

UNESCO's Second Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions

Ivan Bernier

At the end of the first session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions held in September 2004, the newly formed Drafting Committee, assisted by the Secretariat of UNESCO, was given the task of preparing a revised version of the convention based on the preliminary draft submitted by the Director General and incorporating thereto the written comments and proposed amendments submitted by the Member States, with the text in question expected to serve as a starting point for the second session.¹ The Member States had until November 14 to transmit their written comments. The Drafting Committee first met December 14-17, 2004, with a view to proposing, on the basis of the comments received, "formulations in clear, legal language that do not betray any voice whatsoever, while striving to capture the essence", as the Director General suggested in his welcome address.² However, the task would prove to be much more difficult than anticipated.

From the outset, certain problems that were already foreseeable following the first session impeded the functioning of the Committee. The size of the Committee (24 members), the members' different interpretations of the mandate of the Committee as well as their propensity to defend national positions, and lastly the considerable amount and diversity of comments and suggestions for amendments transmitted, led to a questioning of the working methods, which lasted until the end of the meeting. In the Committee's defence, it should be said that this first meeting was something of an experiment in that it was the first time, in UNESCO's practice, that a committee of Member States was tasked with synthesizing the written comments of all of the members; this role has traditionally been assigned to the Secretariat, which would subsequently submit its work to the Plenary Assembly. Throughout the discussions, members were divided by one issue in particular: knowing the method to use to make a formulation in clear, legal language that does not betray any voice whatsoever. For some, a legal formulation likely to contribute to advancing the work could not be achieved without modifying or eliminating certain suggestions or options, in other words, without negotiating. For others, there could be no question of negotiating before informing the Plenary of all options, and, at any rate, negotiations did not come within the mandate of the Drafting Committee. As a last resort, it was agreed that the Committee would simply transmit to the Plenary a list synthesizing all the options, as well as remarks likely to facilitate the work of the Plenary, remarks aimed essentially at highlighting the major trends in terms of options. This method of functioning allowed the work to accelerate sufficiently

¹ For an analysis of the first session, see "UNESCO's First Intergovernmental Meeting of Experts on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: the implications for the next round of negotiations" by Ivan Bernier: <http://unesdoc.unesco.org/images/0013/001384/138466f>.

² See UNESCO, doc. DG/2005/018: <http://unesdoc.unesco.org/images/0013/001384/138466f.pdf>

(after the first day of work, the Committee was still on article 1) so that a revised version of a draft text containing a series of options resulting from the States' contributions, as well as the remarks of the Drafting Committee concerning the title and articles 1 through 11, could be presented to the members.

Most of the observers were rather disappointed in the outcome of the Drafting Committee's first meeting inasmuch as barely one third of the revised version of the Preliminary Draft was actually discussed by the Committee. Nevertheless, it should be recognized that as well as having very substantially reduced the number of options the Plenary needs to consider thanks to the synthesizing work carried out by the Secretariat, the Drafting Committee made it possible, through its debates, to emphasize certain ambiguities concerning its role and working methods. Such ambiguities *called* for clarification before the start of the Second Session of the Intergovernmental Meeting of Experts. Unfortunately, the same problems reappeared as early as the first day of the Second Session of the Intergovernmental Meeting of Experts and later affected the pace and outcome of work. However, it can be noted that while several key issues still remain unresolved, the outcome of this second session is not necessarily negative. In order to gain a solid understanding of the contribution of the latter to the progress of negotiations, we will successively look into the working method used during the work carried out, the results achieved at the end of the meeting, and lastly the issues that remain unresolved.

I – THE WORKING METHOD

Following the welcome speeches of the Director General and the Chairman of the Executive Board, the second session began with a talk given by the Chairman of the Plenary Assembly on the working method. First of all, he suggested that in order to accelerate the work, informal groups could be created as needed, tasked with looking into the most important and controversial issues with a view to highlighting the main options defended by the Members in the Plenary Assembly. Such groups would report to him. Next, the Chairman proposed structuring the debate in the Plenary around the following three themes:

- 1) a debate on the conceptual framework of the Convention (which would include, in addition to the title, the objectives, principles, definitions and scope of application);
- 2) a debate on the political framework of the Convention, which would cover all of the provisions relating to the rights and obligations of the Members and relationships with other international instruments;
- 3) a debate on the legal and administrative framework of the Convention, which would examine the provisions relating to follow-up and dispute settlement mechanisms as well as the final clauses.

