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Mapping the fragmented matrix of trade, culture and IP in global law

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18 February 2010, ISA Annual Convention
New Orleans, LA

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the matrix

A Venn diagram with three overlapping circles. The top circle is light blue and labeled 'trade'. The bottom-left circle is dark blue and labeled 'culture'. The bottom-right circle is medium blue and labeled 'IP'. The circles overlap in the center, and each pair of circles also overlaps.

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- **trade >> culture**
- **culture >> intellectual property**
- **intellectual property >> trade**

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trade and culture

- a special pair in the 'trade and...' discussions
- over-politicised (even emotionally laden) discourse: trade *versus* culture
- the pressure does not come from the developing countries, or from NGOs, it comes from developed countries
- a new instrument on 'culture': the 2005 UNESCO Convention on the protection and promotion of the diversity of cultural expressions
- forum-shopping: the WTO law does not provide sufficient space for domestic cultural measures ⁴

the trade and culture narrative

- the conflict originated under the umbrella of the GATT; **it was not an institutional conflict between UNESCO and the WTO**
- Uruguay Round (1986-1994): the **cultural exception** battle
- 'Agreement to disagree': all services sectors covered by the GATS but with built-in flexibilities
- very few commitments in the audiovisual services sector (Japan, New Zealand and the US)
- **note:** narrow scope of the trade and culture conflict in the WTO context – basically on audiovisual services (film, video, TV programmes, music). ⁵

the UNESCO convention on cultural diversity

- hailed as a remarkable success in int'l treaty-making
- only 2 states voted against its adoption (US and Israel); 4 states abstained (Australia, Honduras, Liberia and Nicaragua)
- 18 March 2007 entry into force
- as of 8 February 2010, 105 states have ratified the Convention.

UNESCO convention: an appraisal

- no real obligations for the State Parties (best endeavour commitments)
- an extensive block of rights
- no distinction between licit and illicit measures; no proportionality test
- fuzzy and/or undefined concepts
- no working 'conflict of law' provision
- substantive incompleteness
- no compulsory dispute settlement.

UNESCO convention: anticipated impact

- **legal**
- **political**
 - *status quo* preservation in audiovisual services
 - negative spillovers to other WTO themes;
 - intensified forum-shopping (mostly bilaterally and regionally); the example of digital trade.

culture and IP

- substantive incompleteness of the Convention
- IPRs only in the preamble: recognising their 'importance [...] in sustaining those involved in cultural creativity'; no further clarifications nor obligations for the State Parties
- IP: fully addressed in the Convention's drafts
- In their strongest version: **subordinating trade and IP obligations** to the Convention **in the event that a state could demonstrate serious damage or threat to the cultural diversity.**

culture and IP

- **ambiguous relationship: possibilities for action**
- the foremost rationale for IP protection is to foster creativity; but the system is far from perfect
- deficiencies relate to the centrality of authorship, originality and mercantilism to the 'Western' IP model: numerous non-Western, collaborative or folkloric modes of production left unprotected
- the **temporary monopoly** of authors over their creations excludes the rest of the public
- no evidence of a direct correlation between IP and creativity (the 'creative play'; remix culture).

IP and trade

- the IP system was not always trade-related; only with establishment of the WTO
- post-TRIPS: a **new narrative of IP – IP as a tool of economic growth** – politically new framing of the issues as a matter of international competitiveness
- highly proactive agenda of developed countries to enforce IP protection and to go **TRIPs-plus** and **TRIPs-extra**
- the voices against come from developing countries and the civil society; **the WIPO Development Agenda** (symptomatic of the new relative power of developing countries on the negotiating scene).

IP and trade

- **WIPO Development Agenda:**
- posits that strong IP protection does not consistently promote creative activity, facilitate technology transfer or accelerate development
- places the benefits of a rich and accessible public domain, national flexibilities in implementing IP treaty norms, A2K, UN development goals, and the need to balance the costs and benefits of IP protection within WIPO's central mission
- **implementation?; impact on the IP regime complex**
- too broad a scope; intrinsic connection to development
- cultural diversity is one of the issues but not one of the important ones.

thank you.
comments welcome at mira.burri@wti.org
