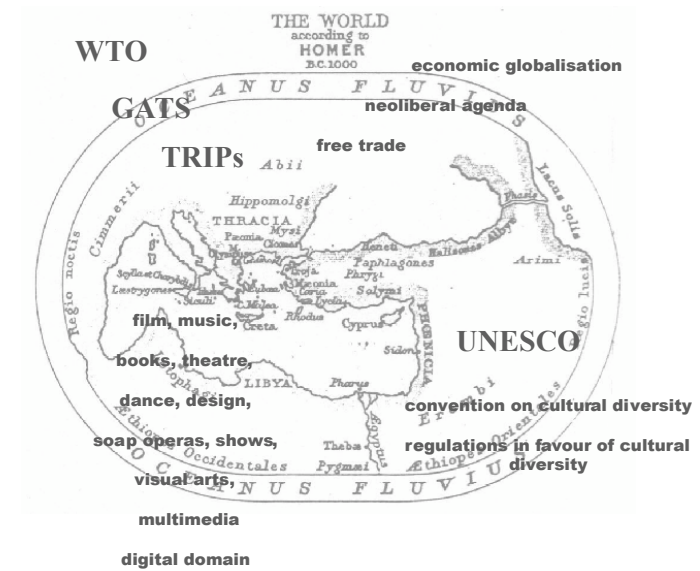


Joost Smiers

## Artistic Expression in a Corporate World

*Do we need monopolistic control?*



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*Do we need monopolistic control?*

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## INTRODUCTION

Most of the rumblings around the World Trade Organisation (WTO) have been linked to questions on the divide between rich and poor countries, agriculture, health and the pharmaceutical industries. In Seattle, Cancún and all these other cities where the present economic globalisation was contested, cultural movements were in the opinion of the public, remarkably invisible. Therefore, it might be surprising to know that the cultural sectors in our societies have set a far reaching proposal on the agenda that could contribute to the weakening of the WTO system: the establishment of a Convention on Cultural Diversity. The purpose of such a Convention is that culture must be freed from the liberalising grip of the world trade system. It should strengthen a country's sovereign right to maintain and install all those measures they feel appropriate for the protection and the promotion of cultural diversity within their society and in their relationships with other countries too. To reach this ideal, serious juridical pitfalls should be overcome, not to mention fierce political struggles.

This Convention, once ratified and signed by a substantial number of countries, must shield them from trade retaliations because of their cultural policies that may include subsidy systems, preferential tax treatments for domestic cultural initiatives, ownership and content regulations, and regulations that would make cultural industries publicly accountable. In the present economically dominated world order all kinds of protective measures have been considered as distortions of the glorified free trade and are therefore meant to be abolished. This is also the purpose of the new round of trade negotiations within WTO (the so-called Doha Round) that was started in 2001. Cultural conglomerates wanting to attain even more exhibition space and selling points world-wide than they have already, press hard to make countries open up their cultural markets completely and remove all protective measures that stand in their way.

However, if ownership and decision-making concerning cultural life is being controlled in a substantial manner by just a few cultural industries worldwide, then fundamental human rights and democracy are in danger. Human communication, expressed in all different forms of the arts, and the access to its means of production and distribution, should be as free and diverse as possible and should in no way be controlled by a few forces that dominate cultural markets in all corners of the world. This is about to

happen. This book is about why there is a need for a Convention on Cultural Diversity (chapter 1); why the WTO is not an appropriate place for the protection and promotion of cultural diversities (chapter 2); and what such a Convention should look like (chapter 3).

If its goal is to strengthen countries' rights to regulate their cultural domain in favour of cultural diversity, then an important topic should be: what appropriate kinds of regulations are effective, flexible, acceptable, understandable and convincing? A substantial part of the book, chapter 4, discusses this complicated topic and illustrates it with many examples of ownership and content regulations, from all fields of the arts, and from as many countries in the world as possible. We should get a better grip on understanding how to combine the freedom of cultural communication with implementing regulatory systems in favour of cultural diversity, and not be hindered by any trade retaliations or by cultural industries that occupy a too large a share of the cultural market or limit the cultural offer to stars, bestsellers and blockbusters.

Cultural diversity is the central concept of the proposed Convention, and a goal for cultural life, wheresoever in the world. By promoting this diversity the focus is on what we commonly call the arts. Of course, artistic expressions have impact on and reflect the broad way of life (which would be covered by the broad anthropological concept of culture), and are crucial in how we define and develop our identities. Moreover, the world of the arts is a significant and decisive segment of specific human communication in all societies. Here deeply felt feelings are expressed. It includes all forms of communication that have an aesthetic aspect; expressed in film, theatre, music, dance, opera, musicals, soaps, shows, pornography, design, visual arts, novels, poems and all different derived forms; exhibited in many distinguished genres; making noise or inviting silent reflection; produced and distributed on a small or a large scale; attracting and entertaining massive audiences and buyers or only modest groups of devotees; embodied in material, audiovisual or digital substances; ritualised, secularised, or commercialised.

Thus, speaking about the broad field of the arts as it functions in our societies, a distinction between culture and entertainment is not relevant. The *scale* of the production and distribution of films, books, music, theatre performances, design and visual arts (whether in the material, audiovisual or digital world) is not relevant as a distinguishing criterion for inclusion or exclusion in the concept of cultural life. Indeed,

some forms of artistic expression are more entertaining, and others invite calm reflection, or do both. However, such kinds of distinctions (and there are many more to make: a work may, for instance, be more traditional or more experimental) do not relate to the size of production, distribution and promotion. Artistic expressions created, produced, distributed, promoted and received on a mass scale belong to the cultural field of a society as much as the music, films, books, et cetera, that have a smaller scale.

It is important to be aware that artistic expressions in different cultures present themselves in diverse ways; they may have distinct ways of presentation, entrepreneurial infrastructures, meanings, financial underpinnings, artistic professions, attentiveness of audiences, and many other kinds of struggles and contradictions. We should not forget that artistic fields are often symbolic battlegrounds about, for instance, what sounds are important and are organised for maximum attention, what words are terrible and should be suppressed, and what kinds of images are absolutely powerful and seduce until the magic has been broken. It is a continuous hegemonic struggle. But this struggle concerns all artistic expressions, whether they have been produced, distributed and promoted on a huge or a small scale. This fight includes moral, aesthetic, social, legal and economic aspects.

Although it may be confusing and conflicting, it is exactly this multitude of artistic expressions that should have the right to exist, with its own conditions, and they should certainly not be organised by just a few enterprises. This multitude differs in any society (whether geographically destined or digitally constituted). Of course, artists and their intermediaries should be able to make a living, and that is the entrepreneurial side of their work. However, the social domain that concerns the freedom of communication should not be taken over completely by commercial forces.

The second word in the concept “cultural diversity” (from a democratic perspective) concerns not only the much-desired diversity of artistic expressions (the content) and occasions for cultural communication. It is just as important that there are *many* owners of the means of production and distribution and *many* decision-makers concerning the artistic communication. A Convention on Cultural Diversity would strengthen, one would hope, the national states’ competence to make sure that this can be realised. It is not about excluding works of art and entertainment from the cultural market; it is

about guaranteeing that audiences may be confronted with the broad range of options that exist and, then, make their choice.

Mid October 2003 the General Conference of Unesco unanimously adopted a resolution mandating its director-general to develop, in two years time, a preliminary draft Convention on protecting cultural content and artistic expression. In chapter 3 we will see that a couple of drafts for such a Convention exist already, which may speed up the process within Unesco. Nevertheless within this unanimity, the United States (since recently back in Unesco; see chapter 1) made clear that, for them, culture is a product like any other, and therefore a new international legally binding instrument for culture is superfluous and makes no sense. However, representatives of most other countries spoke passionately and with great force in favour of such a Convention. This may not be surprising because people are fighting for their identities. These contradictory viewpoints between the US and nearly all the rest of the world will take Unesco, within the next few years, into a decisive battleground on the fundamental question of whether artistic expression will be a trade only product, or whether other values will mitigate the huge commercial interests that narrow diversity and open access to the tools of cultural communication.

World-wide there are quite a lot of people already involved in pushing the idea of a Convention on Cultural Diversity and making the analytical effort to formulate what it should look like while trying to solve the numerous contradictions and near impossibilities that belong to such an immense project. I had the pleasure of interviewing Ivan Bernier, Peter Grant, Garry Neil, and Yvon Thiec for this book. The International Network for Cultural Diversity (INCD), a cultural NGO, is, and has been for many years, an excellent breeding ground for the development of my thinking about arts in the global context. The Research Group Arts and Economics of the Utrecht School of the Arts is a more than welcome home from where I visit the world and its arts, and my colleague Giep Hagoort in this Research Group continues to inspire. Johanna Damm, Lisa Kölker, and Alies MacLean gave me very welcome logistical and research support.

On 25, 26 and 27 September 2003 I had the opportunity to invite more than twenty researchers and cultural activists from all parts of the world to a working conference *Regulations in Favour of Cultural Diversity* (which is the basis for chapter 4) in the Cultural Centre De Balie in Amsterdam, organized by Eric Kluitenberg and Liedewij Loorbach. The conference was supported by the Dutch development organization Hivos.

The participants of the conference were: Jeebesch Bagchi (India), Leonardo Brant (Brazil), Suzanne Burke (Trinidad and Tobago), Mariétou Diongue Diop (Senegal), Gillian Doyle (Scotland), Fernando Duran Ayanegui (Costa Rica), Ben Goldsmith (Australia), Mike van Graan (South Africa), Nilanjana Gupta (India), Souheil Houissa (Tunisia), Jane Kelsey (New Zealand), Garry Neil (Canada), Nina Obuljen (Croatia), K.S. Park (Korea), Paul van Paaschen (the Netherlands), Caroline Pauwels (Belgium), Alinah Segobye (Botswana), Rafael Segovia (Mexico), Josh Silver (United States), Yvon Thiec (France), Inge van der Vlies (the Netherlands), Roger Wallis (Sweden), Karel van Wolferen (the Netherlands), and Gina Yu (Korea). The rapporteur of this conference was Barbara Murray; her observations helped me to formulate certain issues more precisely than otherwise would have been possible. The draft of this booklet was read more than carefully by Max Fuchs, Mike van Graan, Christophe Germann, Lisa Kölker, Nina Obuljen, and Verena Wiedemann.

I feel indebted by the attention all of them have given to this project and very honoured by their continuing warm friendship.

## *chapter 1*

### **1 JANUARY 1985: FROM CULTURE TO TRADE**

#### *Unesco - WTO*

The 1st of January 1985 is a remarkable day. It is one of those moments in history in which the symbolic clinching of a specific development can be observed. What happened on this New Years Day? It was the moment that the United States of America left Unesco, followed later by the United Kingdom and Singapore. (Preston 1989). It was not just the leaving of an organisation. It was the symbolic expression of the wish of the US to get rid of all kinds of measures that were intended to protect and to promote local cultural life wherever in the world, and to consider cultural expressions as commercial products only, whose trade should take place without constraints. (Drahos 2002)

Around 1960 many former colonies became independent. Soon they discovered that this independence was relative, especially concerning information and culture. The place to discuss this imbalance between the rich and the poor countries was evidently Unesco, the United Nations' cultural organisation. Three demands emerged in the 1970s: 'greater variety in sources of information, less monopolisation of the forms of cultural expression, and preservation of some national cultural space from the pervasive commercialisation of Western cultural outpourings.' (Schiller 1989: 142). The desire to change the cultural relations and relations of communication throughout the world became a movement that was called the New World Information and Communication Order (NWICO).

After many conferences and declarations on this topic Unesco asked for a report to investigate what this new order should look like. The Commission, presided by the Irish law scholar Sean MacBride came out with a book, entitled *Many Voices, One World. Towards a more just and a more efficient world information and communication order*. (MacBride 1980). One of the recommendations (number 58) claims that concerning culture and information effective legal instruments should be designed to: '(a) limit the process of concentration and monopolisation; (b) circumscribe the action of trans-nationals by requiring that they comply with specific criteria and conditions defined by national legislation and

development policies; (c) reverse trends to reduce the number of decision-makers at a time when the media's public is growing larger and the impact of communication is increasing; (d) reduce the influence of advertising upon editorial policy and broadcast programming; (e) seek and improve models which would ensure greater independence and autonomy of the media concerning their management and editorial policy, whether these media are under private, public or government ownership.' (MacBride 1980: 266).

Unesco was not allowed the time to make more concrete, and formulate, and possibly encourage the implementation of such legal instruments that would favour what we would nowadays call cultural diversity. From the end of the 1970s on, the US did two things. First, it fulminated against the idea that information and cultural policies would be designed that would hinder the so-called "free flow of information". Of course, freedom of expression is an important value, as long as it is a freedom for everybody to communicate. The "free flow of information" principle, however, mixed up economic and cultural freedom. The economic freedom might result in the extremely strong market positions of just a few cultural conglomerates that push aside the production, distribution, promotion, and reception opportunities of many other different cultural initiatives. This is what was happening in the 1970s and the newly independent countries suffered the most from this "free flow of information" principle and practice.

The idea of a New World Information and Communication Order tried to reverse this trend. The demands became clear, and it was time to take the next step, to formulate concrete policies on a global scale and the place to do so was within Unesco. The development of alternatives for the "free flow" principle and practice is exactly what the US strongly opposed, and in the end this cultural superpower left Unesco. We write the 1st January 1985. This was the deathblow of the New World Information and Communication Order.

The United States did a second thing at the same time as it was preparing its withdrawal from Unesco. It had another new world order in mind, a new world order of "free markets" economics. Jerry Mander writes that this neoliberal agenda would oblige countries, for instance, to open their markets to foreign trade and investments without requiring a majority in local ownership; eliminating all tariff barriers. It would severely reduce government spending, especially in areas of services to the poor; convert small-scale-self-sufficient family farming to high-tech, pesticide-intensive

agribusiness that produces one-crop export commodities such as coffee. And it would demonstrate an unwavering dedication to clearing the last forests, mining the last minerals, diverting and damming the last rivers, and getting native peoples off their lands and resources by any means necessary. (Mander 1993: 19).

The moment that Unesco became toothless, a new round of negotiations inside GATT, the Uruguay Round, started. It had trade liberalisation as its main aim more than ever before, resulting in the establishment of the WTO in 1995, with some new treaties, like GATS (the General Agreement on Trade and Services) and TRIPs (the agreement on Trade Related Aspects of Intellectual Property Rights). In 1993 Martin Khor foresaw that this liberalisation would accelerate the evolution of monocultures. Governments would find it increasingly difficult to regulate or prevent cultural and service imports. 'Since the largest and most powerful enterprises belong to the North, the already rapid spread of modern Western-originating culture will be accelerated even more. Cultural diversity would thus be rapidly eroded.' (1993: 104). A decade later we may conclude that this is true and not true. The cultural conglomerization is progressing, month after month. At the same time multitudes of cultural initiatives of artists, associations and small enterprises take place, everywhere in the world, day after day. (Smiers 2003: 88-102).

Thus the challenge is to give those initiatives ample space and opportunity, because this diversity is what we need from a democratic perspective. Second, the presence and power of cultural conglomerates should be reduced substantially. Otherwise, it becomes nearly impossible to get access to the main channels of cultural communication - which is a basic human right. (See later in this chapter).

The issue of how to deal with the free trade negotiations that would affect cultural diversity came up in Canada first. Around 1986 this country became involved in preparatory discussions with the US about liberalising their markets for each other. It quickly became clear at the political level in Canada that there was to be an impact on the cultural sovereignty of the country. This became a serious political issue, perhaps strangely enough more in Ontario than in Québec. In Ontario many people were concerned about the cultural aspect because they are Anglophone and were much more invaded by American programmes than was the case in Francophone Québec. There, for instance, the most popular television programmes were made in Québec, while in the rest of Canada nine out of ten programmes came from the United States. Nevertheless, the free trade agreement

between Canada and the US was sealed. However, the awareness that trade liberalisation might be a danger for the development of cultural diversity was implanted in the consciousness of many people in Canada.

Meanwhile, the discussions on furthering trade liberalisation also concerning culture within the Uruguay Round went on. This was scarcely noticed in Europe, and most Third World countries had to cope with their defeat in Unesco and with the debt burdens that kept them busy and made them politically ineffective on a global scale. Around 1989 Canada started to demand that culture should be excluded from the discussions within the Uruguay Round, without getting much support from other countries. Hardly anybody, for instance in Europe, could imagine that culture would be embedded in a free trade agreement, and thus nobody cared. This changed at the end of 1992. Mainly in France the awareness grew that liberalising culture within the newly established services agreement (GATS) would have serious consequences for French culture, and specifically for French film making. This mobilised many artists and others who were concerned about the survival of French cultural life. From then on the process swiftly progressed. Action groups published a two page advertisement against harbouring culture in GATS on 29 September 1993 in five major European newspapers: *le Monde* in France, the *Independent* in the UK, *Le Soir* in Belgium, the *Frankfurter Allgemeine* in Germany and *El Pais* in Spain. There was also a big manifestation in the Odeon theatre in Paris.

All of a sudden Europe entered into a huge cultural conflict with the US. Jack Valenti, the president of the Movie Picture Association of America claimed that under the pretext of culture Europe wished to protect its economic interests concerning film. This complete lack of understanding of the cultural values many people in Europe like to defend added fuel to the fire. Artists demanded that the European Commission propose a cultural specificity clause that would, amongst others, permit the continuation and extension of public aid and operational subsidies, allow screen time to be reserved for indigenous production of films and TV programmes, and permit the regulation of existing and future broadcasting technologies and transmission technologies. However, the Commission did not wish to push it that far, in order to avoid the failure of the whole negotiation process of the Uruguay Round (which had to be finished on 15 December 1993).

In the last days and nights before 15 December 1993 the US and the European Union reached an agreement that culture would be regarded as

one of the services under the new GATS agreement within WTO. However, the European Union did not make commitments concerning culture, along with most other nations, with the notable exception of New Zealand. This meant that culture stayed a blank page within GATS for most countries. In France, and some other countries, this blank page was called the cultural exemption. Blank page means, however, no more than: a country (or, in the case of Europe, for instance, the whole European Union) may continue to make its regulations in favour of cultural diversity, as it considers appropriate.