Before tackling the first theme, however, the Chairman proposed examining the so-called "cross-cutting" issues, i.e. issues likely to come up repeatedly throughout the examination of the revised version of the Preliminary Draft, issues most often related to the use of certain terms and expressions for which no consensus had been reached. Following this talk of the Chairman summarizing the working method, and a reminder of the objectives of the negotiation process and the Drafting Committee's specific role, as well as by explanations of the revised version of the Preliminary Draft text, the debate itself began. But it had barely been launched when started intervening on the working method. These interventions would

continue for a good portion of the second session and force the Chairman to revisit the subject several times. Such a development, not without risk for the negotiations, requires explanation. Therefore, in order to get a better understanding of the dynamic underlying this development, we thought it would be useful to go over three issues that fuelled the debate on the working method from the beginning until the end of the second session.

- **The problem of the negotiating method**

When opening the debate on theme 1 (the conceptual framework of the convention), the Chairman had explicitly requested that the cross-cutting issues be addressed first. As an example thereof, he had cited issues relating to the use of terms such as “cultural contents and artistic expressions”, “cultural expressions”, “protection” and “cultural goods and services”. But Thailand, the first State to take the floor, asked that the debate start with the definitions of article 4. This speech was then followed by that of Peru, which asked that the debate begin with the title, that of Canada, which asked that the debate begin with the objectives listed in article 1, that of Saudi Arabia, which expressed the desire to return to the title, that of the United States, which suggested that the debate return to the cross-cutting issues, that of Japan, which insisted that cultural diversity be mentioned in the title rather than the diversity of cultural expressions, and so on and so forth, until Morocco brought up a point of order, asking that the objective of the debate be clarified, with a number of other States echoing this. In response to these requests made by Members for clarification of the exact purpose of the debate, the Chairman simply declared that it was up to the Plenary Assembly to decide how it intended to proceed.

With no specific directive, the Members abandoned the study of cross-cutting issues to focus their interventions on the title of the Convention as well as the objectives of article 1. In other words, the strategy of clarifying the cross-cutting issues right from the start of the negotiations was tacitly abandoned. This being the case, it was only to be expected that these same issues continue to show up throughout the entire negotiation process – and this did indeed happen. More specifically, they reappeared in the framework of the discussions of the Drafting Committee and informal working groups, where they gave rise to a number of interventions dealing with the use of square brackets and footnotes, thereby slowing down the work of these groups considerably.

What could have happened if the Chairman’s initial request to first settle the cross-cutting issues had been met? In such a case, it is possible that the negotiations would have moved along more quickly and that instead of finding themselves, which is the case at present, with only ten articles covered by the Drafting Committee, the entire revised version of the Preliminary Draft with its 34 articles would have been covered. However, we would be forgetting that underlying the debate on the use of terms and expressions such as “protection”, “cultural expressions” and “cultural goods and services”, is a debate on the very conception of the Convention which was emerging. Such a debate would have been more difficult than imagined and would probably not have saved much time. However, it would have facilitated more comprehensive reflection on the objectives and the scope of the Convention. What actually happened instead is that the Members opted to examine the preliminary draft article by article, which was more reassuring, because progress made could be measured more quickly, but which did not facilitate the true, fundamental debates.

As a result, the debates held in the Plenary Assembly were structured in a rather lax manner, lacking in perspective and hardly conducive to actual negotiations. Interventions were made one after the other in an often disjointed manner, in many cases simply expressing a choice among the various options proposed and, furthermore, rarely justifying the choices in question, as the Chairman pointed out. In such a context, there was a major risk of missing the forest for the trees, i.e. of losing sight of the fact that behind the debates on words and formulas, fundamentally different points of view were emerging in terms of the type of conventions to adopt.

- **The respective roles of the informal groups, the Drafting Committee and the Plenary Assembly and the issue of the negotiation site**

By the end of the first day of discussions in the Plenary, the Chairman created an informal group with a view to elucidating the essential elements of the debate on the title and the objectives. This informal group, comprising Senegal, Brazil, Japan, the United States, Luxembourg (speaking on behalf of the European Union) and Saudi Arabia, had to report back the following morning, when the Plenary Assembly reconvened. However, the report given orally the next morning raised more problems than it solved. The report in and of itself was fairly brief (it covered only the title and paragraphs a and c of article 1). Immediately following the presentation of the report, several States took the floor to challenge the group's legitimacy and relevance, asserting that the group was encroaching upon the role of the Drafting Committee without having the representative nature thereof. Other States responded by asserting that pursuant to regulations the Chairman was authorized to form working groups and that if the mandate of a working group was unclear, it simply needed to be clarified.

