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Joint Standing Committee on Treaties
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Dear Committee Secretary

Re: Inquiry into the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005

Please accept this submission to the above inquiry. The Sydney Centre for International Law is a leading research and policy centre with a focus on the Asia-Pacific region. Australia's accession to the UNESCO Convention is strongly supported as a means of strengthening Australia's recognition of, and protection afforded to, cultural diversity and expression. We address two international law matters arising from this proposed treaty action.

1. Australia's Proposed Interpretive Declaration to Article 16

The proposed "interpretive declaration" seeks to preclude any effect on Australian immigration law of the preferential treatment provision for developing countries under article 16 of the Convention. Despite the terminology proposed ("interpretive declaration"), in my view it is arguable that the declaration is, in substance, a reservation purporting to modify Australia's obligations under the Convention in respect of other States accepting or acquiescing in such reservation.

Under article 16, Australia "shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners… from developing countries". On an ordinary interpretation, it requires Australia to give preference to artists from developing countries over artists from developed countries in respect of the same field of regulation, including, for instance, immigration law.

While reference is made to "the appropriate institutional and legal frameworks", the preferential treatment provision is not made *subject to* any existing frameworks or national policy discretion, but rather the preference is to be effected or implemented "through" such legal frameworks. Such implementation may require modification of national law, or alternatively the preference might be given effect through policy measures where discretion exists in the current law. The Australian "interpretive declaration" is not therefore limited to expressly clarifying Australia's understanding of the article 16, but purports to modify it.

Further, in my view, although preferential treatment to artists from developing countries may prima facie result in discrimination on the basis of nationality, it would be compatible Australia's international human rights obligations in relation to non-discrimination, since the measure pursues a legitimate policy objective (the promotion of cultural expression from developing countries) and the measure is proportionate to that objective.

Under existing Australian immigration law, most relevantly, a wide range of artistic and cultural occupations are recognised within the Skilled Migration Visa category under the Employer Nomination Scheme. The admission of artists under that category typically requires, however, high levels of recognised, formal training (such as tertiary education or trade certification).

These requirements do not recognise extensive experience of a particular form of cultural expression, and favour a 'Western' style of learning, cultural communication and production. This is true even in occupations where formal education or training might not be a real indicator of cultural quality: for instance, artistic director, art/dance/drama teacher, fashion/graphic designer, dancer, composer, painter, choreographer, potter/ceramic artist, visual artist, craft professional, and so on.

As a result, these requirements are likely to disadvantage potential migrants from developing nations who have not received formal education in their craft or an appropriate certification, in contrast to those from developed countries where formal education is more common. The immigration program is also likely to disadvantage alternative, non-mainstream forms of cultural expression, such as traditional dance, folk singing, indigenous music and so on, few of which are transmitted through formal or tertiary education schemes.

In sum, Australia's immigration law may operate as a serious impediment to the admission of artists and cultural practitioners from developing countries. Not only does existing immigration fail to accord preference to such persons in conformity with article 16 of the Convention, but the law *actively disadvantages* such persons through its lack of recognition of their informal skills.

The immigration criteria are more adapted to protecting Australia's economic interests and managing demand for places than to protecting the policy interest Australia also has (under the Convention) in promoting cultural diversity. *It is therefore recommended that Australia provide for greater ease of admission for artists and cultural practitioners from developing countries, and moderate the existing legal impediments.*

2. Australia's Proposed Reservation to Article 20

Article 20 of the Convention is unfortunately drafted in a clumsy and ambiguous manner. There is some controversy about the proper interpretation of article 20[1] and whether, for instance, rights to protect cultural expression under the Convention might conflict with World Trade Organisation obligations as constituting barriers to the liberalisation of trade.

On one hand, article 20(1) requires Australia *not* to "subordinate" the Convention to any other treaty and seeks to reconcile obligations under the Convention with other treaty obligations ("foster mutual supportiveness" between treaties and "take into account" the Convention when interpreting and applying other treaties). Such complementarity is not unfamiliar: Australian courts routinely interpret ambiguous statutes and develop the common law consistently with Australia's international obligations where possible.

[1] See, eg, www.larp.fr/IMG/Preparatory_Note_WTO-UNESCO.pdf; see also Christian Lenk, Nils Hoppe, Roberto Andorno, *Ethics and Law of Intellectual Property* (2007), 222.

On the other hand, article 20(2) contrarily suggests that "Nothing in the Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties" – that is, *requiring* that the Convention *be subordinate* to other treaties if in conflict.

In my view, article 20(1) should be interpreted subject to the more explicit and clearer conflict resolution provision in article 20(2), such that article 20 as a whole does not subordinate other treaties to the Convention. All the Convention requires is that other treaties be interpreted and applied complementarily *where possible*, but *in the event of a conflict*, the Convention does *not* trump, override or qualify obligations under other treaties (including World Trade Organisation law).

For this reason, the first sentence of Australia's proposed reservation is, in substance, an interpretive declaration, merely affirming the proper meaning of article 20. It is therefore unnecessary to make such reservation in order to secure Australia's policy objective, although it may have value in reinforcing or signalling the proper interpretation internationally.

The second sentence of the reservation (non-prejudice to Australia's ability to "freely negotiate" new treaties) may in fact be a reservation, if, by mention of "freely negotiate" (that is, subject to no other considerations), it purports to modify the procedural requirement in article 20 that Australia "shall take into account" the Convention in developing new treaties (but with no requirement to conform with that Convention).

Alternatively, it too is merely an interpretive declaration if mention of "freely negotiate" simply suggests that Australia need not *conform* to the Convention in negotiating new treaties, and will indeed "take into account' its provisions as required by article 20, but without being limited by any of those substantive obligations (as article 20 already permits). Again, the interpretive declaration merely affirms the proper meaning of the Convention and is unnecessary, although again, there is value is signalling to others the proper interpretation.

In relation to the broader policy question underlying this issue, we note that 'WTO Members have expressed quite different opinions regarding the relationship between trade and culture, and the application of WTO disciplines to cultural products.'[2] The Convention appears to settle for not trumping trade liberalization with cultural protection, although it encourages compatibility and complementarity where possible.

We simply note that there may indeed be occasions when it may be in Australia's national interest to impose measures of cultural protection which might be incompatible with world trade law obligations, particularly where the survival of certain aspects of local cultural production is seriously jeopardized by the commercial domination of foreign cultural products. This is not a plea for parochial cultural nationalism; but it is to recognise that government support for the arts is an appropriate function of any government and a social interest which must be delicately balanced, rather than trumped, by free trade obligations.

Yours sincerely

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[2] Tania Voon, 'UNESCO and the WTO: A Clash of Cultures?' (2006) 55 *International and Comparative Law Quarterly* 635-651.