We must note that the use of the concept of “cultural exemption” is a misunderstanding. It must be said, as a marketing term it functioned very well for a while, expressing the wish that culture should not belong to the field of trade and should be exempted from the liberalisation in this field. But the reality is different. Culture is not exempted from the free trade agreement. In 1993 the European Union and most other countries agreed with the US that culture is an integral part of GATS which means that it is also subject to the drive of the WTO to liberalise markets continuously. Except that Europe in 1993, like many other countries, would not make commitments to liberalise its cultural markets more than was already the case.

The idea that a cultural exemption exists is thus a dream and does not cover reality. In the GATS context culture is less protected against the free trade wind than many people would like to think. And now, it is extremely complicated to get culture out of the free trade only context of WTO and its services agreement, GATS. This is the challenge to be discussed in chapter 3.

#### *Why should we have cultural conglomerates?*

Meanwhile, in the decade following 1993 multiple mergers of cultural conglomerates have taken place that has brought several cultural enterprises into the hands of companies that have never been active in the cultural sectors before. These companies are horizontally and vertically integrated and linked by cross-ownerships. Robert McChesney notes that two dozen or so firms control the overwhelming percentage of movies, TV shows, cable systems, books, magazines, newspapers, billboards, music and TV networks ‘that constitute the media culture that occupies one-half of the average American’s life. It is an extraordinary degree of economic



and social power in very few hands.’ (2002: 49). A film, for instance, is not merely a film anymore. ‘The great profit in the media today comes from taking a movie or TV show and milking it for maximum return through spin-off books, CDs, video games, and merchandise. Hence it is virtually impossible to compete as a “stand-alone” movie studio, TV network, or music company, when one’s competitors are part of vast empires. This has fuelled the massive conglomeration rush of the past fifteen years.’ (Ibid.). Therefore Benjamin Barber claims that with ‘a few conglomerates controlling what is created, who distributes it, where it is shown, and how it is subsequently licensed for further use, the very idea of a genuinely competitive market place in ideas or images disappears . . .’ (1996: 89).

Besides these super-conglomerates, there are fifty or so second tier giants that are national or regional powerhouses, like Mexico’s Televisa, Brazil’s Globo, Argentina’s Clara, Venezuela’s Cisneros Group, and Berlusconi’s Mediaset in Italy. ‘These firms tend to dominate their own national markets and media markets, which have been experiencing rapid consolidation as well. They have extensive ties and joint-ventures with the largest media Transnational Corporations, as well as with Wall Street investment banks.’<sup>1</sup> Their political influence is abundant. Gillian Doyle remarks that ‘the Berlusconi case provides compelling evidence of a causal connection between concentrated media ownership and undesirable narrowing in the diversity of political opinions available to the public via the media.’ (2002: 20).

An interesting question is ‘what gains arise when media firms embark on strategies of enlargement and cross-sectoral expansion?’ (Doyle 2002: 45). This is a serious issue, because ‘arguments based around “economic” concerns have gained increased status in debates about media ownership policy in recent years. Gillian Doyle judges it ‘important to investigate what, if any, economic benefits or costs may be associated with enlarged and diversified firms. One of the worrying conclusions that emerges from studying recent changes in media ownership policy in the UK and across Europe is that relatively little independent investigation or systematic analysis of the consequences of these changes has been carried out by policy-makers.’ (2002: 172). She claims, that ‘the general absence of any robust body of independent research into the economic implications of deregulating media ownership has greatly favoured corporate interests. It has meant that, in general,

<sup>1</sup> Robert McChesney, *The New Global Media. It’s a Small World of Big Conglomerates*, The Nation, November 1999.

large media firms’ own interpretations of technological and market developments, and of the economic implications of these developments, have been allowed to dominate the policy agenda in the UK and elsewhere in Europe without any attempt at systematic empirical corroboration.’ (2002: 173).

Without any doubt such research would show that cultural conglomerates are rather inefficiently operating enterprises. Their financial gains depend upon an extremely limited number of big successes, while most of what they produce and distribute is losing even its initial investments. They are not merging endlessly because of their strength, but it is their financial and organisational catastrophic position that drives them to eating up even bigger slices of the cultural market. This is a synergy that has been born out of need, while many banks do hope to see a return on the invested money.

Will Hutton makes Gillian Doyle’s amazement concrete with an example. ‘The telecom companies wanted less regulation, they wanted the right to build their own self-standing networks and they wanted their allocations on the terrestrial spectrum to be as free as possible from public service obligations; long-distance carriers wanted to enter local markets; all wanted cross-ownership rules relaxed. All that they wanted, they got.’ (2002: 204). And then the dot-com bubble burst, ‘followed inevitably by the end of the telecoms boom – in which trillions of dollars were at stake. We are left with vast overcapacity, threatened bankruptcies and a massive debt overhang in which only a fraction of the capital invested is remotely recoverable.’ The conclusion of these failed success stories? Will Hutton: ‘And despite it all, no country can boast a complete broadband cable network. If the public sector in the leading industrial countries had spent a fraction of the lost cash in each building one public network, the spread of the information economy would have been faster by years. That was forbidden by the conservative orthodoxy.’ (2002: 206,7).

His observation may help us to be less reserved when in chapter 4 we propose regulations in favour of the protection and promotion of cultural diversity. We should take into account that there is no objective requirement as to why we should have such huge cultural conglomerates that dominate nearly all the cultural fields in our societies.

*The human right of access*

Besides this economic waste, the question of media ownership has a decisive human rights aspect, because it concerns the right of access to the means of communication which is important as this allows individual people and communities to develop their own identity. Having a large number of owners of cultural enterprises is important for the democratic substance of any society.

There are two articles in the Universal Declaration of Human Rights concerning every person's rights of access to the means of communication, and the fields of the arts. Article 19 says: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' If everyone has this right, it should not be hindered by dominant forces that substantially control the means of cultural communication. Opinions and ideas, as mentioned in the article, are plural and should have plural sources of origin. There should be "any media" indeed where people can seek, receive and impart information, including artistic expressions, and not some media controlled by a few owners. This article speaks about, what we call nowadays, the right of *access* to the channels of communication for as many people as possible, and not just for a handful of cultural conglomerates.

The first clause of article 27 focuses on the cultural circumstances of the people's lives. 'Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancements and its benefits.' The central concept in this phrase is the word "community". Thanks to the weird coalition of Thatcher and postmodernists the concept of "community" has become threatened over the last few decades and has been replaced by the ideology that we are isolated individuals who strive only for our own interests. But what about refugees for instance? For them, a safe haven is a *community* somewhere in the world that gives them the security that their own society does not provide. (Smiers 2003: 82). Of course, there are many definitions and practices of communities, but it always concerns the exchange of opinions and feelings, expressed in artistic forms as well. The artistic enjoyment tells people who they are, what is their common pleasure, what are contradictory feelings and what they are dreaming of; it gives them their identity. The cultural life of a community should not be taken over by

mainly entrepreneurs who dominate culture worldwide, and who do not participate in the common daily life of a society. For the present, it is justified to compare cultural industries with *absent landlords*. We should re-invent the value and the practice of communities, and give people back the active right to participate in the cultural life of their communities. Referring to article 19, indeed, this should be regardless of frontiers.

The question of ownership concerns democracy as well. If the essence of democracy is that many voices can express themselves and can be heard, then this plurality should also be the characteristic of the ownership of the means of cultural communication. Nobody and no corporation should be entitled to be the main or the only organiser of the cultural life in any society. This is the basic principle. In chapter 4 the discussion will be about how to regulate the cultural market in order to reach this plurality and to avoid oligopolistic ownership relations.

Because of the human rights aspect of cultural communication, care and attention are needed so that diversity can flourish. The character of the production, distribution and promotion of cultural creations means that works of art should be treated in ways other than just ordinary commodities.<sup>2</sup> Cultural goods and services communicate ideas, and are less utilitarian than most commodities. Mostly there is no assembly line. Cultural creations are expensive one-time processes that then can be stored cheaply, duplicated and delivered. The marginal cost of unit of product is insignificant. The demand for cultural works is difficult to estimate in advance. The substitutability with other products is limited; cultural creations are more or less unique. Most products have a time line of demand that continues indefinitely until the next product cycle. In cultural matters the demand may fall off sharply after the introduction of the artistic work and the next product replaces it, and this may be measured in weeks or months. The pricing of cultural creations is highly discriminatory, dependent upon fame, nature of use, or character of the market. The cultural product can be priced as low as required or as high as the market can bear. Most works of art do not end by its consumption, they are endlessly available; that gives them the status of being public goods too. The promotion of a work of art must be intense at the time of the introduction while other commodities demand advertising over many years.

<sup>2</sup> The following enumeration is based on the paper by Peter S. Grant at the *Deuxième Rencontres Internationales des organisations professionnelles de la culture; une manifestation organisée par le Comité de Vigilance pour la diversité culturelle*, Paris, 2,3,4 February 2003.

In any society the field of all different artistic creations is a specific sector. Something must be done to ensure the flourishing of diversity in this domain of cultural communication. Cultural diversity deserves some forms of regulation. In the context of globalisation and trade liberalisation, there is a need to recognise the particular character of cultural goods and services and to what extent they contribute to the development of social life in any given society. This brings us unavoidably to the national states, because they are the only entities in the world that (should) have the competence and power to structure markets and economic practices. National states should be allowed to take the measures they feel are necessary to protect and to promote cultural diversity, in view of their own circumstances and conditions.

It should be recognised, however, that several national states are not the benign institutes that one hopes for. The suppressing practices of such states are completely against the idea of cultural diversity and what it stands for. As we might see in chapter 3, a highly charged debate is whether national states, signing a Convention on Cultural Diversity, should be obliged to install cultural policies that protect and promote the development of cultural diversity, and refrain from censorship and other forms of suppression of artistic expression.

A second observation concerning national states must be made as well. Only a few of them possess the capacity to develop on their own the kinds of artistic expressions that demand the investment of substantial amounts of money and technological and organizational infrastructures to produce and distribute them. This makes these countries an open goal for the products of cultural industries from abroad. Of course, they have an abundance of creative artists. When the equipment they need is very cheap, diversity can flourish in the appropriate outlets. But, when the need for technical and infrastructural resources is greater – as is the case, for instance for audiovisual products – then these countries face insurmountable problems, financially and in the field of building cultural infrastructures.

What should be done? In order to make them independent from the Western cultural industries a Cultural Development Fund should be established. Western countries should feel obliged to contribute considerably to such a Fund that should be administered in the framework of Unesco, together with the supervision of the Convention on Cultural Diversity. Artists in the poorer parts of the world should have the chance to produce works of art and entertainment that can compete in audience

attention with the products of the cultural giants, without imitating them. Obviously, those countries should not forget to make their own efforts, as well.

The wish for modest and efficient forms of regulations must be seen in the context of a greater movement to make systems of checks and balances more respected again. The Human Development Report 1999 speaks about governance. ‘Governance does not mean more government. It means the framework of rules, institutions and established practices that set limits and give incentives for the behaviour of individuals, organizations and firms. Without strong governance, the dangers of global conflicts could be a reality of the 21<sup>st</sup> century – trade wars promoting national and corporate interests, uncontrolled volatility setting off civil conflicts, untamed global crime infecting safe neighbourhoods and criminalizing politics, business and the police.’ (Human Development Report 1999: 8).

In this context Gillian Doyle hopes that at some stage in the future ‘regulation of media ownership will become unnecessary. As barriers for market entry diminish and as more and more new avenues for distribution of media become available, it is suggested that a diversity of political and cultural representations will flourish without any need for special ownership restrictions.’ (2002: 178). She is aware, however, that at the present moment safeguarding pluralism implies a need for restrictions ‘which would eliminate undesirable concentrations of media power . . .’ (2002: 157).

The challenging question (which is to be discussed in the next chapter) is whether WTO rulings outlaw the possibility of installing the necessary regulations for the sustainment of the development of cultural diversity, concerning all the diversified fields of the arts.

*chapter 2***WTO - NO SAFE HAVEN FOR CULTURE***Preliminary skirmishes*

At first glance the impression may be that there should not be too many worries about the possible negative implications of GATS for cultural diversity. Most countries in the world did not make any commitments in 1993 regarding culture and specifically not for the audiovisual field. This means that their hands are not tied and they can make as many regulations for cultural diversity as they may wish to do so, according to the basic principles of GATS. The only real demand is to be completely transparent about existing regulations like: subsidy systems, content and ownership rules, and other facilities in favour of the production, distribution and promotion of the arts in all its categories.

Nevertheless, there is reason not to be complacent considering what is at stake at the beginning of the twenty first century within WTO. This is the topic of this chapter. During the last months of negotiations on trade liberalization, in 1993 during the Uruguay Round, the United States attacked Europe furiously on cultural matters. Specifically the president of the Movie Picture Association of America, Jack Valenti, pretended, as mentioned before, that the European desire to keep culture out of the free trade realm was nothing less than a cover up for protecting the economic interests of European cultural industries. His blunt remarks worked counterproductively for the Americans because it mobilized artists all over Europe in the defence of the right to protect cultural values. As we have seen in chapter 1, the European Union and most other states, did not make commitments concerning culture, but the American gain was that culture became included in the framework of the trade regime. That is a huge gain, as we will see in chapter 3. Several years after 1993 we may wonder whether the apparently over-simplified statements by Jack Valenti and by other American officials were so counterproductive after all. Piloting culture into the port of the WTO was a real victory for the US cultural industries and, it must be said, for their European and Japanese counterparts as well.

In November 2001 a new round of negotiations with the purpose of furthering trade liberalization started in Doha, and is due to end in 2005.

After the failure – or success? – of Cancún this date is no longer a certainty. It may not be surprising that the issue of culture and trade is on the agenda again. Some countries have tabled so called communications on this issue at WTO, with Canada and the US at both ends of the scale. The Canadian communication stipulates, that ‘GATS cannot be interpreted as requiring governments to privatise or to deregulate any services. We recognize the right of individual countries to maintain public services in sectors of their choice. This is not a matter for the GATS negotiations.’ It is clear that Canada will not make any commitments that restrict its ability to achieve its cultural policy objectives ‘until a new international instrument, designed specifically to safeguard the right of countries to promote and preserve their cultural diversity, can be established.’<sup>3</sup>

The United States leaves behind what it calls the all-or-nothing approach from 1993. ‘Some argue as if the only available options were to exclude culture from the WTO or to liberalize completely all aspects of audiovisual and related services.’ Such stark options obscure, according to the US, some relevant facts. For instance, it hides the fact that ‘business and regulatory considerations affect the ability to make and distribute audiovisual products, both to domestic and foreign audiences. Creating audiovisual content is costly, and commercial success is uncertain. Access to the international market is necessary to help recoup costs. Predictable and clearly defined trade rules will foster international exhibition and distribution opportunities and provide commercial benefits that audiovisual providers must have to continue their artistic endeavours.’<sup>4</sup>

The conclusion in the US communication is that GATS is a very flexible treaty that is open to making full or partial commitments. However, especially ‘in the light of the quantum increase in exhibition possibilities available in today’s digital environment, it is quite possible to enhance one’s cultural identity and to make trade in audiovisual service more transparent, predictable, and open.’ The conclusion is that the ‘choices are not, nor have they ever been, a choice between promoting and preserving a nation’s cultural identity and liberalizing trade in audiovisual services.’<sup>5</sup>

<sup>3</sup> WTO, Council on Trade in Services, Communication from Canada, Initial Canadian Negotiating Proposals, 14 March 2001: Doc. S/CSS/W/46.

<sup>4</sup> WTO, Council for Trade in Services, Communication from the United States, Audiovisual and Related Services, 18 December 2000: Doc.S/CSS/W/21.

<sup>5</sup> Ibid.

Let’s go back a moment to the remark in the American communication that creating audiovisual content is *costly* and that access to the international market is necessary to help recoup costs. But, there are different kinds of “costly”. A film, for instance, can be made for 2 or 200 million dollars or euros. By definition it is not true that the higher the amount of money the better the film. A relevant question therefore is why audiovisual “content” (at present in the hands of cultural conglomerates) should be as costly as it is. If we accept that this high price is not a “necessity” (and it is not, because, for instance magnificent films can be made for a tiny part of the price of blockbusters), then there would be no need to have access to international markets to help recoup costs, and certainly there would be no need to push other creations from the cultural market. This would fundamentally change the debate on liberalizing cultural markets, or not, The exaggerated and unnecessary high production, distribution and promotion costs for cultural “products” do not provide any justification for the worldwide domination of the cultural place.

#### *WTO: only commercial perspective*

If we follow the United States’ arguments, the service agreement of WTO, GATS, is a very open treaty. A country can make commitments to liberalize its trade in culture, but is not obliged to do so. GATS in itself does not hinder individual countries from regulating cultural markets according to their wish.

This is true, and not true. Why this contradiction? Presently, GATS does not force countries to make liberalizing commitments concerning culture. But this open attitude is not the purpose of the whole of the WTO system. WTO is a commercially driven organisation whose main goal is to do away with trade restraints as quickly as possible. All social sectors should be liberalised, including education, water, the environment, transport, as well as culture. The US and some other countries consider it, for instance, unacceptable that in many parts of the world people like to keep their borders closed to genetically manipulated food. From a commercial perspective this distorts trade indeed. However, the possibility that other values may exist are absent in a trade only regime.

What are the major consequences of such a purely commercial regime?

\* A distinction of the WTO treaties is that they imply *National Treatment* and the principle of the *Most Favoured Nation*. National Treatment means that enterprises from all countries have the same rights as enterprises from the own country. In the cultural field this has the consequence, for instance, that the national or regional subsidy systems or other support measures for the arts must be open for everybody from all over the world. Evidently, this is the end of such kinds of support measures (that are not meant to be for the whole planet) and they are the deathblow for many artistic initiatives in the country or region where the support systems for the arts have to be abolished.