Underlying these speeches, however, another type of criticism was emerging relating to the content and functioning of the group. Indeed, for a number of States, the working group's report, especially with regard to the title, did not reflect the main trends observed during the debate in the Plenary Assembly the previous day³. Moreover, the recourse to square brackets to question the first two options, the absence of square brackets for the third option (that favoured from the start by the United States and Japan) and the lack of consideration of another option backed by Luxembourg speaking on behalf of the European Union indicated that the report was unduly biased. The informal working group's report was not ratified as such by the Plenary Assembly and there was no reference made to it afterwards. The informal group itself met once more at the request of the Chairman to continue work on article 1 but it terminated its work, as it was incapable of functioning effectively. The Plenary Assembly decided that the issue of the title would be examined later on the basis of the guidelines of the Plenary and bearing in mind the comments and amendments received by the Secretariat in November 2004 as well as any new proposals transmitted thereafter. As for article 1, the Chairman transmitted his recommendations to the Drafting Committee.⁴

³ Two of the three options proposed concerning the title made reference to cultural diversity rather than "diversity of cultural contents and artistic expressions", which was the predominant option during the Plenary. In the comments transmitted by the States in November 2004, only three of the 16 options used the expression, "cultural diversity".

⁴ Despite this rather inconclusive initial experience with the working group formula, other groups were created in the following days over issues such as the definition of the term "protection", the definition of the expression "cultural goods and services", provisions relating to international cooperation, and lastly on the inclusion of a federal clause in the

This debate on the report presented by the very first working group ended only when the Chairman intervened to clarify the respective roles of the working groups, the Drafting Committee and the Plenary Assembly. He explained that the working group was to assist the Plenary Assembly by reducing the disputes among the delegations and reducing the options. It did not replace the Drafting Committee, which maintained its mandate and status. The Drafting Committee itself could not resolve the contentious issues, as the Plenary Assembly was responsible for identifying solutions with the help of the working group. But these explanations must not have satisfied a large number of States, which, the following morning, again attempted to have the Drafting Committee granted a broader mandate so that it would be able to negotiate.

The very first speech was given by the United States, which asked that the mandate of the Drafting Committee be specified. This was followed immediately by Brazil, which asked that the mandate of the Drafting Committee, which excluded negotiation capabilities, be modified so that the Drafting Committee would be able to negotiate. The United States made another attempt, lamenting the fact that there were no real opportunities to discuss and negotiate considerations deemed to be fundamental to the Convention. Luxembourg, on behalf of the European Union, expressed its agreement with this request, considered to be essential so that the Plenary be able to end up with a revised text. Mexico then requested that the Drafting Committee's mandate be more open and flexible. However, a shift in the debate took place with the intervention of St. Lucia, which stressed that the negotiations should be conducted in the Plenary, as initially agreed and that unfortunately, there had been only monologues in the Plenary up to this point and no real exchanges. Several States, including Canada, Chile and Switzerland, backed this latter position. Switzerland asserted that the Plenary was the strategic body and that the Drafting Committee was the operational body ; accordingly, the Drafting Committee needed to be assigned a clear mandate. If it were granted a broader mandate, it was important that the other States be able to impart their viewpoints. Following a last speech given by Japan requesting again that the Drafting Committee be granted more power, the Chairman intervened to end the debate. He stated that he agreed that the Drafting Committee should be granted more flexibility, but insisted on the fact that not every fundamental issue could be transferred to the Drafting Committee. In response to complaints to the effect that there were no real negotiations, he suggested that the States meet informally to this end.

Nevertheless, in the days that followed, the Chairman had to intervene repeatedly to explain the mandate of the Drafting Committee. On Friday, February 4, after reporting on the work of this latter the previous evening, he highlighted the little progress made and complained about the fact that the process within the Committee was overly heavy and slow. He took the opportunity to repeat the rules that should be guiding the Committee's activities, i.e.:

- 1) that if a directive from the Plenary was clear, it should be reflected in the proposal prepared by the Drafting Committee;

convention. The only one of these groups to have its report approved in its essence by the Plenary Assembly was the one on international cooperation. The groups debating the definitions of "protection" and "cultural goods and services" were merged during the second week and had still not submitted a final report at the end thereof. As for the group debating the inclusion of a federal clause, it had submitted a report establishing the inability of members to come to an agreement on the subject. It is of interest to note that the only group that brought its mandate to fruition – the group on cooperation – worked on an issue that did not arouse significant opposition among the States.

