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## **PROMOTING TRADE RELATED CULTURAL DIVERSITY IN EXCHANGE OF NATIONAL TREATMENT FOR COPYRIGHT**

### **Abstract:**

The current discussion on culture and trade mainly focuses on GATT and GATS, the agreements of the World Trade Organization (WTO) on trade in goods and services. However, WTO Members must also comply with the minimum standards of intellectual property rights protection as provided in the third pillar of WTO, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This instrument should earn increased attention because it offers a specific approach to deal with the relationship between trade and non-trade concerns that is worth to be further explored in the context of promoting trade related cultural diversity, i.e. the supply of goods and services such as films, books and music for mass consumption from a variety of cultural origins. Furthermore, one must stress that intellectual property protection has not only positive effects on cultural diversity, but can also be a threat. These considerations are neglected by the recently approved UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

If a State is eager to promote trade related cultural diversity on its territory at affordable costs (which is of particular relevance for developing and least developed countries), it should be entitled to condition the supply of its public resources dedicated to the protection of intellectual property for foreign right holders upon these beneficiaries' contribution to the State's legitimate cultural policy goals. On a global level, one could envisage a new "Cultural Contract" according to which the States should protect the intellectual property (copyright, neighboring right, trade marks etc.) of a right holder having a dominant position on the market of cultural industries only if such right holder effectively participates in preserving and promoting cultural diversity on the recipient State's territory. On the other hand, if such right holder systematically discriminates on the basis of the cultural origin of films, music or books, i.e. if he violates the draft principles of "Cultural Treatment" or "Most Favoured Culture" (see the proposed formulation below) that mirror the basic WTO principles of National Treatment and Most Favoured Nation, the recipient State should be legitimated to refuse to grant intellectual property protection to his works. In other words, any given State should be allowed to suspend the application of the National Treatment principle to trade related intellectual property rights of foreign right holders if these right holders practice a business behaviour that is detrimental to cultural diversity.

This suggestion is inspired by WTO permissible trade sanctions based on cross retaliation as they were awarded (but eventually not implemented) in an arbitration procedure between Ecuador and the European Community dealing with banana trade. One can argue that this proposal is compliant

with the principles and objectives of the TRIPS agreement as stated in its Preamble and in articles 7 and 8.

**Proposed cultural non discrimination principles for a global “Cultural Contract”:**

Article I

Most Favoured Culture Treatment

With respect to any measure covered by this Agreement, each public, private or mixed-economy factor of cultural commercialization of one cultural origin having a dominant market position shall accord immediately and unconditionally to cultural goods and services and to the factors of cultural creation and production of another cultural origin treatment no less favourable than that it accords to like cultural goods and services and their suppliers of any other cultural origin.

Article II

Cultural Treatment

Each public, private or mixed-economy factor of cultural commercialization of one cultural origin having a dominant market position shall accord to cultural goods and services and to factors of cultural creation and production of any other cultural origin, in respect of all measures affecting the commercialization of cultural goods and services, treatment no less favourable than that it accords to its own like cultural goods and services and like factors of cultural creation and production.

Article III

Maintenance of a culturally discriminatory measure

The factors of cultural commercialization having a dominant market position may maintain a measure inconsistent with articles 1 and 2 provided that such a measure is effectively demanded by the factors of consumption.