The principle of the Most Favoured Nation implies that a commitment made to a specific country should also apply to all other countries. For the cultural field this is harmful too, because it makes co-production agreements between specific countries no longer possible. That is a pity. Many artists thrive by working together with specific artists in other countries, and this may result in formal cultural collaboration agreements between their countries. Such fruitful forms of working together in the cultural field are not tolerated by WTO, or in any case not the systems that support them. The ideology of WTO turns National Treatment and the Most Favoured Nation principle into holy cows that do not reflect the needs of the development of cultural diversity.

\* Within WTO the risk remains that cultural considerations will be addressed from a strictly trade perspective. In Doha an agreement was reached defining that the negotiations will commence with an examination of “trade distorting practices”. The US maintains for example, as said before, that *cultural subsidies*, *public service* institutions like *public broadcasting* and other measures to regulate the cultural market in favour of cultural diversity are “trade distorting” and this may provide an avenue for them to claim the abolishment of such measures. This is a serious and dangerous issue because it may oblige countries to give up all the policy tools they have developed to protect and to promote the development of cultural diversity in their part of the world. Obviously, the US also puts pressure on countries, bilaterally and multilaterally, to make commitments to liberalise their cultural markets even more than is currently the case. Thus, the number of trade making commitments will only increase with time and the capacity of states to take measures for their own needs and specific situations will be more and more restrained.

\* The explicit objective of the ongoing GATS negotiations, given the impetus by the launch of a new comprehensive round of talks at the Doha Ministerial Meeting in November 2001, is to achieve a progressively higher level of liberalization in services trade. (Neil 2002). The fact that this is not yet the reality is an inconvenience that should be cleared away as soon as possible. Thus, every country must know that what looks like an open choice is only temporary. The perspective for the time being is that there is first and foremost trade, and maybe some protective measures may be tolerated. By the 1993 decision that culture has become basically a trade issue, it has become part and parcel of the liberalising umbrella of WTO, and the ultimate destiny is that it will be treated exactly like any other goods and services. The intention of WTO is to have new negotiation rounds every five years with the idea of liberalising markets even more, until the moment that all kinds of restrictions have been removed.

Speaking about culture, we must recognise the reality that market forces alone cannot guarantee the maintenance and promotion of diverse cultural expressions and of cultural diversity. Public policy, developed in partnership with civil society and the private sector, is of vital importance to ensure, for instance, the democratic access to the means of cultural communication, and to respect the fundamental human rights, as discussed in the first chapter.

\* One of the biggest dangers of culture being within WTO is that it has become an integral part of the negotiating process. It is not excluded from the process of giving and taking. A country that refuses to make commitments in its cultural fields may face sanctions with a refusal to its requests for commitments in many other cases. If you refuse to negotiate on culture, the US will say no to any other requests made for other services. This may tempt a country to give up the right to continue to have its own cultural policies. Such a humiliating situation should never happen. If it is important to protect and to promote the flourishing of cultural diversity, measures regulating the cultural market are necessary to make sure that the market is not dominated by too small a number of large producers and distributors. The right to apply such measures cannot and must not be given up in trade negotiations.

\* In the Doha Ministerial Declaration, November 2001, that was the start of a new round of trade liberalisation and consequently of abolishment of protective measures, there is a section about Trade and Investments. Why might this be a threat for cultural diversity? For many years investing enterprises have attempted to create free markets throughout the world without being restrained by conditions concerning their investments. In the mid-90s the rich countries have tried to reach this ideal within the context of their association, the OECD, aiming at a Multilateral Agreement on Investments (MAI). Such an agreement would have abolished all kinds of obligations that enterprises would have when they invest in other countries, as well as in poorer parts of the world. Enterprises can hit and run as they like without providing benefits for poor countries, even though it was proposed that countries had to pay enterprises for the “losses” they would suffer from government measures that were considered as detrimental.

Notably in Canada and in France the arts world protested against such a treaty because it would prevent countries from being able to regulate cultural markets in favour of cultural diversity. The link between culture and investments is of course that nearly every cultural activity is related to an investment. MAI intended making countries comply to the wishes of investing enterprises. Due to the protests the preparations for this investment treaty were cancelled.

But not forever. Investors are trying to get such a treaty, that makes them more important than national states, within the WTO framework. Garry Neil sums up what the consequences might be: ‘An investment agreement could force a re-evaluation of a significant number of cultural policies, including: prohibitions, limits or restrictions on foreign ownership in the cultural industries; public service broadcasters and other public institutions, since these might be perceived as unfair competitors for private foreign investors; regulations that discriminate against foreign broadcasting or publishing interests; co-production treaties; even financial subsidy programs if these discriminate against foreign firms or individuals. Should the agreement include an investor-state dispute settlement system that permits individual firms to sue foreign governments, the potential challenges by multinational firms in the entertainment business would be great.’ (Neil 2001).

\* It might even follow that a country may claim that another country makes it impossible to harvest copyrights. How could this be the case? The argument might be that a country that regulates its cultural market (for instance by ownership regulations and other measures as will be discussed in chapter 4) makes it impossible for an enterprise from another country to get benefits from exercising their copyrights. Why? The answer will be: these regulations provide artificial limits on how many sales (of music for instance) can be made, and this is a distortion of the market place. In any case, this could be the argument.

\* In WTO a division has been made between the so-called goods and services, a distinction that does not fit in cultural life as we know it, and that might be harmful for the arts. First there was only GATT (since 1948) that promoted trade liberalisation of goods between the member states. During the Uruguay Round the concept of services was also introduced in order to stimulate freedom of trade in non-tangible products. In the WTO a new kind of agreement was established, notably on services, called GATS, the General Agreement on Trade and Services, under whose umbrella culture was placed as being services. But are cultural expressions goods or services? Who knows? In trade terms one might say that the work of the author, the painter, the musician or the film distributor is a “service”. ‘But the physical embodiment of the artistic creation can also be viewed as a “good”. A magazine, book, compact disk and painting are all physical objects with mass and texture.’ (Neil 2002).

What about the artistic expressions performed or shown in the digital media? Are they “services” or “goods”? Apparently they are non-tangible. The US claims, however, that digital music or software (also with a cultural content) should be considered as “goods”. One may wonder why the struggle about those distinctions is so sharp. The fact is that under GATT (the “goods” agreement) trade liberalisation has progressed much more than in the sector of the so-called services. Moreover, the way a country commits itself to a trade liberalisation is different under both agreements. Under GATS a country itself makes the decision to make a commitment to a certain opening of its market. Under GATT it is the contrary. There are general measures about the liberalisation of specific goods. A country that does not wish to adhere to this general rule must exempt itself from this ruling, which is much more difficult than in the case of GATS where the commitment is more of a choice.

By pushing the whole digital field into the “goods” sector the US hopes to liberalise this domain completely, preventing this field from being regulated. It looks as though the US will say to Europe and other parts of the world: you may keep the old media, but you should surrender the future to us. This extremely important case may make all aware that culture is not divisible in “goods” and “services”. Artists are always working in different media, old and new alike, and also the results of their work are of different shapes and qualities. To disconnect it in goods and services is not helpful, specifically if the purpose is to suppress the possibility that the digital field may be regulated in favour of the protection and promotion of cultural diversity.

\* Ivan Bernier and H el ene Ruiz Fabri conclude that under the circumstances of economically driven globalisation cultural diversity is threatened, ‘because the original and multiple identities of the groups and societies that make up mankind are being undermined by a trade liberalization process, whose final outcome is hard to predict. The process in question, which is based largely on competition, tends to impose a single commercial mould on the many expectations citizens have in different realms of human activity and fosters new forms of social organisation that call into question not only traditional ways of doing things, but shared values as well.’ (Bernier 2002: 23).

The authors recognize that all national cultures have to adapt over time to a variety of changes, both internal and external. The real problem that the present form of economic globalisation poses for the diversity of cultures ‘is whether the changes it brings about in values, lifestyles and ways of doing things affect our ability to “promote and maintain a pluralistic public space where citizens have access to and can participate in cultural life, which itself is necessary for public life.” (in Raboy 1994: 77). In other words, do such changes affect our ability to maintain distinct cultural expressions?’ (Bernier 2002: 23). Cultural diversity is also threatened, according to Ivan Bernier and H el ene Ruiz Fabri ‘by the impact of trade liberalization on the capacity of states to sustain distinct cultural expressions, since it prevents them from adopting standards that directly or indirectly impede the circulation of cultural goods and services.’ (Ibid.).

They clarify, that these negotiations concern the various types of government intervention commonly employed in the cultural sectors, such as subsidies, quotas, restrictions on foreign investment, regulatory measures, and so forth (see chapter 4). ‘Unfortunately, once a state agrees

to stop using one or more of these types of intervention, it cannot go back on its decision. New Zealand found this out recently after making a commitment during the Uruguay Round of negotiations to no longer apply quantitative restrictions in the audiovisual services sector, effectively limiting its leeway solely to subsidies. When it backtracked and announced in its Ministry of Culture’s 2001-2002 activity program that it planned to re-introduce radio and television quotas, the United States soon made it clear that this was no longer possible.’ (Ibid.).

What is the case? New Zealand deregulated its broadcasting sector and listed it as a covered service under the GATS. It is thus constrained from reintroducing quotas, despite a change in government and clear public will to re-regulate the sector. Nearly all printing and publishing companies in New Zealand, as well as the majority of book retail outlets, are owned and controlled by foreign interests. It is now difficult for New Zealand writers to get works published or distributed locally. One may conclude, that foreign dominance threatens local creativity and cultural spontaneity.

#### *A new binding international instrument on cultural diversity*

The broader context of the odd relationship between culture and trade is of course the movement that started in Seattle in 1999 disputing the present ruthless economic globalisation. Apparently there are many movements from different social and economic sectors that claim that trade should be balanced with protecting measures of different character. National governments should have the full right to shape the conditions that a diversity of interests of its own citizens, of the surrounding region, and of the world as a whole can continue to exist, and not be controlled by only a few commercial forces. The world is not for sale, is the adage.

It would be desirable for all these movements to be more unified on a global level and be able to change WTO completely; a change from being the emperor of the world to, for example, the Ministry of Economic Affairs of the United Nations only where trade concerns could be balanced with, for instance, educational and social questions, with a new partnership between agriculture and ecology, in brief the kind of balancing that takes place within every government between the different ministries and interests. This is not, yet, the case.



Nevertheless, as we have seen before, the cultural domain in any society has been confronted with an extremely urgent challenge. The fundamental human right that many voices can express themselves, can be heard, and can be discussed is acutely in danger. When cultural corporations take over cultural life, even more than is now the case, and when national, regional and local public authorities are no longer allowed to support the development of cultural diversity within their territories and in relation with other parts of the world, then we will miss something, namely the huge diversity of voices, melodies, texts, films, performances, books and images, which we need from a democratic perspective.

What to do in this pressing situation? There is no sign that the present WTO is the place where basic human rights (such as: cultural democracy, the flourishing of diverse cultural climates, and the maintenance of a broad public domain for cultural developments) would be respected, promoted and sustained. This is not the intention of WTO, and under current conditions never will be. Thus, should we try another Declaration on Cultural Diversity or another resolution, action plan, recommendation, or guideline on the importance of culture for societies, as several of them exist already?<sup>6</sup>

Obviously, these are important documents that raise awareness about the importance of cultural diversity, but they do not have a binding legal force at a global level and have no competence to intervene in favour of cultural diversity or on the rules and regulations concerning global commerce. In chapter 1 we have seen how and why the US left Unesco in 1985: for the transplantation of culture to the sector where commercial interests are the only players in the market place.

The only solution to safeguard cultural diversity is to take culture out of WTO. Then, it will no longer be subject to the permanent pressure of treating the arts, in all its forms, sizes and genres, as trade products. Then, the risk that cultural diversity will disappear in the offertory-box of full blown trade liberalisation will be over. Then, public authorities will again be able to create the conditions, including the implementation of regulative measures, so that a great variety of artistic creations and presentations can flourish.

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<sup>6</sup> See, for instance, Unesco's *Action Plan on Cultural Policies for Development*, adopted in the Intergovernmental Conference on Cultural Policies for Development, Stockholm, Sweden, 2 April 1998; Council of Europe's *Declaration on Cultural Diversity*, Strasbourg, 7 December 2000; Unesco's *Universal Declaration of Cultural Diversity*, and its *Action Plan*, Paris, 2 November 2001.

In order to make a Convention on Cultural Diversity viable, it is necessary for countries to make no commitments within WTO that may liberalize their cultural markets, notwithstanding the enormous pressure they experience during the present Doha Round negotiations. For, however it may be, WTO is a fly-trap. Once a country is in, it is nearly impossible to get out of the commitments that the country has made. The price is simply too high, as with the example of New Zealand, which, as already mentioned before, made commitments in 1993 to open up their audiovisual market. Despite the US propaganda that GATS is a very flexible treaty (you enter, and leave when you may wish to do so), the reality is different. Countries should refuse to make commitments within the framework of WTO which could compromise their ability to achieve their cultural policy aims. At the same time they should be careful that the proposed Convention on Cultural Diversity does not become an empty box, because governments have already given away their competence to make those regulations and to sustain those support systems as they judge appropriate for the protection of cultural diversity.

*chapter 3***CONVENTION ON CULTURAL DIVERSITY***The capacity of all states to preserve and enhance cultural diversity*

The WTO is an immense power block of the economically dominant forces enabling them to conquer markets all over the planet at an ever-increasing rate unhindered by any regulatory measures. The economic interests of the few remaining large cultural conglomerates are considerable and their influence in WTO is significant. They demand the opening up of worldwide markets for their “products”.

Considering the power they put behind this liberalizing project, it is nearly impossible to get culture out of the grip of this “trade only” context of the World Trade Organisation. Nevertheless, several countries and non-governmental organisations attempt to do so. As said before, in mid October 2003 Unesco agreed to invite its Director-General to develop a first draft on the protection of the diversity of cultural contents and artistic expressions. This could be good news. Hopefully this will result in a new legally binding international instrument that will give national states, and consequently local, regional and intergovernmental authorities, the full right to maintain and implement those measures they consider necessary for the preservation and promotion of cultural diversity.

Canada experienced with Nafta (its free trade agreement with the US) that something that looked like an exception for culture in the treaty did not work. The US managed to use another part of the treaty that made trade interests more important than the right Canada thought it had for protecting its own cultural life. In Canada in the mid 90s, this hard lesson brought about the idea that the right of states taking measures in favour of cultural diversity is not a welcome philosophy in free trade agreements, and in practice it is impossible. If institutions like Nafta and, consequently, WTO, do not respect the fact that cultural diversity is a value at least as important as commercial interests, and those free trade treaties cannot and will not guarantee that there should be an equal balance between the two, what then? The answer was speedily found. The idea was to take culture out of the WTO and to make a new legally binding international instrument that would give states adhering to such a treaty the right to take all the measures they think appropriate in order to protect and

enhance cultural diversity; something similar to the Convention on Biodiversity.

Actually, three drafts are circulating for such a Convention on Cultural Diversity. One comes from Sagit, a Canadian association of cultural enterprises. The second originates from a cultural NGO, the International Network for Cultural Diversity, and the third draft was composed by the International Network on Cultural Policy (INCP), an association of more than fifty ministers of culture from all parts of the world. This last draft will, without doubt, be the main source for Unesco when drafting its own text for a Convention on Cultural Diversity. It is not the purpose of this chapter to discuss and compare these three existing drafts separately. It is more the intention to analyse what issues are at stake in conceptualising such a framework of rules.<sup>7</sup>

Before doing this, it is necessary not to raise false hopes and expectations. Therefore we have to look in the direction of the 1969 Vienna Treaty on the Law of Conventions. This treaty discusses how international conventions that operate in (nearly) the same field relate to each other. It says that the first convention on the same matter has priority. In the case of culture it means this. As we have seen before, in December 1993 culture has become part of GATS, the WTO treaty on trade and services. A new international treaty, like a Convention on Cultural Diversity may intend to bring culture out of the dispute settlement procedure of WTO, and may try to safeguard countries that regulate their cultural market from trade retaliations. Nevertheless, the US may wish to claim that this is impossible, because all the obligations of WTO have priority above a new Convention on Cultural Diversity.

Does this mean that the establishment, and all the preparatory work, of such a Convention on Cultural Diversity would not make sense? Not at all. Firstly, one could make the argument that there already is something like an international legally binding instrument in the same field that dates from the years prior to culture having been sneaked into GATS. This is the Universal Declaration of Human Rights from 10 December 1948, which is of course more important than any imaginable trade treaty. One may argue that countries did not have the right to pilot culture into the port of WTO and its services treaty. Why not? The Universal Declaration of Human

<sup>7</sup> This chapter has been based on Bernier 2000; Bernier 2002; Ruiz Fabri 2003; Wiedemann, 2002; the drafts of the Convention on Cultural Diversity of Sagit, INCD, and INCP; and papers from and discussions during the conference of The Comité de vigilance sur la diversité culturelle, Paris, 2, 3, 4 février 2003.

Rights guarantees that everybody should have *access* to the means of communication. The WTO treaties however, open the possibility for this right to be denied, and so it happens.

Thus, the claim might be that the Universal Declaration of Human Rights came first, and so the WTO does not have the right to deal with culture. A Convention on Cultural Diversity, however, derives its legal status directly from the Universal Declaration of Human Rights. It would give states (including the regional and local administrative levels) the right to regulate markets in such a way that access to the means of cultural communication is open to as many people as possible. It would also take care that the cultural life from any community will not be taken over by absent landlords, as we have defined cultural industries. A Convention on Cultural Diversity would make concrete the aims of the Universal Declaration of Human Rights. So, there is a direct link between these two international instruments. The WTO, however, is an aberration that does not fit into this line.