- 2) that if a State wanted to challenge a directive from the Plenary, it should do so within the Plenary and not the Drafting Committee;
- 3) that Drafting Committee sessions were not the proper arena for fundamental debates: such issues were to be discussed in the Plenary.

On Monday, February 7, having noted that the work of the Drafting Committee was still not progressing as it should be, he resumed his explanations, this time complaining that the national delegates within the Committee were more concerned with defending their national positions than trying to transcribe the consensus emerging within the Plenary. However, on Wednesday, February 9, Brazil complained again at the Drafting Committee of the fact that certain provisions of article 6 were substantially weakened, contrary to the desire clearly expressed in the Plenary. During the final days of the session, certain States and blocs of States met informally with a view to encouraging rapprochements, but with no very obvious results, at least if we are to go by the discussions in the Plenary and the texts submitted by the Drafting Committee, still strewn with multiple square brackets.

- **Recourse to square brackets and footnotes or the issue of the use of the procedure as a negotiating tool**

While the issue of using square brackets and footnotes was raised for the first time in the context of the informal working group on the title and article 1 of the revised Preliminary Draft of the Convention, the issue was discussed in particular in the context of the work of the Drafting Committee – and often very passionately. It must have come up practically every day for most of the first week of negotiations (and again during the final days of the second week). The Chairman strived to clarify this with increasing frustration.

The very principle of resorting to square brackets and footnotes was first questioned during the very first days. On February 2, during the Drafting Committee's examination of article 1(a), Switzerland took the floor to stress that the Plenary had a clear mandate and that a solution had to be found on the basis of the instructions provided; the use of square brackets should therefore not be considered. This intervention led to another one by the United States, which declared that in its opinion, the Committee was fully authorized to suggest that square brackets be inserted. The Committee Chairman took the floor at this point to suggest that it would perhaps be preferable to explain the different points of view instead of using square brackets.

But the United States brought up the subject again, affirming that UNESCO's consistent practice had been to use square brackets instead of footnotes. And the debate continued in this manner with interventions from Benin, which declared itself in favour of using square brackets and against footnotes, India, which stressed that the technique of using footnotes was more complex than that of square brackets, the Committee Chairman, who, after declaring himself in favour of footnotes, asked if there was cause to use square brackets, Brazil, which explained that square brackets should be used to provide a clear indication of differing opinions, Russia, which declared itself in favour of footnotes, Costa Rica, also in favour of footnotes and totally opposed to the use of square brackets, and Japan, which

proposed diplomatically that both square brackets and footnotes be used. Equator continued the debate by declaring that footnotes were much more meaningful than square brackets.

The Chairman then took the opportunity to once again express his preference for footnotes. But after hearing Senegal repeat the idea that there was no reason to dispense with one or other method, he finally decided that square brackets and footnotes could both be used depending on the circumstances. Consequently, the way was paved for extensive use of these two techniques with a view to protecting minority viewpoints in the face of choices expressed by the majority in the Plenary Assembly and clearly indicated in the instructions of the Drafting Committee Chairman.

The following day, February 4, new debates reappeared in the Drafting Committee regarding the use of square brackets and footnotes. For nearly two hours, the members of the Committee discussed the opportunity to maintain the term “freely” in the proposed wording of article 1(d), which thus presented one of the objectives of the convention: “to create the conditions under which cultures may freely evolve and interact”. To avoid having to use square brackets, the Chairman decided as a last resort to send the issue to the Plenary with two options. Immediately afterward, a new debate began on the use of square brackets with regard to article 1(e), which read as follows, in its original version widely favoured by the Plenary and transmitted as is to the Drafting Committee: “to encourage dialogue among cultures and civilizations with a view to ensuring wider and more balanced cultural exchanges in the world”. The debate had barely started when the United States took the floor to assert that it objected to the original text and that it wished to use square brackets, which was a perfectly acceptable negotiating technique, to indicate its disagreement with the expression, “wider and more balanced”. The Rapporteur then took the floor to stress that the Plenary’s explicit instructions were to keep the expression “wider and more balanced”. The United States reiterated its request, which was refused by several countries. Finally, a compromise was reached, whereby the use of square brackets was avoided, when the Committee members agreed that the expression “wider and more balanced” be replaced by “wider and balanced”.

