⁴⁷ For Professor Stoll, the concept of non-subordination may be understood as “a plea not to give any automatic preference to the norms of another international treaty vis-à-vis the norms of the CCD”.⁴⁸

2. The “Taking into Account” Obligation

33. The second obligation set out in Article 20.1 [“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” 20.1(b)] is, according to Ruiz Fabri, that of “taking into account”, which “may seem rather vague.”⁴⁹ But “the ‘taking into account’ formula should also, and again, be read in the light of non-subordination. This presupposes an effective ‘taking into account’, within a context of conciliation.”⁵⁰

34. According to Bernier,

“The language of Article 20.1 (b) ... imposes a positive duty on the Parties to take into account the relevant provisions of the Convention. The expression “to take into account” is sometimes seen as a weak obligation because it does not insure a specific result. But this is a misunderstanding of the nature of the obligation which is not a substantive obligation but a procedural obligation. Now procedural obligations are not insignificant. Depending on the context, the non-respect of an obligation to take into account may be sufficient to invalidate a process or a decision.”⁵¹

35. With regard to the question of quotas on the part of State A in the example given above, these quotas could eventually, as already pointed out, find their way into one of the General Exceptions of Article XX of GATT and Article XIV of GATS. Article 20.1(b) can therefore be useful in interpreting the catalogue of exceptions, as well as the general requirements of the measures falling under these articles (e.g. the condition of “necessity” required in them)⁵², in such a way that they entail respect for cultural diversity.

36. Regarding this question, it seems that it would not be necessary for all the members of WTO to also be parties to the latter treaty (CCD) in order to accept the “taking into account” of it by the DSB⁵³.

⁴⁵ H. RUIZ FABRI, ‘Reflections on possible future legal implications on the Convention’, in N. OBULJEN & J. SMIERS, *UNESCO’s Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making it Work*, Zagreb, CULTURELINK, Institute for International Relations, 2006, p. 83.

⁴⁶ *Ibid.*, p. 83.

⁴⁷ *Ibid.*, p. 83.

⁴⁸ STOLL, *supra*, note 8, p. 532.

⁴⁹ RUIZ FABRI, *supra* note 45, p. 83.

⁵⁰ *Ibid.*, p. 84.

⁵¹ I. BERNIER, “The UNESCO Convention on the protection and promotion of the diversity of cultural expressions: a cultural instrument at the junction of law and politics”, *Cultural Diversity/Diversité culturelle* (2008), p. 23.

⁵² DAHRENDORF, *supra* note 10, p. 32.

⁵³ Following the solution given in *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, October 12, 1998. *Ibid.*, p. 28.

It seems to suffice for the latter rule to be “at least implicitly accepted or tolerated.”⁵⁴ In the case of the UNESCO Convention, this is not the case, since the United States has been a persistent objector to the Convention from the very beginning of its negotiations.

37. In any case, it is difficult to come to terms with the fact that in a very specific case between States Parties to the Convention the DSB is not going to take the Convention into account, especially when only one member of the international community – the United States – seems to fall under the category of “persistent objector” to the UNESCO Convention. An effective approach to treaty interpretation leaving room for new concerns and “[intending] to expand the normative scope of treaties”⁵⁵ would be appropriate for facilitating the application of UNESCO Convention before the DSB of WTO.

3. How to Interpret the Second Paragraph of Article 20

38. As Ruiz Fabri notes,

“taken in isolation, [the second paragraph] corresponds to a so-called “without prejudice” formula that prevents the Convention from producing effects on other treaties. However, it cannot be read in isolation. It is also necessary to consider its literal meaning and situate it in time. It is a question of “modifying” rights and obligations under other treaties.”⁵⁶

39. For Professor Stoll, this second paragraph “must be interpreted as a limit for the interpretation stated in paragraph 1.”⁵⁷

40. In any case, and following Ruiz Fabri, it seems quite clear that “the Convention does not claim to revise existing agreements and, considering its provisions, it cannot be used as a basis for calling into question commitments such as those that some States may have undertaken within the WTO.” Such a result is quite disappointing for observers like Armand Mattelart, who have maintained that “a Convention that was not on sales should allow States that have renounced their ‘cultural sovereignty’ by signing multilateral or bilateral agreements forbidding quotas to get it back.”⁵⁸ However, one must note that, from an international law point of view, there is no *cultural, economic or political* sovereignty as such at stake, since the legal concept of sovereignty does not refer to a catalogue of issues *rationae materiae*, which are sometimes difficult to distinguish, but rather to the fact that the given issue still falls under the “domain réservé”;⁵⁹ this is not the case when a State has freely signed an agreement to liberalize its audiovisual sector. One must note, however, that in such a case the State has not “lost” its cultural sovereignty, but exercised it by signing a free-trade agreement.

IV. Final remarks

41. It is clear that Article 20 – or, indeed, the whole Convention – is not written in terms that conflict with or contradict other instruments. On the contrary, it is its complementarity which prevails. In the first part of this article I suggest that the best – and perhaps only – role that Art. 20 of the UNESCO Convention can play is in the interpretation of WTO provisions from a cultural perspective and in the enriching of the dialogue between the WTO and the UNESCO Convention’s mechanisms for the settlement of disputes.

⁵⁴ Following Pauwelyn. See DAHRENDORF, *supra* note 10, p. 28.

⁵⁵ Using Cassese’s expression. See A. CASSESE, *International Law*, Oxford, Oxford University Press, 2006, p. 179.

⁵⁶ RUIZ FABRI, *supra* note 45, p. 84.

⁵⁷ STOLL, *supra* note 8, pp. 540-541.

⁵⁸ A. MATTELART, *Diversité culturelle et mondialisation*, Paris, La Découverte, 2005, p. 99 (my own translation).