The second reason why it makes sense to continue to work on a Convention on Cultural Diversity comes from the Doha Ministerial Declaration from 14 November 2001, that started a new Round of trade liberalisation (in disorder however, since its mid term September 2003 meeting in Cancún). Its Article 31 demands that the relation between treaties in the fields of trade and environment must be scrutinized, concretely of course between WTO and the Convention on Biodiversity. It might be clear that here the same problem exists as between WTO and a future Convention on Cultural Diversity. What has priority? It seems that there exists a Working Group on trade and environment, but there is huge secrecy on its membership, its agenda and its possible results. This may not amaze because this undemocratic way of working is commonplace in the WTO, and therefore the organization may be compared with the former Soviet Union.

The question of cultural diversity is also involved in the conflict that several developing countries like Brazil and India put on the agenda on the consequences of the TRIPs agreement (the WTO treaty on so called Trade Related Aspects of Intellectual Properties) for sustaining the Convention on Biodiversity. The purpose of this convention is the protection of ecological diversity and concern for sustainable development. Therefore, the convention says that states have the sovereign right to protect their genetic resources, traditional knowledge and the use of it in a sustainable manner; taking any measures they

consider appropriate for this end. However, TRIPs is incompatible with this autonomous competence of states, because TRIPs gives corporations the right to privatisation, to take intellectual property rights on the traditional biological heritage of peoples in all parts of the world, and to monopolise this stock of knowledge. Also here the protection of cultural diversity is at stake. (Wiedemann 2002: 35-7).

The decisive question is thus, should the trade-only-principle rule the world? Or, should commerce be balanced with many other interests? WTO is a product of a period when the neoliberal trade agenda was at its height. Meanwhile, we know the catastrophe it caused. Actually, the Doha Round is according to WTO's own rulings an illegal activity. At the end of the Uruguay Round in 1993 there was an agreement that a new round of trade liberalising negotiations would *not* start before an evaluation had taken place on the consequences of what the results of the Uruguay Round in practice would bring about. This evaluation never took place, and that is what bureaucrats at the WTO office in Geneva prefer to forget. In the case of an evaluation one thing would have become very clear: a trade-only treaty, like that of WTO, is not an adequate tool for dealing with questions of ecological and cultural diversity. A new round could only have started after the revision of the mistakes that had been made by thinking that a commercially led system can rule the world without giving due attention to the many completely different questions and concerns, like diversity.

Therefore it was not unexpected that serious contradictions between different groups of members exploded the WTO Ministerial Meeting in Cancún in September 2003 and paralysed the organization, in this case on the dumping of agricultural products by American and European enterprises on the markets of Third World countries. The general question at stake within WTO is whether other values than trade concerns from mostly Western corporations may also count. Therefore, coming back to culture within Unesco, it is of utmost importance to prepare a strong safeguard for the rich diversity of artistic communication: a Convention on Cultural Diversity, that respects, protects and promotes the development of cultural diversity. To make such a new international legally binding instrument is even more than a political statement. It attacks the basic principles of WTO. This is not by definition a lost case in a period in which WTO is losing ground. A broad coalition of cultural movements with the ecological movements that are in a comparable struggle with WTO is an interesting perspective.

The third reason why the Convention on Cultural Diversity must be pushed forward is so that in the case of disputes it works between the countries that have signed and ratified the Convention. Therefore it follows that this must be the greatest number possible, hopefully in this way isolating the US and forcing it to adhere to multilateralism.

A fourth reason is that a strong Convention on Cultural Diversity would make Unesco the important organization it should be. Previously we have already concluded that it is a strange world in which there is only one ministry, namely the economic ministry called WTO. Unesco should be a worldwide ministry of cultural, scientific and educational affairs that has as much weight as the ministry of economic affairs, thus making a completely reformed WTO.

At last, the fifth reason is that within WTO, law is not to be read in isolation from the rest of international law. Ivan Bernier and Hélène Ruiz Fabri remind that 'the fact remains that the bodies in charge of settling disputes within the WTO do not hesitate to refer to external principles and rules'. Therefore, they conclude that the situation seems fairly open. 'A "cultural" instrument that reflects some degree of consensus could be designed to influence the interpretive approach of WTO dispute settlement bodies, especially since it would then be possible to show that the position of the State in question is not necessarily "isolated".' (Bernier 2002: 39, 40)

The general feeling is that there is no time to be lost. First, the work within Unesco should be completed in two years. Second, WTO has put 2005 – this will be later - on the calendar as the deadline for finishing its present round of negotiations (the Doha Round), which should result in furthering the liberalisation of world markets. Before this crucial moment culture should have been transferred from WTO to the new Convention on Cultural Diversity. In any case, there should be the perspective that many countries may wish to adhere to such a project. Even more important as said before, is that countries should not make commitments concerning culture during WTO's Doha Round. The failure of Cancún, or some may say, its success, may postpone the Doha deadline. This does not mean that the process of market liberalisation in the cultural field stops meanwhile. Countries with strong cultural industries, specifically the US, will try to make bilateral agreements with separate countries that would

open their cultural markets; the strategy will also be directed on regional trade agreements.

A working group of the INCP - consisting of the ministers of culture - states (September 2002) that the immediate objective of this new legally binding international instrument 'is to ensure that States have the means to determine, from a cultural standpoint, and on the basis of their own conditions and circumstances, the policies that are needed to ensure the preservation and promotion of cultural diversity and to provide a set of principles and rules for the realization of this goal.' The same ambition, in slightly different wording, can be found in several texts on the idea of such a Convention and in the other drafts.

The origin of this unanimity is that a balance deficit has been noted between culture and trade within existing free trade agreements. A new international instrument would acknowledge the legitimate role of domestic cultural policies in ensuring cultural diversity, on the national, local, regional and intergovernmental level. Crucial in this process are the national states. Are not national states the only entities qualified to adhere to international treaties? They may take actions, or adopt, maintain and enforce measures to preserve or enhance cultural diversity. These may include regulations and support systems most often used by the state to achieve its cultural aims, while also emphasizing the right of each state to choose new kinds of measures which it feels are most appropriate, given the situations and conditions.

However, we should keep in mind that for many different reasons many states are not benign and do not desire the development of cultural diversity. A Convention on Cultural Diversity might help cultural activists and NGO's to stimulate the debate about what the role of the state should and can be concerning the flourishing of diversity. It should be made clear as well that cultural diversity does not have to lead to the falling apart of specific national states where strong minorities claim greater autonomy. A lesson to be learned is how different cultures can live together productively while avoiding civil war and at the same time finding the right balance between unity and regional or local autonomy in certain degrees.

It is interesting to note that in all drafts and texts on the idea of a Convention there are two concepts: the *preservation* and the *promotion* of cultural diversity. A balance is needed between maintaining and enhancing cultural expression. It is not only conservation of cultural heritage and existing cultural practices that should be cherished, but also new developments should be encouraged.

One of the basic philosophies should be that countries do not oppose the cultural measures adopted by others. Every country adhering to the Convention recognises and respects the sovereign right of all other member states of the Convention to take its own measures. For example one country may not claim that another country hinders its cultural commerce. At the same time, the philosophy behind the proposed Convention is that a multitude of cultural exchanges between countries will take place. One of the goals of preserving cultural diversity is closely linked to other social objectives, such as democratic expression, social cohesion and economic development, without, however, turning the international legal instrument into a text on democratic governance or economic development per se.

One of the paradoxes of globalisation is that it promotes cultural diversity by the increasing exchange and communication possibilities, while at the same time cultural diversity becomes threatened, if one does not develop adequate mechanisms for its preservation. One of the difficulties originates from the fact that there is no worldwide shared vision on how to regulate globalisation, let alone how to prioritise the protection and promotion of cultural diversity. Hélène Ruiz Fabri (2003) analyses that a non-binding instrument (like a Declaration) does not have the "weight" to mitigate, and certainly not to change WTO's rules that presently obliges national states to make high level market openings. 'Only such rules can counterbalance WTO that have an equivalent power in the international order.'

For the right of states protecting and promoting cultural diversity a new Convention should guarantee that they, or their local or regional authorities, will not be sanctioned for their cultural policies. To avoid the threat of trade retaliations, there is a clearly identified need for an international binding legal instrument that goes beyond a simple declaration. A Convention on Cultural Diversity will provide the member states with the necessary powers to definitively exclude culture from commercial negotiations, whether within the WTO or any other framework.

It is beyond doubt that such a Convention will only be effective if a sufficient number of states will adhere to it, and amongst them there should be many countries that have substantial economic power. A power block is needed, as quickly as possible that will refuse to submit culture completely to economic regimes. At the same time this group of countries must be strong enough to withstand possible sanctions from countries that stay out of the Convention on Cultural Diversity. It is not difficult to

imagine that, for instance, the United States would not be amused by an effective movement of countries separating culture from the commercial domination. It is therefore predictable that this superpower will do all it can to break such a united front and to submit individual countries to draconian trade retaliations on all imaginable products. This can only be avoided when the power block of countries represented in the Convention on Cultural Diversity has sufficient economic clout to withstand these kinds of threats.

#### *Cultural diversity: signifiers in human life*

It is clear that the concept of cultural diversity, which is the key issue of solicitude, does not relate here to the anthropological concept of culture which covers all aspects of social life. The concern is to protect and promote the varied development of theatre, dance, opera, musicals, soaps, music, films, visual arts, design, novels, poems, and all other artistic expressions, in all their sobriety or abundance, mixed forms and genres, whether produced and distributed en masse or on a small scale, whilst preventing one form of cultural enterprise from dominating the market of cultural expressions and communication. Of course these signifiers in human life contribute to the development of individual and social identities, but they also provide, for instance, pleasure or consolation.

But we should be aware that in every society this cultural field of artistic expressions has another texture, has a different structure, expresses distinguished sentiments, has other connotations, reflects dissimilar histories, is characterised by distinct struggles about what could be imagined and what not, and includes different occasions of presenting these works of art. Therefore, the International Network for Cultural Diversity, a cultural NGO that brings together scholars and cultural activists from all over the world, says in its draft for a Convention on Culture: ‘Nothing in this Convention shall be construed to limit the sovereign authority of a Party to define such terms as “culture”, “cultural diversity”, and “indigenous or national culture” in a manner it considers appropriate to the characteristics of its particular society.’

This fluid statement may provide lawyers with a feeling of horror. They may prefer clear definitions, but this is not the way that cultural life works. It is true that the cultural artistic field between societies may differ enormously. Therefore, the only thing a Convention on Cultural Diversity

can do is to respect this beautiful reality. This “legal handicap” can be solved by demanding states being transparent about what to include in their conceptualisation of the cultural field for which they ask for the freedom to regulate in a way they, and their local and regional authorities, think appropriate for the flourishing of cultural diversity. States and regional organisations should have the freedom to encourage diversity of cultural undertakings. The general public and audiences should have a broad choice of works of art and cultural productions available to them in their countries.

In any case, the preservation of cultural diversity implies at the outset the preservation of all existing cultures because each culture that disappears, each language that ceases to be spoken is a loss for cultural diversity. On the other hand, the Convention on Cultural Diversity should by no means be a static, protectionist instrument. On the contrary, it must prove to be instrumental in the development of cultures, cultural exchange and cultural diversity. It should give breadth to the dynamism and openness that is a characteristic for many artistic expressions and for the work of most artists.

However, we must be aware that the concept of cultural diversity is not undefiled. In South Africa during the apartheid regime, for instance, cultural diversity was a premise for segregation: divide people along tribal, ethnic and cultural lines in order to maintain white domination. For many people it might mean a major shift in their thinking to now use the historically oppressive term “cultural diversity” in a positive way.

#### *Guiding principles*

The Convention on Cultural Diversity will have some general guiding principles.

\* We have already seen that there should be transparency about what, according to a specific country, belongs to its cultural field for which it likes to regulate the market relations.

\* Its regulatory measures should not be out of proportion. For instance, it should never be the intention for cultural creations coming from other countries to have no chance of being shown or sold in a specific country because it has regulated its cultural market with an endless list of restrictions. Measures should also be flexible and

appropriate for new developments in the cultural fields. At the same time, cultural enterprises should have the right of not being confronted with completely new or reverse regulations, from one day to the next. It will be a challenge to combine flexibility and predictability. As already mentioned, the agreement would be binding in this regard, with each member state making a commitment to recognize the right of the other member states to determine, on the basis of their particular situation, what type of measures they will implement.

\* The draft text of a Convention on Cultural Diversity of the INCD states in its article 13 that ‘each Contracting Party shall, in accordance with its particular conditions and capabilities, integrate as far as possible and as appropriate, the objectives of the Convention with relevant investment, and competition measures, and may for such purposes prohibit or limit foreign investment in the cultural sector; or where investment is made in cultural undertakings, maintain or enforce any of the following requirements: a. to achieve a given level or percentage of domestic content; b. to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory . . .’ In chapter 4, I will elaborate on this article and propose in more detail what kinds of regulations and measures might be appropriate. This may differ of course for separate countries and different parts of the world, according to their history, economic situation, the actual leverage of concrete states to regulate the (cultural) market, the consciousness that exists about the importance of having a diverse cultural life, and the character of the threats for cultural diversity by enterprises dominating the cultural domain in general or specific forms of the arts in particular.

\* A discussion exists about the question whether the Convention text should oblige countries to support the arts or to regulate their cultural market. On one side, it may function as an encouragement for countries to be more active in this field. On the other side, Peter Grant, a Canadian legal expert on questions of cultural regulations, may be right when he states, that most countries would not want to sign a Convention in which there is a section that says: each party *shall* develop cultural policies, spend money on the arts, and regulate its cultural market. Most countries will say: I am not going to put this in a treaty. This is a domestic matter.

In a report of Sagit, the association of Canadian cultural enterprises (February 1999: 31), it has been stated that ‘a new cultural instrument would seek to develop an international consensus on the responsibility to encourage indigenous cultural expressions and on the need for regulatory and other measures to promote cultural and linguistic diversity.’ However, ‘the instrument would not compel any country to take measures to promote culture, but it would give countries the right to determine the measures they will use (within the limits of the agreement) to safeguard their cultural diversity.’ (in Morris 2001: 129).

Maybe, the dispute on whether to comply or not is a fictive debate. Countries that ratify and sign a Convention on Cultural Diversity obviously feel involved in the challenge that the cultural field in their societies is not dominated by market forces that push aside a diversity of cultural expressions. This makes it likely that they will make an effort to reach this ideal. It is up to them to decide what the effort will be. In that case, it is less necessary to formulate this as an explicit obligation in the text of the Convention. However, it would be wise to try to make sure that countries do not give lip service only to cultural diversity. It might help when they oblige themselves positively in a Convention text to take those measures – for instance subsidies, ownership or content regulations – that really sustain the development of cultural diversity.

\* Cultural expressions do not exist without artists and their intermediaries. In most drafts of, and texts on, the proposed Convention on Cultural Diversity the hypotheses has become accepted, without more ado, that copyrights will give them the income they deserve. Respect for intellectual property rights therefore has been formulated as one of the basic principles of this Convention. Sometimes even the field of cultural productions becomes equalized with ground that has already been covered by the present copyright system. One may wonder whether a more adept analysis isn’t lacking. The production and distribution of the arts has become more and more controlled by only a few conglomerates (the reason why a Convention on Cultural Diversity is highly needed), and this same phenomenon is happening with copyrights.

The time is not far away when most of the world’s cultural heritage and most of the contemporary creations and registrations of performances will be in the hands of a regrettably limited number of copyright industries. Artists who enjoy a substantial income from copyrights are rare. The Western copyright system freezes cultures, which is far worse in countries

who were not aware until now of the systems that privatise creativity and knowledge (as is happening with patents concerning, for instance, seeds of rice). Intellectual property rights hinder the creative adaptation that has always characterised and guaranteed the continuation of cultures. In *Arts Under Pressure: Promoting Cultural Diversity in the Age of Globalization I* present a more detailed analysis on the problematic and unsustainable sides of our present Western copyright system and propose some alternatives that are better for artists, the public domain and non-Western countries. (Smiers 2003). It is sufficient to note here that there is a contradiction. How can a Convention on Cultural Diversity, that is meant to keep down the too dominant cultural positions, glorify a copyright system that keeps open the way for the too dominant controlling situations on the cultural markets? We will return to this question in chapter 4.

\* It would be a misunderstanding to think that the Convention on Cultural Diversity is only meant to protect and promote the cultural life within national states. However, the basic principles include an urgent need for a more balanced exchange between cultures. The area of priority is openness to foreign cultural productions. Allowances should be made for the products and creations of others to come into their own market place. This demands care; otherwise this openness is only useful for, for instance, Hollywood productions, excluding creators and performers from their own country and from other parts of the world. The big challenge (to be discussed in chapter 4) is thus, how do we regulate for a realization of a balanced cultural exchange between a diversity of countries and parts of the world in favour of more reciprocity and more two-way cultural movements?

\* Each state is free to take any measures needed to ensure dynamic, diversified cultural expression on its own territory and preserve cultural diversity internationally. Obviously, exercising this right must not infringe basic human rights. Cultural diversity cannot be expressed without the conditions for free creative expression, and freedom of information existing in all forms of cultural exchange. A dispute is whether this basic principle should be mentioned explicitly in the Convention. The advocates of this idea are afraid that some countries may claim that the Convention may give them the full right to regulate the fields of cultural production and distribution according to their wish, and accordingly will oppress basic

freedoms and human rights. Including such principles in the text of the Convention might oblige countries to respect the freedom of expression and communication.

There are others who maintain that this cannot be the purpose of such a Convention. All member states of the United Nations have accepted the Universal Declaration of Human Rights. Is it necessary to repeat the intention of such an important document with this new convention? When countries do not conform to the Universal Declaration of Human Rights, what does one think that they will do when it is also included in a Convention on Cultural Diversity? In any case, such an aspect of the proposed Convention would not be enforceable. It is not good overburdening a new convention (that is already an extremely complicated project in itself) with too many topics. It might undermine the preparedness of countries about to join the bandwagon and it might degrade the convention in that far too many perspectives will not be observed. Nevertheless, the core of this Convention is to promote cultural diversity in the fields of artistic expression. Where censorship and lack of freedom of expression exist, there is no question of diversity of artistic expression. Therefore, it would be incredible to make a Convention on Cultural Diversity in which governments would not commit themselves positively to the basic human right of the freedom of expression.