As could be expected, this last debate in the Drafting Committee elicited a reaction from the Chairman of the Plenary Assembly the following morning, February 5. He expressed his impatience about the fact that the Drafting Committee had spent more than two hours discussing terms and concepts that had not been discussed during the Plenary. He asked that the use of square brackets be reserved for terms and expressions that are of genuine importance to the debate and suggested that in the cases in which the meaning of a concept needed to be clarified by the Plenary, it be indicated in footnotes. On Saturday, February 5, the Chairman again addressed this issue of the use of square brackets to remind delegates that this was permitted if an article presents a single recommendation and that a word or expression of this recommendation was a “vital” issue to a delegation. During the second week of negotiations, new clashes over the use of square brackets arose, in particular with regard to the right to use them for an entire provision. At the very end of the meeting, in his review of the work accomplished during the second session, the Chairman of the Plenary Assembly himself returned to the subject, noting that in view of the numerous square brackets and footnotes scattered throughout the text, there were still serious differences of opinion on the Convention that needed to be addressed.

As can be seen, the debate on the use of square brackets and footnotes will have monopolized an abnormally large amount of time during this second session. In a context in which serious differences of opinion on the Convention existed, it was predictable that square brackets and footnotes would be used to ensure that minority viewpoints be taken into consideration. In practice, this negotiation technique was indeed used predominantly by those States whose points of view on issues that they considered to be important could not obtain a majority support in the Plenary Assembly. However, the increased use of this type of negotiating technique was giving rise to a new risk: losing touch with the wishes of the majority of the Plenary Assembly.

II – THE OUTCOME AT THE END OF THE SECOND SESSION

It is relatively easy to get a basic idea of the work accomplished during the second session from the “composite” text of the Preliminary Draft Convention on the Diversity of Cultural Contents and Artistic Expressions, which accompanies the Preliminary Report the Director General of UNESCO sent to the Members on March 3, 2005.⁵ The text in question, as emphasized in the Preliminary Report, “reflects the state of progress of the work and illustrates the progress made as well as the work that remains to be accomplished”.⁶ There are three parts, which are completed to various degrees, i.e. Part I, which presents the results of the work of the Drafting Committee (articles 1-11, excluding article 8, which is still being discussed), Part II, which presents the results of the work of the informal working group on section III.2 (new articles 12, 13, 14 and 15 on international cooperation), and lastly Part III, which presents the comments of the Plenary Assembly on the remaining provisions (article 8, former article 15, former articles 13 and 19, articles 20-23 and 25-34). In terms of all the work to be accomplished to achieve a finished text, it can be estimated that a little over half of the work was carried out during the second session. The Plenary Assembly has already looked into almost all of the provisions of the revised version of the Preliminary Draft, except for the preamble and article 24 with its two annexes. However, it still needs to take a position on the cross-cutting issues that are the subject of square brackets and footnotes, as well as on a number of issues that have not yet been settled, which could still give rise to serious debates. As for the Drafting Committee, it has made clearly less progress and must quicken its pace so as not to slow the Assembly’ work unduly. But if we consider that new articles 12-15, resulting from the work of the informal working group on cooperation, have already received extensive support from the Plenary and that the final provisions, other than those on the federal clause, raise relatively few problems, we can hope that the work that remains to be done will be completed within the deadlines. In all, the results of this latter, when we consider it strictly from the point of view of the scope of the work accomplished, remain reasonable, even if we could have perhaps hoped for better.

In addition to the work accomplished during the second session, the work carried out after the session by the Chairman at the request of the Plenary Assembly must also be considered as part of the output of that session. Chairman Asmal was asked to prepare a consolidated text “composed of draft provisions recommended by the Drafting Committee, and for the remaining parts of the text, of his own proposals drafted in light of specific directives of the

⁵ UNESCO, Doc. CLT/CPD/2005/CONF.203/6, pages 13-48. See: <http://unesdoc.unesco.org/images/0013/001387/138765f.pdf>

⁶ Idem, paragraph 47

Plenary, using, as necessary, square brackets and footnotes in order to take into consideration different approaches requiring subsequent examination”⁷. This text goes somewhat further than the mandate given in that it not only supplements the remaining parts of the text, but also goes back over a number of provisions recommended by the Drafting Committee, with a view to consistency and clarity. Notwithstanding the admonition of the Director general of UNESCO that the composite text and the consolidated text “must be read together and in a complementary manner”⁸, it remains to be seen how these two texts can be reconciled in practice. In the following pages, we have added remarks and comments to our analysis of the former, which take into consideration the latter.