⁵⁹ J. Kranz, ‘Réflexions sur la souveraineté’, in *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski*, The Hague, Kluwer Law International, 1996, p. 208.

42. Article 20 does not offer definitive answers to the question of conflicts. This highlights the complexity of the new concerns of the international community and therefore encourages the search for new ways to deal with them under international law. The interpretation of treaties will be an appropriate scenario to take into account these new concerns.

43. One must also bear in mind that WTO Law is a law in the process of construction: the Doha negotiations have not yet finished and the agreements made there should take into account the UNESCO Convention. In this regard it would seem that Anke Dahrendorf is right when she suggests that:

“In order to give cultural diversity legal importance within the WTO framework, an amendment of the GATT 1994 and the GATS is necessary. A cultural exception should be added to the currently existing exceptions on public interests, such as environment and public health. The majority of WTO Members have deep concern with the protection of cultural diversity; this should be reflected in the World Trade Organization of today.”⁶⁰

44. In fact, such an amendment can be interpreted as an obligation under the UNESCO Convention on Cultural Diversity, based on Articles 20.1.b) and 21, which establishes the Parties’ obligation of “undertaking to promote the objectives and principles of this Convention in other international forums”. For this purpose, Article 21 continues, “Parties shall consult each other, as appropriate, bearing in mind these objectives and principles.” Any enthusiasm invested in the possibility of such an interpretation, must be, however, tempered, taking into account the Declarations and Reservations made by some States Parties in the Convention: New Zealand declares that “it considers the clear legal effect of Article 20 is to ensure the provisions of the Convention do not modify *in any way* the rights and obligations of the Parties under other treaties to which they are also parties,”⁶¹ as if such article had no other effects. In its Reservation with regard to Article 20 (1) (a) and (b) Australia states that “the Convention shall be interpreted and applied in a manner that is consistent with the rights and obligations of Australia under any other treaties to which it is a party, including the Marrakesh Agreement Establishing the World Trade Organization. This Convention shall not prejudice the ability of Australia to freely negotiate rights and obligations in other current or future treaty negotiations.” This last sentence is remarkable, as it is the reservation of the United Mexican States to the interpretation of Article 20, stating that “(a) This Convention shall be implemented in a manner that is in harmony and compatible with other international treaties, especially the Marrakesh Agreement Establishing the World Trade Organization and other international trade treaties... (c) With regard to paragraph 1 (b), Mexico does not prejudice its position in future international treaty negotiations.”⁶²

45. It must be noted that of all the Reservations and Declarations formulated until present (of which there are ten) those referring to Article 20 are the most common.

46. The aim of this article has been to examine the possible uses or applications of article 20 which can foster cultural diversity in WTO Law. Though there are not many such possible uses there are some significant ones to be considered. Paragraph 1.b) of Article 20 offers, in my view, important potentialities for the “taking into account” of cultural diversity by WTO bodies. However, the expectations for the “taking into account” obligation are, currently, quite low. In the same vein as the aforementioned reservations, the case “*China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*,” has shown that third Parties⁶³ involved in the case interpret Article 20 in a very restrictive way regarding the promotion of cultural diversity in WTO Law. But that does not prevent the interpretation of Article 20 -namely its paragraph 1.b- in a manner that is more favorable to cultural diversity by emphasizing the procedural character of the “taking into

⁶⁰ DAHRENDORF, *supra* note 10.

⁶¹ Emphasis added.

⁶² See http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html#reserves

⁶³ Korea, Japan and Australia. Note that Korea and Japan are not Parties in the Convention.

account” obligation contained in that Article. An interpretation favorable to cultural diversity is more likely to take place when States involved in the dispute are States which are supporters of the UNESCO Convention. Moreover, in my view, it would not be absurd to argue that some of the aforementioned reservations to the UNESCO Convention would be against its object and purpose.

47. One must recognize that the legal value of the *environmental principle* has a lot to do with the strengthening of the procedural obligations which shape it. Hence, it is a question of time as well as of lobbying by the cultural civil society –which is weaker and less organized than the environmental one- to make the obligation of “taking into account” in Article 20.1 b) more effective. A recent reflection by Intergovernmental Committee of the UNESCO Convention regarding not article 20.1b) but article 21, which also contains procedural obligations to follow in the frame of decision-making processes in other international forums, states that: “it is still too early to evaluate the impact of Article 21, which depends on long-term effects entailing major changes at institutional and governance levels”⁶⁴.

48. Hence, we can expect that, in the near future, UNESCO Convention’s Conference of Parties will give *operational guidelines* specifying mechanisms for making Article 20.1.b) an efficient obligation.

49. Last but not least, I would like to draw attention to the construction of the Post-2015 Millennium Development Goals (MDG) Agenda and the eventual inclusion of *cultural diversity concerns* in this Agenda. More than relying on financial assistance, the existence of a *legal principle of cultural diversity-based development* relies on the strengthening of “taking into account” obligations such as the one stated in Article 20.1.b) of the UNESCO Convention. It is necessary for States considering themselves supporters of cultural diversity to become aware of the importance of these kinds of obligations and to act in consistency with them. States’ donations to the UNESCO Convention’s Cultural Diversity Fund or other similar Funds need to be accompanied by positions favoring cultural diversity in WTO and other commercial forums.

⁶⁴ See the “first report on the impact of the implementation of Article 21 of the Convention Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions” annexed to the document “Item 12 of the provisional agenda,” Intergovernmental Committee of UNESCO Convention, 7th ordinary session, Paris, UNESCO 10-13 December 2013, p. 13. Available at <http://unesdoc.unesco.org/images/0022/002249/224906e.pdf>