On the other hand one must be realistic. A Convention on Cultural Diversity, if it is to be accepted, will not bring about heaven on earth. It will not and cannot solve all imaginable problems linked to cultural diversity. There is nothing in such a treaty that will effectively stop autonomous governments from banning television channels; there is nothing to stop governments from imposing censorship on their own artists and creators, and limiting freedom of expression; and the Convention will not automatically lead governments that at the moment refrain from having cultural policies, to introduce them. However, the existence of such a Convention on Cultural Diversity may be a tool that can help to raise awareness about the importance of cultural diversity for the development of strong cultural identities.

\* It may be difficult to convince a substantial number of countries that from a cultural perspective they are better off with, rather than without, a Convention on Cultural Diversity. Besides the predictable opposition of the US and some of its most loyal partners like the Netherlands, it is not certain that many developing countries will be interested in participating



immediately. There may be doubts or even disinterest. Understandably, questions like economic growth, job creation and agriculture, and worries about providing basic services such as health, education, housing, running water and electricity have a higher priority than caring about culture. Many countries simply do not have the means to establish cultural policies. Often the state as a law enforcing mechanism is too weak and does not have the capacity to regulate cultural markets. Some countries may consider the question of cultural diversity an issue that concerns the struggle between cultural industries from different parts of the Western world. There could also be fear in countries with multi-ethnic structures, that putting cultural diversity on the agenda could lead to identity-related demands, possibly posing a threat to national unity and the authority of the state.

The problem for poor countries is that they are most susceptible to the kind of bilateral pressure that comes from the US. How can a poor country, for instance, withhold its consensus from the WTO, when the Americans say: do you want this next shipment of food? Participating in the withdrawal of culture out of WTO is a risky affair in such a position. This can only be done when a strong conviction exists that its cultures and languages will become threatened in the present global economic order, when the cultural dependency from the West has been felt strongly, and when it becomes clear that successful cultural enterprises from the own country are bought time and time again by Western cultural conglomerates.

Developing countries do not start from a zero position. To adhere to the Convention they should have the feeling that there is something in it for them and that they can afford to do this because they are in it with a large enough group of countries. In the introduction I have already mentioned that rich countries should establish a Cultural Development Fund. Otherwise, how could the poor countries compete with the one million dollar an episode television drama? They have to have the chance of building the capacity to develop alternatives (hopefully together with neighbouring countries) which have a reasonable chance to attract audiences in their own part of the world, not forgetting, however, what they can do themselves as well in sustaining the development of cultural diversity.

\* The immediate aim of the new agreement is reinforcing solidarity and co-operation at the international level in order to allow all countries, and particularly the developing and least-advanced countries, to create and maintain cultural enterprises which will project their own vision at national and international levels. Therefore, the ministerial International Network on Cultural Policy writes in its draft text of the Convention: 'Members shall facilitate the exchange of information, from all publicly available sources, relevant to the promotion and presentation of cultural diversity, taking into account the special needs of developing and least developed countries.' This last part of the phrase is a precondition for making the Convention on Cultural Diversity a success.

\* Making a Convention on Cultural Diversity is a unique opportunity for national states to promote their cultural exchanges and to support each other in their relations with, for instance, WTO and the countries that consider culture as normal a trade product as any other and that are opposed to the idea of such a cultural convention and the withdrawal of culture out of WTO. One of the most difficult issues is how countries like New Zealand, which have made commitments concerning culture and wish to be member of the new Convention on Cultural Diversity, can get rid of those commitments without having the expectations of terrible trade retaliations from countries opposed to such a transfer.

\* When a Convention on Cultural Diversity exists, it is quite reasonable to expect that member states of this international instrument may get disputes about ....., about what? Some examples may help. Garry Neil mentions, for instance, a dispute that would go along these lines: When is a domestic quota an encouragement of local production and a space for local cultural product, and when does it become a prohibition against the importation of foreign works? 'I could see at some point a dispute panel of the Convention having to adjudicate this issue. Let's say, the treaty is now in effect and, for example, the Canadian broadcast regulatory agency would say: effective 1 January of the new year minimum Canadian content for radio stations operating in Canada will be 100%. One can make a strong argument that that's no longer protecting a shelf space for domestic cultural product, but that this is a prohibition. On the other hand, I think that everybody would accept that a Canadian content regulation of 35% for radio is perfectly acceptable. So, where is the watershed between prohibition and a completely reasonable approach?'

Another example of a probable dispute settlement question comes from Peter Grant. 'Let's imagine a country establishing a quota on printing plants for CD's, because it wants to protect its local CD manufacturing industry. Does this activity really belong to its cultural domain that deserves protection, or should this protection be limited to the process of making the master CD, because this is in essence its cultural act more so than printing? This is a relevant question that an opposing country may submit to dispute settlement resolution.'

One of the advantages of having a Convention on Cultural Diversity is that such a dispute resolution panel does not have to have only trade people as members as is the case with WTO. It goes without saying that it is necessary that cultural experts belong to the panel. It should also not be imbued with the secretiveness that characterises WTO's dispute panels. Unsurprisingly, the International Network for Cultural Diversity claimed at its Cape Town meeting, 14 October 2002, that 'the dispute settlement process must be transparent, it must guarantee input from third parties and non-governmental organizations, and must acknowledge that the rights of individuals are equivalent to corporate rights.' All these demands differ from the WTO practice.

\* The key question is: what would be the legal authority of the future Convention on Cultural Diversity, considering WTO's present authority in commercial disputes? Therefore, as mentioned before, a substantial number of states, some of them also having economic clout, should ratify and sign the Convention. There are a couple of explicit advocates to name for this project on the political level: Sheila Copps, until December 2003, the Canadian minister of Culture and Heritage, and the French president, Jacques Chirac with the support of the Francophone countries. It will be seen as decisive whether the European Union will change its tack. Until now, it is firm in making no commitments concerning culture during the Doha Round negotiations, as was decided by the Council of the EU, 25 October 1999: 'During the forthcoming WTO negotiations the Union will ensure, as in the Uruguay Round, that the Community and its member states maintain the possibility to reserve and develop their capacity to define and implement their cultural and audiovisual policies of preserving cultural diversity.'

In the new European Constitution (still waiting for acceptance after the disagreement between EU member states in December 2003), France and Germany succeeded in keeping the unanimity on decision making

concerning negotiations and agreements in the field of cultural and audiovisual services, if they harmed the cultural and linguistic diversity of the Union. This means that, for instance France or Germany may veto the tendency of some other member states to make commitments concerning the liberalization of the cultural market. The next step would be full-hearted support for the development of a Convention on Cultural Diversity within Unesco.

The Council of Europe (the countries of the EU and other European states, including Russia) adopted, on 7 December 2000, a Declaration on Cultural Diversity that asks 'to elaborate a catalogue of measures, which may be useful to member states in their quest to sustain and enable cultural diversity.' It is a pity that the Council of Europe forgot to produce this catalogue. Thus, this is the work to be realized in the next chapter.

If we overlook this battlefield, the running start to a Convention on Cultural Diversity will seem to be very prosperous but this is not certain. The draft text for a Convention from the INCP (the network of ministers of culture) is likely to provide the model for the Unesco's work on its own draft. In the INCP draft, Article 4 reads as follows: 'Nothing in this Convention shall derogate from existing rights and obligations that Parties may have to each other under any other international Treaty.' The cultural NGO, the International Network for Cultural Diversity comments on this clause, that essentially, 'this clause is contrary to one of the principal objectives of the Convention, which is to ensure that, wherever possible, disputes about trade in cultural goods and services are adjudicated under its terms rather than the trade agreements.'<sup>8</sup> The basic idea was to withdraw culture from the trade only context of the WTO. The struggle will be to make this come true.

<sup>8</sup> INCD conference, Opatija, Croatia, 13, 14, 15 October 2003.

*chapter 4***REGULATIONS IN FAVOUR OF ARTISTIC DIVERSITY***Robust regulatory systems*

In the fields of film, music, theatre, dance, visual arts, design, and publishing (whether presented in the real world or by audiovisual or digital means) there are dominant market positions that harm broad access to cultural communication. From a human rights perspective this is a loss. Some of these market-dominating cultural conglomerates are foreign to a country; others are domestic, as in the USA or Brazil. Left to the market, mergers and take-overs will continue. However, democracy demands the reverse. In all fields of the arts and media, there should be producers, distributors and promoters, who have strong local affinities, and yet originate from many different parts of the world. National states should regulate the cultural market in favour of diversity in order to reach this ideal. A Convention on Cultural Diversity, that would take culture out of the neoliberal WTO context, would hopefully give states the full right to implement the kinds of regulations they judge necessary for the protection and promotion of cultural diversity.

Already now, even before such a Convention on Cultural Diversity would exist, systematic thinking should take place about the kinds of regulations that would be appropriate, for specific categories of the arts, in specific parts of the world. There are several categories of regulations to consider: *ownership* regulations (including *competition* law), *content* regulations, and regulations of the *public accountability* of cultural enterprises, *subsidy* systems, *tax* policies and different kinds of *preferential treatments*.

Gillian Doyle is right when she writes that media ownership is ‘a difficult political minefield’, and therefore ‘the design of a regulatory scheme to deal with concentrations ought to be robust, equitable and squarely aimed at legitimate public policy objectives.’ (2002: 177) Thus our mission is clear, but also extremely complicated. Regulations should be flexible enough to respond adequately to the changing cultural landscape, intelligently composed so that they cannot be bypassed easily or miss the target, practically allowing monitoring, impossible to skirt around juridically, and understandable so that they can be accepted easily.

We should be aware that in most cases one form of regulations would not be sufficient in order to reach the desired purpose of cultural diversity. For instance, from diversity of ownership it does not automatically follow that diversity of content will arise. (Doyle 2002: 13). This means that regulating authorities should find and prescribe the right mixture of ownership and content regulations. Let's imagine a town somewhere in the world. In this town there are three cinemas. If all cinemas are in the hands of one company, then decision making about what is on show tonight and tomorrow night is too centralised. To continue the example, we install an ownership regulation that says that every cinema should have a separate owner. However, it may happen that all three new owners buy their films from one source, for instance from mainstream Hollywood. Once again there is a problem for cultural diversity. Thus, the ownership regulation should be complemented with a content regulation.

Analysis is needed re the kinds of market positions that hamper broad access to the channels of artistic production and communication. Regulators should design flexible kinds of regulations that will give answers to already existing problems. At the same time, policies must be predictable for enterprises, as well as for cultural enterprises. However, this should not give them the right to be able to easily block the changes of regulations (in court) which have been introduced in order to promote broad access in the cultural field and to prevent monopolistic situations. In this chapter I will present and discuss several examples in the fields of audiovisual media, music, the digital world, film, books, visual arts, and design; however, the summing up is of course not conclusive. The categorisation and the examples may help to stimulate the imagination: in which situations what kinds of regulations may work, and where there is not, or not yet, a cure.

The purpose is that we share for a moment a solid and consistent catalogue of solutions that responds to the needs of categories of different countries, and that keeps in mind the distinct character of the distinguishable fields of the arts and their transmitting tools and outlets. This framework needs to be flexible enough to react to changes in technologies, production, distribution, and promotion methods and ownership relations while at the same time being fair to enterprises operating in the cultural fields, yet has the capacity to mobilise many people and cultural organisations to get such regulating systems accepted and introduced.

It is not difficult to understand that this is an enormous task. First of all, intellectually: How can we imagine that regulations exist at all, when coming from a couple of decades where measures in favour of cultural diversity seemed to be out of fashion? And then, we have to try to formulate what the appropriate kinds of regulations are. How to introduce them? How to make them acceptable? How to implement them? And, how to enforce them? I come from the Netherlands. So, I know what windmills are. I will not fight against them. But, maybe the wind of a growing respect and a growing need for cultural diversity may help us to have the courage to imagine, formulate and enforce what is nearly unimaginable. The purpose of the following sections is to bring order to the chaos by suggesting different categories of regulations and to illustrate them with several examples in order to raise awareness about options, contradictions and issues that are, for the time being maybe, not easily solvable. It is all about strategies.

#### *Ownership regulations*

The purpose of ownership regulations is to prevent one owner having a too dominant control on the production, distribution, promotion and/or the conditions for reception of the different forms of the arts. The main objectives of regulating ownership are to maintain a balanced diversity of owners of cultural enterprises; to limit the market-driven paradigm; to protect communities that would not normally have a voice in the market place; and to ensure there is accountability of the owners to the public sphere. Ownership matters because it is decisive for who can produce, what can be produced, and which artistic expressions will be distributed in what manner and surrounded by which ambiance. Internationally, oligopolistic ownership relations cause huge inequities between countries. As said before, in a human rights perspective there should be an enormous variety of enterprises that choose what will be produced, distributed, promoted and received in the different fields of the arts. The number of decision makers determines whether broad access exists in the cultural field, or not.

The consequence of ownership regulations is obviously that companies are obliged to remain relatively small. It is true that this may make them vulnerable to take-over, and at the same time it may happen that by limitations on ownership overseas expansion becomes obstructed.

(Doyle 2002: 159). How to approach this issue? In theory, if all companies are relatively small there is no problem because no one company has a significantly bigger size or greater power than other companies. This is exactly the objective we are trying to reach in the exercise of this part of the book: the oversized cultural conglomerates should no longer dominate the cultural field.

Let us try to imagine what the next step could or should be. Shouldn't cultural companies be made smaller before they are allowed to operate in a specific national market? I agree, that this is a proposal that we, children of the neoliberal era, cannot fully comprehend. But, isn't the logical consequence of this that the cultural playing field must not become dominated by any one cultural enterprise in any way? The side effect is that we will no longer have the fierce competition that presently exists between the few remaining cultural giants. The argument that they should have the economies of scale, and therefore the ability to merge, goes to ruin. The diversity of artistic expression needs a beneficial inefficiency.

Even the very idea of owning cultural expression is a strange concept in most cultures. This concerns the control of the means of production, distribution, promotion and reception of works of art, entertainment and design; this subject will be discussed in this part of the book. But, it also matters in the field of intellectual property rights. Sure, artists must make a living from their work. But isn't it exaggerated to grant them (and most of their intermediaries: the cultural industries) an exclusive monopolistic right (for more than a century) on their cultural expressions which they derive for the most part from many different sources in the public domain?

Ownership regulations concerning the different fields of the arts (in the material, audiovisual or digital worlds) may have several faces, as discussed below: (a) no private ownership entitlement at all; followed by regulations concerning (b) horizontal, (c) vertical, (d) cross ownership, and (e) foreign ownership regulations; (f) regulations concerning informal market dominations; (g) competition law; (h) taxation as a tool for diminishing the control possibilities for cultural conglomerates; and (i) the reduction of excessive copyright protection.

In every situation the relevant question is on what criteria ownership restrictions should be imposed. There are several possibilities: audience time, viewer share; turnover, market share; net advertisement

revenues; production, distribution, and/or performance capacity; access points. Followed immediately by the question, in what quantities?

(a) In a world in which it has very nearly become self-evident that everything can, and must be owned privately, it may sound strange to claim that important segments of our communication tools should be not be owned by anybody and should stay in the public domain. Lawrence Lessig stipulates, however, that the state should regulate that the *spectrum* stays embraced in the field of the public domain. His argument is that 'free resources have been crucial to innovation and creativity; that without them, creativity is crippled. Thus, and especially in the digital age, the central question becomes, not whether government or the market should control a resource, but whether a resource should be controlled at all. Just because control is possible, it doesn't follow that it is justified.' (2002: 14). There is a need to get a broad public understanding re this problem and there is not much time to lose. Only then can the privatisation of the spectrum be prevented.

(b, c and d) It is becoming more and more clear, that nearly all forms of horizontal and vertical integration no longer exist. Mostly, what we see, nowadays, are forms of cross ownership in the cultural field: media conglomerates that are active in all the fields of the arts and entertainment, in all stages from production to distribution, promotion, and reception, and in all different media. In several cases we should realise that the reality is that cultural production and distribution has become involved in situations of cross industry ownership. For instance, General Electrics, which is a huge military industry, has extensive interests in cultural industries and news agencies. Arms producer Lagardère in France owns a substantial part of the publishing houses and distribution channels for newspapers and books in this country after it took over the publishing division of Vivendi Universal.. Italian Prime Minister Berlusconi owns many different media; controls public radio and television, is also owner of the main publicity agency in Italy and one the most important supermarket chains. Such forms of cross industry ownership are a nightmare re inherent conflicts, in which cultural freedom becomes extremely vulnerable.

What to do? In 1996 the European Commission attempted to propose a draft Directive on *media ownership* which would have included a 30 per cent upper limit on mono-media ownership for radio and television

broadcasters in their own transmission areas. 'In addition, the draft Directive suggested an upper limit for total media ownership – ownership of television, radio and /or newspapers – of 10 per cent of the market in which a supplier is operating.' (Doyle 2002: 162-4). However, a year later even this modest attempt at a draft was withdrawn without bringing masses of people onto the street.

In 2003, the US Federal Communication Commission proposed to delete the last remaining cross-ownership regulations, which would then give cultural giants in nearly all the fields of culture and communication, absolute power. This measure caused uproar in the US. Temporarily, the abolishment of this regulation has been abandoned. One wonders for how long. It is a good sign though that people can be mobilised with regard to a subject that involves cultural and informational issues. Left unimpeded this is a defensive action.

What would be more offensive? Given that a handful of cultural giants control most of the production and distribution in nearly all fields of the arts, in almost all corners of the world, is it conceivable that they would be segmented again? Segmented and split up into many smaller enterprises, according to the different forms of the arts, into distinguishable stages from production to reception, and not allowed to operate in all countries at the same time? In any case, for one country alone it is almost impossible to put strict conditions on the size and reach of cultural conglomerates that operate globally. All these giants are heavily indebted as well. This is their weakness, but at the same time their strength. Breaking them into pieces – this should be done from a democratic perspective – would mean that they would lose their "virtual" value, and their moneylenders, like the major banks in the world, would go bankrupt.