It is clearly more difficult to get an idea of the type of convention being drafted at the end of this second session. The content of too many provisions is not yet adequately established to allow it to pass definitive judgment in this respect. This is the case in particular of provisions that incorporate terms and expressions in square brackets, such as “protection”, “cultural goods and services” and “cultural expressions”, which are still being discussed⁹. While the consolidated text prepared by Chairman Asmal eliminates all square brackets and footnotes, this does not mean, as the Chairman himself stressed in the introduction of his Report, that the relevant words had finally been accepted. This is also the case of provisions such as those relating to the relationship between the Convention and other instruments (former article 13 and article 19), which are still among the unresolved issues, just like the provisions that have been approved only in principle, without the details thereof being addressed, like those relating to the follow-up mechanisms and bodies, or that have not yet been considered in the Plenary Assembly, such as those relating to dispute settlement. Although the consolidated text prepared by Chairman Asmal provided solutions to these latter cases, such solutions must also be considered by the Plenary Assembly. In these conditions, any prediction would clearly be premature at this stage regarding the type of convention that will emerge from the negotiations at the end of the process.

Having said this, the current uncertainty concerning the content of a good number of provisions of the composite text does not preclude considering the path that led to the current outcome and taking a critical look at the work accomplished. To this end, we will proceed following the three major blocs of provisions identified by the Chairman at the beginning, i.e. the provisions relating to the conceptual framework, those relating to rights and obligations and those relating to the legal and administrative framework.

- **Provisions relating to the conceptual framework**

As soon as the negotiations started, it appeared very clear that the provisions relating to the conceptual framework would be of the utmost importance. Establishing the title and objectives of a convention, determining the principles and scope thereof, and defining the basic concepts: this is already saying a lot about it. Two approaches presented themselves at the beginning to tackle these issues. One approach was functional and pragmatic in nature, keeping only that which was essential in achieving the fundamental objectives of the

⁷ See UNESCO, doc. 171 EX/INFO.18, appendix 2, page 2.

⁸ UNESCO, doc. 171EX/INF.18, p. 1

⁹ We can get an idea of the problem by considering that in articles 1-11 only (those examined by the Drafting Committee), “cultural expressions” comes up over thirty times, “protection” comes up about 18 times and “cultural goods and services” comes up eight times.

convention. The other one is more contextual and discursive, seeking to ensure the success of the convention by expanding its scope. The result, at this stage, even though it cannot be totally identified as one or the other of these approaches, borrows much more from the second than from the first.

Thus, with regard to the objectives listed in article 1, two new objectives are added to the seven already mentioned in the revised version of the Preliminary Draft (a number too high, according to some Members); with regard to the principles listed in article 2, the initial list of nine, which, according to the Chairman, was redundant and had to be reduced to four or five if at all possible, still includes eight principles after elements were merged, deleted and added; with regard to the definitions, lastly, two were deleted (“culture” and “cultural capital”) and a new one was added (“interculturality”). This result is not entirely satisfactory, because it still leaves room for a certain redundancy in the objectives and principles¹⁰ and a lack of clarity in terms of the relationship between principles and the rights and obligations set out in the following section, as several of the principles in question serve an essentially declaratory purpose. In addition, we might wonder if it was necessary to use the same fundamental wording concerning States’ sovereign right to adopt measures to protect and promote the diversity of cultural expressions in the objectives, principles and rules, unless we consider this repetition as a way of giving more weight to the rule, the scope of which is crucial and which must be well understood by all signatory States.

Articles 1 and 2 gave rise to exchanges concerning more particularly the cross-cutting issues, as square brackets appeared, accompanying practically each and every one of the statements therein. The problems raised in this respect will be addressed in further detail in Section 3, which tackles the unresolved issues. As for the rest, article 1 did not raise any particular difficulties, even though debates on secondary issues monopolized quite a bit of time. This was the case, among others, when the United States and China confronted each other while examining paragraph (d), which declares that the Convention aims, among other things, “to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner”. China wanted the word, “freely” to be removed, whereas the United States wanted to keep it. This was also the case during the examination of paragraph (e), which establishes the objective of “encouraging dialogue among cultures with a view to ensuring wider and more balanced cultural exchanges”, with the United States insisting that the words “more balanced” be deleted. The situation is quite similar for article 2: some of the principles therein raised terminology problems, which have not yet been resolved but that do not necessarily reflect major opposition in terms of content. This is the case, for example, of the “Principle of equal dignity of and respect for all cultures”, where square brackets have been used with regard to references to “minorities and indigenous peoples” at the request of some countries concerned about the vague scope of these terms. In the end, it was agreed that these terms would have to be harmonized in the text of the Convention.