What can be done? First of all, awareness should be raised with many people and their organizations that the unlimited power of the cultural conglomerates is an immense problem. In the context of the wider global movement against privatisations and deregulation, such an immense cultural democracy challenge should be tackled. Second, the power of cultural conglomerates should be attacked from different and separate angles. One erodes their dominance by effectively using the internet and digital means in favour of the creation and spread of artistic diversity, as said previously.

But, there is also a third possibility. Countries can say: cultural enterprises that are too conglomerated may not be based here. It would be

more effective if a group of countries were to decree this together. Of course, it should be defined what size is still acceptable in the perspective of democracy concerning cultural production, distribution and promotion, and regarding the Universal Declaration of Human Rights. Obviously there is a huge problem with countries where an oligopolistic cultural enterprise dominates the home market, like Berlusconi's Mediaset does in Italy and Globo in Brazil. Let's be honest, we cannot expect that this limit on size will be introduced next year. At the same time, we can agree that it should be done and that it is not acceptable for a few cultural conglomerates to dominate cultural markets everywhere in the world. The strategy should thus be to raise the awareness that the oligopolistic ownership of the media and other outlets cannot be tolerated in a democracy. It should also be clear that breaking the power of cultural giants should be done from different angles, with different kinds of regulations while finding which ones are the most appropriate.

Let's try doing an exercise in the field of music distribution. Important outlets for *music* are the record shops. The question obviously is whether the ownership of most of them is in the hands of one chain, or a couple of chains, so that decision making is too concentrated. But maybe this is a too unspecified approach because there are varied music segments in the market. Can we establish where concentration hampers market access for other record shops, and where the cultural damage is not really that big? A complication is, however, that it is becoming less clear what a record shop is, as most supermarkets carry CD's and cassettes nowadays. Specialised shops are becoming rare. Probably one may be happy, at a given moment, for a chain to keep open a number of specialised record shops. Or not? Only the examples of many different countries can help to solve this question. Immediately it becomes clear that we lack in many fields of artistic expression, and for many countries, precise and up to date information about the level of concentration, in this case that of record shops.

Considering the fluidity of the market for music, my guess is that it is not that easy to regulate the ownership of record shops. Probably the starting point for caring for diversity concerning the distribution of music lies in the audiovisual media. My argument is that there will automatically be a diversity of stock in record shops if a broad diversity of music has been broadcast on radio and television. People buy what they hear. If there is no dominant and unavoidable tune or song on the radio or on television, but a huge diversity of tunes and songs, then the audience will

buy diversely. If this is true, then the question of ownership concentration of record shops becomes relatively less important.

This would replace the need for regulation to another category of regulations, namely the field of content regulations (see below). Then, public and private channels could be obliged to broadcast, for instance, thousands of different songs a year, even at prime time, that come from many different and independent sources, and many different countries.

It is interesting that the distribution of music gets another perspective partly by the rapid development of the peer-to-peer systems of music exchange. If the continuing trend is that the music industry, followed by the film industry, is selling less, then this might become an attack on their dominant positions. But what positions are at stake? In the field of distribution, certainly, and also their copyrights loose market value. But what about the production of music and films? Until now, it seems that most people exchange music and films that have been produced by the cultural giants and made popular by their marketing machines.

A real attack on the dominant position of the music and film industry would be for more and more artists to produce and distribute themselves using the rapidly developing tools of digitalisation and the internet and not to contract themselves to the cultural industries. However, this option is more available for artists in the richer countries and selected groups in poorer parts of the world. Besides, audiences could do two things. First, they develop curiosity to this diversity, and change and adapt the works creatively, no longer being passive exchangers of what is on the hit lists. And second, of course they should, and will, pay the small amount of money directly to the artists for the use of their works.

(e) Is there something wrong with foreigners owning important cultural production and distribution facilities in a specific country? Yes, indeed. It increases the chance for artistic expression to no longer be related to the specific circumstances of people living in that country. The Universal Declaration of Human Rights demands that people should have the right to participate in the cultural life of their community. In Canada, for instance, it is proven that domestic producers offer substantially more domestic content than foreign producers. In the field of books, perhaps twenty per cent of sales are generated by Canadian publishers, but they are responsible for 85 to 90 per cent of the Canadian titles published. It is

the same in the music industry. Canadian producers bring the overwhelming bulk of Canadian artists who are recorded onto the market.

This does not mean that it is sufficient to have foreign ownership limits. This, in itself, does not guarantee a rich offer of diverse kinds of artistic expressions. Foreign ownership restrictions should be combined with other regulatory measures, particularly various content quotas. Nevertheless, restrictions on foreign ownership give a better chance to domestic cultural entrepreneurs. They know the cultural field in their own country, which is likely to result in more domestic content. The least that can be said of regulations that restrict foreign ownership is that they forge conditions so that local artistic life can be developed.

On the other hand, if there are foreign owners they can be required to present more and more local artists in the countries where they trade. However, this does not mean that they are part and parcel of the cultural life of such a society, because those foreign cultural conglomerates decide which local artists will get a chance, and they decide the ambience of presentation.

Well meant foreign ownership restrictions may become ineffective when they have been constructed for a world that no longer exists. For instance, in France the foreign ownership of multimedia companies is restricted to no more than twenty per cent. (Doyle 2002: 148-150). In the case of the merger of Vivendi with Universal, however, it became difficult to make this law effective. Though who knows who the stockholders are, and tomorrow the stocks may already be in completely different - foreign - hands. The debate about the *raison d'être* of this law was avoided; nothing could stop this merger, and later was too late.

(f) It is easy to forget that the economic clout a specific cultural conglomerate or enterprise has, might seduce them to an actual market behaviour that is undesirable. An example may illustrate this. In Great Britain the *bookshop chain* of Waterstone has an estimated market share of 20 per cent. But how do they use this apparently modest position on the market? Recently Waterstone changed its conditions on returns and payments that had a catastrophic effect on small publishers, effectively making many of them insolvent. The way Waterstone behaves is bad for cultural diversity because it pushes small publishers out of the cultural market space. It diminishes their chance of economic survival. A comparable phenomenon we observe with big publishers who buy window space and favourable displays in bookshops for the books they

promote as bestsellers. Smaller publishers cannot compete with such behaviour of the giants in this race for the attention of clients.

First of all, such informal market relations should be unravelled and made transparent. Apparently, we accept that these kinds of processes take place, but one may wonder, is it self evident that big companies may distort the development of diversity in the market of artistic expression, by their actual behaviour? Second, would it not be desirable to regulate the conduct of dominant players in the cultural field? One may discuss whether such a regulation should be brought under the category of ownership regulations. I would say yes, because it restricts the autonomy of the owner of the cultural production, distribution or promotion capacity.

(g) It is amazing that in many states existing competition law has seldom been used in the cultural field, in any case not effectively. It can be applied in the case of mergers and when there is abuse of a market dominating position. One could claim that a market dominating position is an abuse especially in the perspective of upholding democratic values.

It would be a cultural gain in many situations if existing anti-monopoly laws could be applied in the cultural sectors, but this seldom happens.<sup>9</sup> Benjamin Barber is amazed that cultural corporations have the right 'to swallow one another up, converging, merging, and buying each other out as fast as financing can be found and stockholders bribed. The courts step in not to preserve a public good nor to impede a developing monopoly but only to assure that stockholders' profitability will be the only criterion of the deal.' (1996: 85). In a city like Amsterdam around eighty per cent of cinema screens are in the hands of one company (more than eighty per cent of the films on offer coming from Hollywood, but this is a subject for the next section on content regulations). One cannot understand why the competition authorities do not come together and forbid such an accumulation of cultural power.

However, as discussed above, the conditions of access concerning culture must be even more open than would be necessary for other entrepreneurial activities. Nevertheless, it would be a good start for normal competition to be strictly applied in the cultural sectors. This process would also stimulate the thinking about what kind of diversity of entrepreneurial activities is necessary in a cultural democratic perspective.

<sup>9</sup> Robert W. McChesney and John Nichols, *Getting Serious About Media Reform*, The Nation, 7/14 January 2002.

It would be one of the opportunities for stressing the necessity to develop for instance, a biennial cultural diversity index.

(h) What to think about *taxation as a tool for diminishing the control possibilities of cultural conglomerates*? For instance, for the US Robert McChesney proposes that 'to the extent that commercial media and advertising play a role in a democratic media, they should be taxed to subsidise the non-profit and non-commercial sector. A tax of, say, 1 percent on advertising would generate over \$1.5 billion in 1997.' (1997: 67). This is a considerable amount of money that could be used for the promotion of cultural diversity. *Our Creative Diversity*, Unesco's and the United Nations' Report of the World Commission on Culture and Development, suggests that at the heart of the debate should be 'how best to share the *global commons* in media terms. One simple idea would be to use international taxation to generate new revenue that may be invested in alternative regional and global services and programming. A tax may be used on the commercial use of the global commons, much like taxes which have been suggested elsewhere for cross-border capital flows and fossil fuel consumption.' (Pérez de Cuéllar 1996: 121,2).

Lawrence K. Grossman has launched a comparable idea in an article with the headline: 'These Airwaves Are Public Property.'<sup>10</sup> It might be evident from this that the creative thinking on such kinds of examples is still at its beginning. But if it is true that private enterprises use the public domain for commercial interests, why not tax them and thereby support culture and education?

Why are there blockbusters, bestsellers and stars? The main reason is that they have been launched with enormous market budgets of millions and millions of dollars that actually falsify competition. Why? Without such fabulous amounts of money other artists and their enterprises are by definition loosing the competition with these mega events. Christophe Germann analyses, in the case of film, that 'the investments in marketing are arguably the most decisive incentives for film exhibitors to programme blockbusters. Consequently, the moviegoers must consume the content that the majors have imposed up on theatre exhibitors through their powerful distribution structures and marketing investments. This situation is even worse when distributors use the so-called "block booking" methods, i.e., they rent blockbusters to exhibitors on the condition that the

<sup>10</sup> Lawrence K. Grossman, *These Airwaves Are Public Property*, International Herald Tribune, 24 August 1995.



latter also show other films of lower commercial value from the same distributor. The blockbuster is in this way licensed as part of a package deal to saturate the screens. In many jurisdictions, this practice violates competition rules. Arguably, the audience's demand is therefore largely irrelevant since the market relationship takes place between the majors as producers and distributors (offer) and film exhibitors (demand). The dominant market position of the majors' oligopoly leaves almost no screen capacity for content other than for blockbusters from one single cultural origin, unless governments intervene on a national and regional level by way of cultural laws and policies aimed at promoting diversity in the audiovisual offer.' (Germann 2003)

It would make sense to tax the excessive marketing budgets of blockbusters, bestsellers and stars and transfer this collected money to the marketing budgets of other cultural productions. This would bring them to an equal position and would make sure that falsification of the competition no longer exists. (Ibid.)

(i) Oligopolistic ownership claims may be limited as well by the *reduction of our excessive copyright system*. This has an octopus-like character. It will last almost forever, and everything that looks like a specific content may also be owned. Copyright has become less of an instrument to pay artists but turned more into a control mechanism of the cultural industries with as much content as possible. The time is near when our entire cultural heritage from the past to the present will be in the hands of only a few owners. It goes without saying that this is not democratic. Such a monopolistic control on artistic expressions has never existed before in history and in no other culture other than in present Western societies.

Lower copyright protection standards are likely to reduce excessive investments in stars, blockbusters and bestsellers. This has a consequence that cultural industries will no longer produce "contents" that are meant for and able to dominate cultural markets all over the planet. At the same time, this may result in the possibility of many, many more artists and their creations finding audiences, not being hindered by the dominant market forces. (Smiers 2003: 207-216).

This is exactly the purpose of all ownership regulations discussed thus far. A second category of regulations concerns the cultural "content".

### *Content regulations*

Having a great number of decision makers concerning artistic expression does not automatically guarantee that audiences, buyers, and listeners can benefit from the rich diversity of artistic creations and performances that artists produce. The offer might tend towards a limited range of products. Why? For instance, because they are cheap, or it is sure that they will attract a mass public, or they are uncontroversial, or they are more in line with the political or aesthetic convictions of owners and programme makers.

An even more important reason to have content regulations is the reality that we might not succeed immediately in restraining the size and power of cultural conglomerates and turning them into small or medium sized enterprises, as mentioned above. A third reason to have content regulations is that nobody in any society has an equal voice and the possibility to be heard in public; this also applies to the cultural field. The consequence of this is that many artistic expressions do not count in public debate and experience, for instance about taste, about language, design, kinds of music, theatrical imaginations, narrative structures in film, or on television. This would be a democratic loss. It will be an impoverishment if cultural products come from only one foreign country (with a little from the own country), and not from many other sources, countries, and cultures.

In general, content regulations are meant to provide access to a wide range of diverse content via appropriate and relevant distribution channels. This immediately calls to mind what has already been discussed: many countries do not have the capacity to let artists create, for example audiovisual works that are of such quality that they can compete with foreign products coming from huge cultural industries. This said, these countries should get the financial means to build production and distribution infrastructures while giving artists the chance to develop their craft.

Content regulations can make sure that cultural industries cannot go on to dump their wares on markets that do not have the economic and infrastructural clout to resist these cultural invasions, and that would otherwise never be able to produce artistic expression which is more costly. Many countries are small. So, it would be wise, for such countries to cooperate on a regional level with neighbouring countries in the

development of cultural productions and to assure them that there is a market that is bigger than the home market.

Content regulations may serve different objectives. The most typical regulation tries to assure that domestic artistic products can be shown in sufficient quantity. It focuses on the own country, on creative developments going around, and hopefully giving abundant shelf space to those works of art.

Secondly, content regulations may be aimed at promoting the existence of a culturally diverse offer from surrounding countries and other parts of the world. In huge countries like India, China and Brazil it would be worthwhile for regulations to promote the exchange of cultural creations from all the different corners of these, of course, culturally very diverse countries. Obviously, this idea of looking further than the own country or province is more complicated to realise than just regulating that only local artistic developments are not to be snowed under the torrents of the globally operating cultural industries. Most existing content regulations have an eye on safeguarding domestic artistic life. This is important. However, it is also important to take care that the diversity of artistic expression has a place and that the whole world, and all different artistic varieties, comes into the cultural picture and should be an object of regulating policies.

The third purpose of content regulations is to ensure that the broad diversity of categories of cultural representations is not neglected. It can promote diversity of genres. This may mean, for instance, the protection and promotion of cultural, linguistic, political, and demographic diversity, including different minority interests. The objective of these three purposes is to prevent cultural creations from having a too uniform source; or to put it another way - they should promote the confrontation between public and diversified forms of cultural communication.

In general four kinds of content regulations can be conceived. We may call them: (a) the *at least* kind of regulation; (b) the *must carry* system; (c) the *no more than* alternative; and (d) the *reciprocity* policy.

(a) Most forms of content regulations are those that can be indicated as *at least*. It speaks about the percentage of domestic product that should at least be presented. For instance, the European Directive *Television without Frontiers* contains a domestic (i.e. European Union) quota system. But it is precisely this legislation that shows that different kinds of regulations should be mixed in order to reach the desired purpose.

Ben Goldsmith and research partners comment that there are a number of problems with the EU systems, including difficulties in adequately policing airtime and in programming budget-based quota systems. ‘One commentator even argues that the Directive actually served to weaken national controls and enabled the entry of American programming because no limits were placed on imported programming, and because the definition of “European works” extended to official co-productions and programs made in Europe by non-European producers (Venturelli 1998: 202-5).’ (in Raboy 2002: 99). The statement of “no limits were placed on imported programming” brings us to the *no more than* alternative that I will discuss under (c).

In France a *music* content regulation ensures that *at least* 40 per cent of the songs broadcast on radio, with some variations, should be in the French language; at least half of them should be from new talent or newly produced. This is quite a successful system, with only a few problems. There is no obligation to broadcast music from other European countries. The consequence? The musical offer is limited to that of French musicians and Anglo-Saxon material. A second inconvenience is that a few major record companies are the prime source for DJ’s and VC’s. An obligation that over the year the music offer must come from, for instance fifty record companies, would really help the promotion of diversity. A third anomaly is that in prime time only a tiny percentage of the music produced in France can be heard. Diversity exists, but it does not get a chance to play a significant role in public life. Thus, broadcasters (public as well as private commercial) should be required to make their selection representative for the broadness of the jealously making expansive French music scene.

For several years in South Korea a screen quota system exists. This makes it mandatory for movie theatres in the nation to screen Korean films in the cinemas for no less than 146 days out of the 365 of a whole year. Broadcasting companies must show Korean films around 30 per cent out of their total airtime for films. This is the result of the concentrated efforts of the Korean Coalition for Cultural Diversity in Moving Images and its predecessor the Screen Quota Watchers. Actually it works. US films held a 47% share of the Korean movie market, while Korean films 46%. This has had a positive effect on the production of films in Korea, and several of them are winning international awards. In any case, it gives directors the chance to make many films in a row and thus to learn the craft, while in

most parts of the world a director is happy when he or she can make one film every three or four years.

The quota system does not prevent some films from still having their origins in Hollywood. It does not exclude, but it enlarges the range of options. Nevertheless, the US is not happy and threatens not to sign an investment agreement with South Korea, because Hollywood studios like to have a completely open playing field for their products globally, thus also in Korea. The pressure on the Korean government to open its cinematographic market is huge. Therefore it would be of enormous support if more Asian countries would adopt a quota system for films. This would make it easier for the Koreans to withstand the American pressure.

One problem that I have signalled here already, in the Korean film case, is that the offer of films stays limited to locally made cinematic products and films from Hollywood. Is there no news on the film front from other countries? This is unlikely. A system would help that says that *no more than*, for instance, twenty per cent of the films may come from one country (see under (c) below), and that at least another thirty per cent should come from many other countries in and outside their own region.

Is it desirable, and feasible, to regulate the *digital* domain? This is a huge question. Philippe Quéau observes that regulations are necessary because in this field global monopolies develop, and the new technical processes do not offer by definition access to information and development for all. ‘Regulating mechanisms which are specific for the global information society should therefore be conceived. The start should be putting in place a legal framework with global reach and institutions that are capable of defending the global public interests.’<sup>11</sup> There is no lack of subjects that require regulation, according to Philippe Quéau.

He sums up: the positions of satellites; fair competition and global anti-trust laws concerning the fields of telecommunications, software and electronic commerce; the definition of the concept of elementary global services; fair entrance to the global centres of internet routing that are presently dominated by monopolistic operators; the definition of tariff politics for international telecommunications; and with regard to the administration of intellectual property rights, a better equilibrium should be reached between right-holders and users. Also, a system that gives

<sup>11</sup> Philip Quéau, *Une mythe fondateur pour la mondialisation*, Le Monde, 17 February 2001.

developing countries better access to knowledge and creativity should be created.<sup>12</sup> Several of these topics would demand a mix of ownership and content regulations.

In the same vein as Philippe Quéau, Gillian Doyle considers that ‘conventional ownership rules based exclusively on “traditional” media have, to some extent, been overtaken by developments surrounding digitisation, convergence and the growth of the internet, and national policy-makers have to respond accordingly. . . . Regulating “gateways” and potential bottlenecks (e.g. monopoly control over conditional access systems, or user navigation systems or key content) has become pivotal to the objective of ensuring open and diverse systems of media provision.’ (2002a: 151).

Two key elements are essential. First, to regulate the technical infrastructure of the digital domain in order to avoid having just a few players who control the conditions of using the digital world. Lawrence Lessig, as mentioned before, indicates even that nobody should have ownership of the spectrum. (Lessig 2002). The second element concerns the *distribution* of content – I would prefer the term ‘cultural creations’, but currently ‘content’ is the widely used terminology – in the digital world, according to Garry Neil<sup>13</sup>. Care should be taken to make sure that cultural diversity gets a real chance in this rapidly growing field of digital communication. Once it is lost, it is lost for a long time to come. In order to bear out his argument Garry Neil goes back a little in Canadian history (his own country). ‘We have a strong television production industry which is very good and effective, but we have nearly no film production industry. Why? It is not because we don’t have the creative people. What is the difference? We control publicly the distribution of television; there we always have regulated the distributors, the broadcasters, the cable companies, the satellite companies; we regulate them. We don’t regulate film distribution. We succeed in television, we fail in film.’

The lesson Garry Neil draws from this experience is that regulation of distribution is the key element in realising the desired cultural diversity and this is also true for the internet. ‘Who is doing the distribution there? The Internet Service Provider. Thus, they will get the content obligation. Some people will argue that if you regulate them, they will go offshore. This is no answer because they have to collect the money, thus they have

<sup>12</sup> Ibid.

<sup>13</sup> Interview with Garry Neil, coordinator of the International Network for Cultural Diversity, Toronto, 22 January 2003.

to have some kind of physical presence in the country, and thus you can regulate them. They need a physical place.' But what kinds of regulations would be appropriate? 'It is not going to be the traditional model of regulations. The central focus point will be the navigation system, while this is the key in distribution. The content regulation will work as follows. The audience can make a choice out of a list of, for instance, ten movies or ten comedies. Included in the first ten, three or four should be local in origin, or should otherwise be diversified. And also in the next series of ten, three or four should be, for instance, local.' Garry Neil: 'We cannot force members of the audience to watch them, of course not. The regulation, however, has as a purpose making them available to you in every list of choices, and in a substantial quantity.' It is not about excluding anything, but it is about offering the audience the choice from the full range of options.

Thus, diversity should be the normal share of the offer. Diversity is not hidden in a far away, difficult to find corner. It is self-evidently present. This has far reaching consequences for the production of comedies, films, games, shows, and so on: 'The distribution obligation is at the same time a powerful incentive for cultural enterprises to produce the demanded diversity.' This means that diversity of production follows automatically from the already existing diversity on the distribution side. A huge topic remains on how to monitor and assess the Internet Service Providers who are, thus, obliged to put conditions on the companies who wish to use their distribution facilities.

Another significant issue is whether such digital content regulations infringe the freedom many internet users cherish and whether or not it streamlines the use that was supposed to be more anarchistic of character. To start with this last observation. It is doubtful whether so many people use the internet creatively. Probably most of them use it like they used television, and tune in on what is within easy reach. A cultural diversity policy should give them, indeed, the choice from a wide variety of options.

Does the introduction of such kinds of regulations change the character of the internet? Not really, because it is already in a process of transformation. For several reasons the internet is becoming more and more controlled. To name some of them: security concerns, for reasons that are not difficult to guess; moral issues (like child pornography) urge public authorities to control what is going around on the internet; commercial interests like to see their trade protected and paid in this new

domain where businesses take off only when the free-beer-principle has been abolished; and of course national states like to receive the taxes.

If this is the reality, then it must be a high priority for cultural movements to steer those regulatory processes in directions that do not harm freedom of expression and communication, and the spread of cultural diversity. On the contrary. First, care should be taken that the cultural field in this newly digitised world does not become a playground for the cultural conglomerates only. The consequence would be that, instead of having more options, the cultural offer will stay as limited as is presently the case, in the "material" world, where cultural giants bear the sceptre. On the internet a huge space should remain, perhaps even the largest space, where independent artists, their collectives and their groups and modestly sized institutes can present their work and can communicate actively with each other and with every other interested party.

Second, digitisation and the internet offer unique opportunities for creative adaptation as existed in all centuries and in nearly all countries, until the Western copyright system started to freeze works of art forbidding artists from creatively transforming what their predecessors have done. Cultural industries presently try to allow the penetration of this creatively unproductive copyright system into all the pores of the internet. Thirdly, the regulations concerning moral issues - that are partly understandable and sometimes even desirable - also demand vigilance. One step too far, too much regulation, then freedom of expression is done for.

It might seem that productive thinking about regulations in favour of cultural diversity on the internet is still at its beginning. A major task will be educating people into becoming competent citizens that know how to use this medium as creatively as possible.

A question that suddenly becomes relevant is whether the whole new field of *games* should be taken into consideration here. Is it included in the field of cultural production and communication for which we try to define relevant forms of regulation? The answer should be yes. It is theatre, pure drama; it has narrative structures; and it is full of aesthetics. The main discussion is not whether it should be regulated because of the violent content of many of the game genres. Nevertheless, I think that there is reason enough to include this topic in our debate because it is linked to the question 'if and how' to regulate. In the case of games regulatory frameworks are very much desired for a number of reasons. Morally, there

is no reason to treat the digital world any differently from the world we know thus far. The fact is that strong violent imaginations construct the moral make-up of viewers and users, and also that of games, and this influences indirectly their day-to-day behaviour. Not only are regulations desirable from this perspective, but also because of the immanent threat for diversity as a consequence of market developments. Actually, the field of games is very much conglomerated. There are three major industrial players who dominate the market, and it is not inconceivable that this number will be reduced to two in the near future. Of course, there are many others who are trying to find a place under the digital sun, but they are pushed away more and more from public attention by the omnipresence of the big three.

What to do? Where is the access for regulations? There is an urgent need for public authorities to support, with subsidies and other facilities, the production of a great diversity of games. Otherwise this interesting interactive cultural field will be left to a couple of dominant market forces. On the side of outlets the question is less easy to answer. Actually, there are two equally important instances of distribution. Potential players buy a game in a shop, then adapt it to their requirements on the internet and pay there a second time accordingly. To regulate the internet in this field, as in the digital examples given up here by Garry Neil would not make sense. Players, who have bought a game in a shop will steer their mouse straightforwardly to the site of the company from which they have bought the game. Would this then mean that the only remaining starting-point for regulating is the shop? Until now we have tried to avoid taking shops as the point of regulation, because in the case of publishing, it would prove difficult to get a grip on the stock in shops. In the case of games, one can buy them in a number of different outlets. Getting a grip on them is nearly a mission impossible; a limited number of outlets are relatively easier to regulate, monitor and assess than dispersed ones. So, the question how to regulate the distribution of games stays, thus far, unanswered, but is nevertheless relevant.

(b) After this exposé on the *at least* variable content regulations, the second option of content regulations is the *must carry* system, that might also be called the essential facility doctrine under US law that says that an enterprise that controls a specific channel of communication must open it up to more suppliers than just the owner of the essential facility (Germann 2003: 121). This approach requires monopolists or dominant players on the

cultural market to give third-party access to rivals on terms that are fair and non-discriminatory. (Doyle 2002: 169). If a cultural enterprise in the field of production, distribution or promotion (or all of them at the same time) is very strongly present on the cultural market (at the moment this cannot be avoided) then it should get a public task to fulfil. This will ensure that cultural diversity continues to exist, despite the market dominant position of this specific enterprise. The public task is to be the carrier of diversity without interfering editorially or otherwise in the artistic choice of what selected independent producers and distributors wish to offer to the public.

The *must carry* system is a crucial one because it regulates that access to all different kinds of content is available and possible. Obviously, all the social and cultural objectives of other regulations in favour of cultural diversity through such mechanisms as quotas, subsidies, tax systems and so on could not be met if viewers or listeners cannot find access to this content.

(c) Maybe one of the most challenging forms of content regulations is the system clearly defining that cultural products from one foreign country may not have a market share larger than, for example, ten, twenty or twenty five per cent. One may call this the *no more than* alternative. It limits the market share. This is an attractive form because it keeps the cultural market open for cultural creations from everywhere in the world. However, there should not be one foreign source that overwhelms local cultural life substantially. The basic principle here is that: this regulation is not about exclusion, but does make sure that there is space for the presentation of a wide range of diverse cultural options.

For instance, in South Korea the *Broadcasting Act* limits foreign content to 20 per cent for terrestrial channels, 30 per cent for cable channels, or up to 50 per cent if the cable programs concern technology and science, culture, or sports. However, Daeho Kim and Seok-Keyong Hong remark that the ratio of foreign content does not even reach this level. 'Thus, it can be said that the quota is a normative line rather than a practical restraint.' (Kim 2001: 79).

The *no more than* alternative is not directed against one specific country, or any specific cultural enterprise. It just signals that foreign content, or productions coming from one other single source, have a too dominant presence on the local cultural market and push aside the variety

that is necessary in a democratic and human rights perspective. The aim is to correct this market failure.

(d) A fourth kind of content regulation would be the *reciprocity* policy. A foreign country that has a strong presence in another country may hear from that country this message: if you wish to operate in our country, we demand that a comparable number of, for instance, films from our country will be shown in your country. The *reciprocity policy* is the opposite of the ideology of the comparative advantage, which says that one country is better, for example, in film making or in producing shows. So, that country should do this, with as a benign consequence the product becomes cheaper for all other countries, and they will get a better quality product as well. Thus unavoidably, the industry from one country, or a couple of countries, delivers cultural products into all corners of the world.

For several reasons this “comparative advantage” argument does not and must not work in the cultural field. Of course, for instance films made in different countries will differ; but hopefully this will also be the case within countries. “Better” is therefore an irrelevant concept. It might happen that in a certain field of artistic expression, and in a certain period of time and under certain conditions, an enormous outburst of creativity takes place. But this does not mean that what artists are creating at that same time in other societies is irrelevant. Also these creations and performances should have the chance to communicate with the public. This is a general cultural interest that would be nullified if the “comparative advantage” philosophy dominated the world.

Does the dominant “comparative advantage” policy make cultural products cheaper and more consumer friendly, as has been stated in this philosophy? Even this may be doubted. The exorbitant price of CD’s counters this argument. Apparently, the music, and also the film industry do not know how to react to the fabulous cultural possibilities the internet offers, and tries to tame this medium by scattering lawsuits. It demands too much of the imagination to call this a consumer friendly industry. What to think of the huge investments cultural industries make in what they hope will be bestsellers, blockbusters and stars, knowing that nearly all of them will fail on the market? Is it that the cultural industries waste cultural energy? What to think of the publicity sector? This is a sector that throws away creative ideas, designs and music, all the time.

Why not accept and celebrate that societies are different, countries are different, and groups within societies differ, and that this results in a varied range of works of artistic expression? Even the idea that the production and distribution of a huge diversity would be inefficient does not hold when we keep in mind the inefficiency and the consumer unfriendliness that is the hallmark of the cultural industries.

Interesting to note is that a *reciprocity* regulation has been introduced by China in its trade negotiations with the United States. This approach makes it clear that an unequal balance in cultural exchange should not be self-evident. For the sake of the argument it already works. Nevertheless, apparently it can be practically applied too. To gain access to the Chinese cultural market Rupert Murdoch’s Fox had to consent that its US networks distribute an equal number of Chinese cultural products.

Of course, this *reciprocity* policy would work only between countries or regions that are of a comparable size (geographically or concerning production), for instance the West and East African countries and the US; or between Southeast Asia and Japan or Hong Kong.

#### *The carrots: subsidies, tax policies and other incentives*

Until now only the sticks – ownership and content regulations - have been brought into the game; let’s see what carrots are able to do in order to support the development of cultural diversity. The carrots may be subsidies, infrastructural measures, tax advantages and other forms of preferential treatment. Sticks alone will not always work, partly because national states do not have endless power to implement or to enforce them. On the other hand meanwhile some creations, performances and shows need financial or infrastructural support. For example, because they cost more than the market can bear (as is nearly always the case with opera); or the public does not yet know them, but nevertheless it is, from a cultural perspective worthwhile that they exist, can communicate with audiences, enrich the cultural landscape, and build up in time enough followers to make them financially more feasible; or the competition from other more or less comparable artistic products is vehement and pushes other alternatives to the very fringe (for these situations we try to introduce ownership or content regulations, but this does not always work); or one does not succeed in strengthening adequate infrastructures for production, distribution or promotion of artistic expression.

We should, however, not forget that in most societies quite a lot of works of art could and can be produced and distributed only by the support of, for instance, a king, a maecenas, the church, the village, or, nowadays, the state and its national, regional or local authorities. The present dominance of the Hollywood film would be inconceivable but for the huge support it got from the US government at the beginning of the twentieth century; also nowadays the American state supports, in trade negotiations and in many other platforms, its film and music industry; and some may say, quite aggressively. It is important to note, again, that several of the support measures that will be discussed below, may be too expensive for poor countries, and therefore a Cultural Development Fund is highly necessary, as mentioned before.

Subsidies can be given in different forms. It may be given, for instance, to producers, to artists themselves, broadcasters, intermediaries, or to venues. In The Netherlands, there are two interesting examples in the field of the visual arts, where the public is subsidized in one way or another. In nearly every town or city there are lending libraries for works of visual arts, the so-called “artotheek”. The public can borrow these works for several months at very reasonable prices and hang them on their walls. Even more interesting is the system where people (who do not earn above a certain amount of money per year) can buy works of art and pay for them using interest free terms, which is funded at the expense of the Ministry of Culture.

Important are, of course, subsidies for training of artists, and for arts education in schools, clubs and associations. In many countries subsidies are actually guarantees. For instance, in the case of a subsidized film becoming successful, the money goes back to the ministry or any other public fund. They may also be soft loans, or they may be guarantees for bank loans. The state may also be the initiator and the enforcement authority for different kinds of levies, like the blank tape levy, that may be used partly for remunerating artists, but also for contributions to specific cultural projects. Subsidies may be used for artists exchange projects, or for cultural representations abroad. The state may also stimulate lotteries whose purpose is to financially support social and cultural projects.

In France, a stimulating policy exists concerning the production of films. I do not speak about French films, because there is not one film genre that characterises the French film landscape; there are many different kinds, and this is as it should be. What is it that makes France relatively unique in Europe? In no other country in this part of the world

are there so many locally made films on show as in France. Besides a generous subsidy system other measures have also been taken to promote film production on a substantial scale. Cinemagoers pay a small amount of money on every ticket that goes to the national fund for film production. Television channels are obliged to take part in the production of certain quantities of films. And, since decentralisation brought more money to the regions and the provinces (*les départements*), they contribute substantially to the production of films and this has the interesting side effect that many films find their inspiration and location in the countryside and in towns far away from Paris.

At present cinemas all over the country screen these films and there is a large interested audience for them. Many towns have communally financed cinemas, which means that these films have a chance in nearly all corners of the country. A problem arises with the large-scale introduction of multiplexes with many screens. Most of the time they are vertically linked with the Hollywood studios – even by presales and so-called co-production agreements. This might become a problem for French film production. When there is less exhibition space for the locally made film, then it loses its popularity, its financial underpinning, and its political support. This brings the question to the fore of whether the multiplexes should become regulated with content quotas and ownership regulations.

A problem, not only in Europe, is that films and other artistic creations and performances do not reach neighbouring countries; they do not cross borders anymore. For instance, in Latin America, it used to be quite normal for books published in one country to also be distributed self-evidently in many other countries on the continent. This is not the case anymore. In a cultural perspective this is a loss, but also economically the lack of exchange is harmful for the development of cultural diversity. Many countries have small markets, but together in a region there are huge audiences and groups of buyers that may make many works of art financially more easily feasible than when they stay in the own country. A challenging task for ministers of culture and their colleagues for economic affairs would be to establish regional exchange infrastructures for the different fields of the arts. One may be sure that many more works of artistic expression would then appear on the market that would otherwise depend on subsidies. (Smiers 2003: 205-207). In huge countries like Brazil, India, Indonesia, or Russia it would be a cultural gain if cultural exchange within the country could be stimulated and facilitated.

Many countries have a complex range of legislated tax measures which have a direct positive impact on the cultural sector. There is a chance that they will be less at risk in the daily political turmoil than subsidies whose total amount can be cut more easily. Tax advantages, and comparable incentives are given automatically when for instance, a producer fulfils certain conditions, unless a specific tax law is changed.