However, a different situation arises with regard to the “Principle of openness and balance”, about which the Members of the Drafting Committee, unable to reach an agreement on suitable wording, preferred to let the Plenary Assembly decide between two options. It should be emphasized that this principle plays a key role in the general economy of the Convention inasmuch as it limits the recognized sovereign rights of signatory States to adopt measures and policies aimed at protecting and promoting the diversity of cultural expressions

¹⁰ The objectives listed in paragraphs 1 (e) and 1 (i), for example, seem to tie in noticeably with the same reality.

in their territories. It stipulates that when they exercise this right, these latter “should seek to [“promote” or “guarantee”, depending on the option chosen], in an appropriate manner, openness to the other cultures of the world and ensure that these measures are adapted to the objectives of the present Convention”. In the version of this principle examined by the Plenary, the word “seek” rather than the words “should seek” was used, making it possible for a signatory State to contest the measures of another Member State on the basis of cultural rather than commercial considerations. With the new version, which expresses a wish and not an order, the extent to which this possibility of lodging a complaint remains is no longer clear.

Now concerning the scope of application of the Convention, the new wording of article 3 is interesting but at the same time raises certain problems. In its original version, the article in question read as follows: “The present Convention shall apply to the cultural policies and measures that the States Parties take for the protection and promotion of the diversity of cultural expressions”. When the Drafting Committee met in December 2004, a majority of Committee members opted for a markedly broader formulation for this provision, explaining that the application thereof was not limited merely to the field of cultural policies. Article 3 of the composite text, which uses this approach, now, reads as follows: “This Convention shall apply to the policies and measures by the [States Policies] that [have an impact on] the diversity of [cultural expressions]”. This last formulation emphasizes the importance of taking into consideration the impact on the diversity of cultural expressions of policies adopted in fields other than culture, such as education, trade and economic development. But this broadening of the scope of the Convention must not make us lose sight of the fact that the action thereof lies essentially in the area of culture and that it is first and foremost through cultural policies that its objectives can be achieved. It must be pointed out that the consolidated text prepared by Chairman Asmal speaks in that respect of “policies and measures by the Parties concerning the protection and promotion of the diversity of cultural expressions” [our underline]. This latter wording very clearly narrows the scope of the Convention.

Lastly, with regard to definitions, the work accomplished to date remains incomplete. Simply in terms of consistency, it must first be stressed that after having deleted two definitions (“culture” and “cultural capital”), the relevance of which to the objectives of the Convention was contextual at best, in the same line of reasoning, it would probably be appropriate to delete the definition of the expression “cultural industries”, which appears only a few times in the Convention and adds little to the understanding of the term. The same could possibly be said of the new definition of the term “interculturality”, which appears only once in the Convention, in article 1 (i), where it seems to tie in with a reality that has already been taken into consideration elsewhere. However, as it is a term, the precise meaning of which is far from obvious, perhaps this definition does belong in the Convention. Although it is not central to the general economy of the Convention, the expression “cultural diversity” is quite important from a contextual standpoint and should be defined in the Convention . But as defined in the composite text, it appears rather heavy and complicated. The definitions of “cultural expressions” and “cultural goods and services” are fully justified but are still the object of a number of brackets. We will return to this later when we address the unresolved issues. Requests with a view to defining other terms and expressions which remain controversial, such as “protection”, can also be expected. Finally, it is important to stress that in the consolidated text prepared by Chairman Asmal, modifications have been made to

some of the existing definitions and new definitions have been proposed for the terms “protection” and “cultural activities”. While the modifications made to some of these terms may be considered as a helpful contribution, the same is not true for the new definition of the terms “cultural activities, goods and services”, which still raise a problem, as we will see below.

- **Provisions relating to rights and obligations**

Compared to the debate on the conceptual framework of the Convention, the debate on rights and obligations seemed to give rise to fewer controversies and proceeded more quickly than anticipated, given the number of articles to cover. It should be mentioned that the discussion on the conceptual framework had already helped break down in part the different opinions on the so-called cross-cutting issues, which made it possible to focus the debate on other contentious aspects of the provisions in question.