Tax credits are a cost to government because it is giving up part of its revenue. However, Canada for instance uses a tax credit system that is based on the concept of “foregone” tax for private sector companies and individuals in the cultural field. This might interest, for example, film producers, who should first try to find investment money for making a film themselves. However, the government agrees to reduce the amount of tax a producer will have to pay in the year the exploitation of the film starts. This means no money (no subsidy is given by the government) but when the film appears the producer does not have to pay tax at the same rate as any other income. This form of tax incentive is meant to encourage creativity, and it generates income for the state because the government gets revenue on a film, book, music cassette or TV programme that would not otherwise have been produced.

This list of carrots that may help artists, intermediaries and the public, is just a sample of what public authorities can do in order to support cultural diversity. Because these are public facilities, systems of granting should be, as much as possible, at an arms’ length from politicians and bureaucrats. Their preferences should stay out of the decision-making processes. In many countries this is a hard lesson to learn: it is a challenge.

A bigger challenge, as mentioned before, is whether subsidies and other public support systems for the arts can remain at all. They are threatened, as mentioned before, because in trade terms they falsify competition. The threat is actually twofold, and comes, not surprisingly, from the WTO. Within WTO, the National Treatment principle exists. This implies that foreign enterprises should be treated in the same way as local ones: the same rights, the same obligations. The consequence for the cultural field of the National Treatment is that foreign artists, producers and cultural industries would have the same rights on subsidies and other preferential treatments as cultural enterprises and creators and performers living in that specific country. It is not difficult to guess that this is the

end of any subsidy system. After all, it is impossible to subsidise arts and entertainment in the whole world!

The second threat comes from the argument that subsidies falsify competition and distort trade. The pressure on countries, specifically coming from the US, is that every country must justify why a cultural support system is not falsifying competition. Maybe, the subsidy for a very small local theatre group may stay. But, governments must explain, for instance, why they have three public television channels. The quest will be for the public service to do what the commercial channels cannot do. The private, commercial enterprise is the norm, and maybe a little bit of public service and a minimum of subsidies will be tolerated.

Does this mean that all subsidies and public service institutions will be and must be abolished tomorrow? Probably not tomorrow, but decisive steps in this process within WTO have been set, and the time will pass very quickly.

#### *Public accountability*

In the general overview of regulations in favour of cultural diversity, the responsibility of cultural enterprises themselves should be considered. This is what we may call public accountability. Cultural corporations should make themselves accountable. The appropriate tool therefore could be that they commit themselves to a *corporate cultural charter*. One should not expect them to voluntarily agree to observe all the regulations proposed concerning ownership and content regulations: notably to reduce their size and differentiate their contents. It remains the task of public authorities to regulate cultural markets in this perspective. Having said this, however, enough has been left over for cultural enterprises to show themselves as being responsible. Freedom of expression is not at daggers drawn with accountability.

The Commission on Global Governance, in its report *Our Global Neighbourhood* (1995: 56), postulates that while enjoying basic rights, all people share responsibilities: to contribute to the common good; to consider the impact of their actions on the security and welfare of others; to promote equity, including gender equity; to protect the interests of future generations by pursuing sustainable development and safeguarding the global commons; to preserve humanity’s cultural and



intellectual heritage; to be active participants to governance; and to work to eliminate corruption. (summarized in Dacyl 2003: 45).

The concept of responsibility should again play a role. I do understand that it is very difficult, if nigh impossible, to motivate large cultural enterprises to voluntarily make, without any outside pressure, a list or charter for their behaviour both internally in the company and externally on what they should accomplish in the outside world. I know as well, that cultural movements do not have the same kind of pressure force that environmental movements have, but even they must hope that social and ecological charters like the one which Shell has accepted may work. Nevertheless, we can put pressure on our governments to make sure that they oblige cultural corporations (above a certain size) to adopt a corporate cultural charter.

The cultural field is a precarious place in our societies and should not be controlled only by economically driven rights. Nobody can accept as a serious argument that enterprises, whose main aim is to accumulate capital, are able to behave responsibly concerning the development of cultural diversity (in all aspects, as described above) if they are not obliged to do so. Thus, governments should state that if you, the cultural enterprise – coming from abroad, or from inside – wish to operate in our country, the basic conditions are these:

- you draft a corporate cultural charter;
- in that charter you agree to mention certain specific topics, as summed up below;
- you discuss this draft publicly, notably with the National Arts Council;
- you improve the charter according to the results of any debates;
- you report yearly upon measures taken to live up to this charter, and also accept and facilitate reports coming from the National Arts Councils;
- in case your charter and/or the evaluations do not meet the minimal standards of responsible behaviour, the charter will be replaced by a directive or another legal instrument that obligates you to certain conditions of behaviour;
- in case you still do not behave responsibly in a culturally diverse perspective, your operations in our country will be terminated.

Will this be realised tomorrow? Probably not. However, should we aim to reach a situation in which cultural enterprises make themselves accountable? Yes of course. Thus, it is better to prepare ourselves, and

engage in the debate on what the responsibilities of cultural corporations should be. Strategically it is good to remember that large corporations are concerned with their image. Cultural conglomerates that dominate the artistic field can also be shamed, on the topics as discussed before and about the responsibilities they bear. Therefore we have to formulate what these responsibilities should be.

I have designed several broad categories, and sub-categories, that may help to stimulate thinking. There will be people who might say: why not bring these topics under ownership regulations, as discussed above (where some behavioural questions are also classed), or under the content regulations? It would indeed be possible. Nevertheless, it is worthwhile to start the exercise with an experimental corporate cultural charter. It opens the opportunity to publicly debate the kind of responsibility we expect from cultural enterprises catering in our cultural and social surroundings, and how we like them to make themselves accountable. What are the topics we might think of when we speak about a corporate cultural charter?

\* The first category brings the ownership, the dependency, the influence and the lobby relations of the cultural corporation into the picture. Who are the owners? How is the ownership organised and structured, in what kinds of networks? What kinds of cross-ownerships exist? From which outside forces is the company dependent, for example from which banks and other financial sources, or from which other social interest groups? Where do they keep their money? To which political, religious or other social interest groups are they contributing? What informal relations do they have with major decision makers that are important for their functioning?

\* The second category concerns how cultural enterprises are to be governed. They must be obliged to take representatives from diverse cultural backgrounds onto their boards of trustees. And, they should invite artists and thinkers from different ilk to participate on advisory committees. At its highest level social and cultural contradictions must be discussed and the outcomes must stimulate the artistic and cultural decisions cultural enterprises engage themselves in.

\* A third category deals with internal relations in the cultural enterprise. Ownership of the corporation must be separated, as strictly as possible, from the processes of decision-making concerning artistic and editorial affairs. In several countries news media have editorial covenants that restrict the influence of the owners to the nomination of the chief editor and the establishment of the editorial basic principles. (Doyle 2002: 152). It goes without saying that this model can be transferred easily to cultural enterprises. A cultural covenant would seek to prevent proprietors from influencing the editorial and artistic content of the media, production facilities and outlets they own.

\* The fourth category would intervene in the relation between advertisers and the media that produce, present and promote products of artistic expression (including of course entertainment and design, comprised as before in the concept of the arts). First, cultural enterprises must be obliged to make a strict division between publicity and programmes. Their policy on how they will realise this objective must be transparent and the day-to-day practice must be controllable. Second, publicity slots, time and space should not overshadow programmes and other cultural content. Cultural media should not for a substantial part be driven by the aim of presenting as many advertisements as possible. The public should have the right not to be influenced any moment of the day by publicity. Cultural enterprises should commit themselves to carry substantially less publicity than is nowadays more and more the case. Publicity should have a modest place and should not push programming aside. Third, advertising should be held to a much higher standard for truth and accuracy than exists at present. (McChesney 1997: 67,8). It is the task of cultural corporations to present only advertisements that comply with this norm, and to make their policies concerning this issue transparent.

\* The fifth category does not evade the difficult topic of how cultural enterprises should engage themselves in questions of moral responsibility. Producers, distributors and promoters of artistic expression do always make, by definition, choices that have a moral component. They should agree to make their policies in this field explicit and must engage themselves in public debates about their choices.

\* Corporations that use, unavoidably by their activities in society, common public space – materially, spiritually, or virtually – must also contribute to the development of the cultural diversity of these societies. This is the sixth and last category for a corporate cultural charter. They should respect cultural traditions and cultural heritage, and refrain from misusing or appropriating it. At the same time, they must oblige themselves to produce, distribute and promote the whole and diverse area of theatre, films, music, dance, visual arts, design, literature, games and diverse multimedia that is dawning in society. Cultural corporations that earn substantial amounts of money in a given country – for instance American cultural industries take more than 2 billion dollars out of the Canadian market – must oblige themselves to reinvest substantial parts of such sums in such a country.

These are reasonable demands. Only, we have to get used to putting words to the responsibilities cultural enterprises should bear, and to give voice to these words.

### *Monitoring*

Facts and figures are essential to make citizens aware about the abnormality of the concentrated cultural power that a limited number of corporations exercise in our societies. We need to have data that illuminates how they play a strategic and decisive role as gatekeepers preventing cultural diversity from being part and parcel of our public life. Without concrete evidence it is difficult to convince politicians that essential cultural values will be lost if they do not intervene. Regulations will be more adequate, the more they are based on the real production, distribution, and promotion relations as already exist in the different cultural fields.

There is a lack of knowledge on market shares, on how few songs can be heard on the radio out of the abundance that musicians create and perform, on how very few films have been screened by cinemas that have been produced in the own country and region, on dumping cultural industries practice, on turnovers, on how existing quota systems function, on the quantitatively overwhelming presence of Anglo-Saxon literature in non-English speaking countries, et cetera; on changes in the cultural market, and so on; on the facts and figures behind all the topics as discussed in this book. In Sweden, for instance, research showed that a

public service channel had a decrease of fifty per cent in the number of songs they played over ten years. Such figures may stimulate the debate, may mobilise audiences and musicians demanding a more richly diverse offer, and may bring politicians and programme makers themselves to action. The same might happen in other fields and forms of artistic expression.

There is a need for several monitoring agencies. First, in the framework of a new Convention on Cultural Diversity, developments in the cultural fields should be observed, and data should be gathered and structured. There should be information documented about the implementation of the Convention in the different countries and regions; about the contradictions it has with, for instance the WTO treaties; about conflicts that potentially may arise; and it should have a transparency about the cases that will be under dispute settlements. Such a Convention on Cultural Diversity can only productively function if an Observatory brings together information about the various kinds of regulations member states have taken in order to protect and promote cultural diversity, in all its different meanings. This data should be structured, made understandable, and should be a source of inspiration for countries whilst developing cultural policies that also include regulatory systems that restrict the power of cultural conglomerates and that guarantees the offer of widely diverse contents.

To ensure the implementation of the Convention on Cultural Diversity and encourage member states to work together to achieve the objectives pursued, provision should be made for a monitoring mechanism. According to Ivan Bernier and H el ene Ruiz Fabri (2002), the responsibilities of a monitoring body would be twofold. It should receive notifications from states with regard to their procedural obligations. States could be required not only to notify subsidy systems, intervention frameworks, domestic regulations and competition rules to the monitoring committee, but also to submit annual or biennial self-assessment reports. States would commit themselves to evaluating the effectiveness of their actions in various aspects. ‘In this way, expertise could be disseminated and the approaches pursued by intervention instruments harmonized.’

The monitoring committee could also be entrusted to discuss or even formulate recommendations on compliance with the instrument’s objectives. It could act as a consultative body. ‘Such information and monitoring procedures would be useful in that they may demonstrate whether intervention is proportional to the objectives set. Provision might

also be made for establishing cooperation mechanisms. For, example, a State in need of technical cooperation with respect to competition law in the cultural sector could obtain technical assistance through the committee.’ (Bernier 2002).

Furthermore, national states should have a Cultural Observatory that gathers and structures this kind of information for the own country and translates the data and facts from many other countries into applicable policy measures. National states should also establish a Cultural Competition Authority that will have an intervening role if certain cultural enterprises dominate the market too much, within a cultural perspective. This means that the ruling of this Authority should be far stricter than is usual with Competition Authorities.

But of course cultural NGO’s should establish their own Cultural Observatories as well. There is the expectation that they would be more alert to market distortions. They see in the daily practice that thousands of artists, from many different ilk, contribute to the flourishing of our cultures, but they also observe when this diversity is absent in the public space. A cultural impact assessment (maybe called a cultural diversity index) should be developed nationally, regionally and globally comparable to the work the environmental movement has done with impact assessments. Now that Unesco has put the drafting of a Convention on Cultural Diversity on its agenda, it is high time for cultural NGO’s to monitor what the content will be, how the text will be formulated, what kinds of contradictions and struggles may arise and in what manner they may be influenced, and how, eventually and hopefully, such a Convention will be implemented. All these dispersed fragments of information must be distributed, in a coherent way, to arts networks and other groups involved (or yet to be involved) in cultural diversity issues.

*at the end comes the beginning*

## **STRATEGIC OBSERVATION**

For audiences and for policy makers it is difficult to imagine that the cultural offer could be completely different from their day-to-day experience. They are not participating in the processes of making choices within cultural industries. They do not have the information about what other artistic, moral, entertaining, beautiful, raw, romantic, serious, or unexpected options are possible. The pleasure the entertainment and other artistic products provide them does not lead them to thinking about ownership concentrations from cultural giants. Audiences and buyers are end-users, and are enticed or impressed by the cultural offer that is most near to them. Therefore, it is very difficult to get discussions started about the attack that is going on on cultural diversity, because most people are unaware that we are in the process of losing important values, not only in the ecological, but also in the cultural field.

What to do? I would say there are three layers of activity that can be employed. First, NGO's in the cultural field should train many of their adherents to formulate what the problem is; why cultural diversity matters; what contradictions are inherent to this concept; why WTO is not the appropriate place for giving public exposure to the whole rainbow of existing artistic expression; what kind of Convention and what kinds of regulations could provide a better breeding ground for cultural diversity that will also guarantee a fairer income for artists; and what more should be done, for instance, to push governments to guarantee freedom of expression, to introduce cultural policies, to stimulate cultural exchange with neighbouring countries and many other parts of the world; and to do all what can be done to avoid the dominating positions of cultural enterprises and specific artistic expressions.

It would be a misunderstanding to think that artists are solely responsible for spreading the message that another cultural playing field is possible. And that it would be their task to lobby for it. Yes, it is true that many of them do not have the chance to find audiences because cultural conglomerates obstruct their passage. Nevertheless, it is in the interest of all citizens that many artistic expressions are able to be communicated. We do not have a sane society if only a handful of decision makers determine

what forms of artistic expressions are available to us and what will contribute to the development of our identities.

This makes it necessary to broaden the coalition to a second layer. The purpose should be that as many social organisations as possible put the promotion of cultural diversity on their agenda. In former times, trade unions also defended the cultural interests of their members. Why isn't it possible for this to come back? There are many more organisations that fight against the domination of conglomerates and that have the promotion of diversity on their agenda. We only have to think of movements in the field of the environment, health, education and agriculture. Isn't it that associations of small entrepreneurs may be kicked out at short notice for the same reasons as cultural diversity is under threat?

The third layer is the involvement in movements that try to delegitimise WTO. This neoliberal trade body takes away peoples' identities. It is exactly this reality that makes it possible for cultural movements to forge a coalition with activists from all different corners of social life, from ecology, agriculture, health, education and labour. Their demands are that basic human rights will not be denied, that identities will no longer be raped, and that they can give voice to their own desires. After Cancún it is more than ever clear that WTO stands for a bankrupt agenda.

If we can learn anything from history, it is that things never remain the same. For the contemporary the present is overwhelmingly at hand, and it looks unchangeable, as if it was always there. However, in regard to artistic expression: the neoliberal agenda is only a couple of decades old, and most of the cultural giants are not as old as that.

Even after having proposed many possible kinds of interventions in favour of the development of cultural diversity, it still looks a little unrealistic to me. Can it become true? How can we convince a sufficient number of our co-citizens that democracy and the right of access to the means of artistic expression demand that dominant forms of control on the cultural landscape must be substantially changed? Are we able to propose measures that keep the cultural field truly open for many films, genres of music, books, shows, forms of design and visual arts, games, and multimedia? Can we establish a Convention on Cultural Diversity that will put aside the WTO regarding artistic creation, production, distribution, promotion and the conditions for reception?

All these doubts will be cast into shadow by one certainty: history never stays the same. What has been proposed in this booklet is a small contribution to try to open the eyes and minds of everybody, including me. It is possible to imagine that the diversity artists create will one day be a normal part of our daily experiences. It is not unthinkable that cultural conglomerates will be and must be reduced in size substantially. In any case, it will make our cultures (plural) more vivid, and that is certainly a worthwhile endeavour.

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## ARTS UNDER PRESSURE

*Promoting Cultural Diversity in the Age of Globalisation*

Joost Smiers

ARTS UNDER PRESSURE analyses the relevant forces behind decision making in cultural matters worldwide, specifically in the field of the arts, under the influence of economic globalisation. The book deals with all the arts, in all parts of the world. The arts are a field where emotional incompatibilities, social conflicts, and questions of status between people collide with great intensity. Add to this the huge economic interests at stake in the cultural field and we find ourselves in highly charged territory. This is certainly the case now that economic globalisation is causing substantial changes in the structure of many institutions in the cultural field.

The book focuses on the cycle of creation, production, distribution, promotion, reception and influence. It asks the key questions: who has the power to decide what reaches audiences, in what quantities, with what contents and surrounded by what kinds of ambiances? Refuting the existence of a mass culture, Arts Under Pressure argues that what exists are artistic creations that are produced, distributed and promoted on a mass scale. This mass scale pushes aside public attention to the diversity that - from a democratic perspective - any society desperately needs.

Smiers argues that countries must take culture out of the grip of the WTO and sign a new International Treaty on Cultural Diversity, which would give them the full right to take all measures necessary to reduce significantly the market domination of cultural industries and to formulate their own cultural policies. The neoliberal world order is not capable of protecting what is fragile, and this is certainly the case for the blossoming of artistic diversity at a local level. The author sets out a completely new vision of copyright: the abolition of which, he suggests, would be advantageous for artists, third world countries and the public domain. In the digital domain we can see that the spontaneous meltdown of copyright is already happening.

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