- Articles 5 and 6

Initially, the provisions contained in Article 5 on the general rules on rights and obligations and article 6 on the rights of States Parties at the national level seemed to be the most contentious. Indeed, more than any of the others, these provisions were perceived by some States as exemplifying the potential for conflict between the Convention and the WTO agreements. But during the Plenary debate, a fairly broad consensus was quickly reached in favour of a version of article 5 that clearly reaffirms, in its paragraph 1, the sovereign right of States to formulate policies and adopt measures to protect and promote the diversity of cultural expressions, and that at the same time recognizes their obligations to protect and promote it both domestically and at the international level. The same article, in its paragraph 2, sets out the corresponding obligation of States, when they take measures to protect and promote the diversity of cultural expressions, of ensuring that these measures shall comply with the provisions of the Convention (including that set out in article 2 (7), guaranteeing in an appropriate manner openness to the other cultures of the world). As for article 6, the Plenary Assembly retained in essence the original text, which specified first that in the framework of its cultural policies and taking into account its own particular circumstances and needs, each State may adopt measures, regulatory and financial measures in particular, aimed at protecting and promoting the diversity of cultural expressions, and then made a list of these measures. Nevertheless, the Drafting Committee had toned down these clear choices by adding, at the request of the United States and Japan, a requirement for compliance with international obligations, which is now found in square brackets in the first two paragraphs of article 5 as well as in the first paragraph of article 6. Most of the other members of the Committee saw this requirement as going against the wishes of the Plenary, as weakening the provisions in questions and as encroaching upon the work of the informal group on article 19 (relationship between the Convention and other international agreements).¹¹

Article 6 (2) a) was the subject of another key debate. The instructions the Plenary gave to the Drafting Committee on this matter were clear, i.e. to keep the original text of the revised version of the Preliminary Draft, which mentioned, as an illustration of the measures that the

¹¹ On this subject, see the speeches of France (on behalf of the European Union), Brazil, Lebanon, the United Arab Emirates, China, Benin, Equator, Algeria and Croatia.

States Parties could take to protect and promote the diversity of the diversity of cultural expressions, “measures which in an appropriate manner reserve a certain space for domestic cultural goods and services among all those available within the national territory in order to ensure opportunities for their production, distribution, dissemination and consumption, and include, where appropriate, provisions relating to the language used for the above-mentioned goods and services”. From the outset, the United States asked that the entire paragraph be placed in square brackets, as it raised an important substantive issue, and not a wording problem. Japan immediately took it a step further, asserting that this provision was closely tied to the WTO and that there was perhaps reason to delete it. France, in the name of the European Union, then took the floor to stress that this request made by the United States and Japan did not respect the mandate with which the Plenary tasked the Drafting Committee. The discussion then continued with interventions on the wording of article 6 (2) a) and with numerous requests to place various terms and expressions in square brackets. At the end of this exercise, we now have a text, the composite text, which does indeed keep the original text of article 6 (2) a), but with no fewer than seven different terms in square brackets.

This text must now be read together with the consolidated text prepared by Chairman Asmal, which not only eliminates the square brackets in question but also proposes a wording that differs from article 6 (2) a) and reads as follows: “measures which in an appropriate manner provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for their production, dissemination, distribution and enjoyment, including provisions relating to the language used for such activities, goods and services”. The terms used, if we are to judge by the Chairman’s explanations, would have been weighed carefully in order to exclude any notion of protectionism, while reasserting the commitment of the States to protect and promote the diversity of cultural expressions. But the outcome of the exercise is not particularly conclusive: what was clear before has now become muddled.

More than any other debate, this debate on articles 5 and 6 will have emphasized clearly the two opposing perspectives in the ongoing negotiations regarding the type of convention to adopt. These divergent perspectives are also present in other debates, such as the debate on cross-cutting issues and the debate on the relationship between the Convention and other international agreements. However, in the debate on articles 5 and 6, the very core of the convention is being challenged, i.e. the right to formulate policies and adopt measures to protect and promote the diversity of cultural expressions and the obligation to protect it both domestically and at the international level. Some States look at the provisions in question suspiciously, because they have in their view the potential to affect trade liberalization. They are seen in a positive light by other States – the vast majority, in reality – because they seek to create conditions enabling cultures to flourish and freely interact in a mutually beneficial manner. For those States, there can be no meaningful intercultural dialogue if cultures do not at the outset have the opportunity to express themselves. We will have the chance to re-examine this divergence of views in the conclusion.

However, before moving on to the next articles, another interesting debate must be mentioned, this time concerning article 6 (1). At the very end of the first paragraph of article 6, reference is made to measures that seek to protect and promote the diversity of cultural expressions, “in particular in cases where cultural diversity is threatened or in a situation of vulnerability”. These words, which were of particular concern to developing countries, gave

rise to several interventions – some requesting that they be deleted, either because they were viewed as an undue restrictions on the scope of paragraph 1, or more generally because the issue of threatened or vulnerable cultural expressions was covered in article 8, and other interventions requesting on the contrary that the wording in question be retained. In the last resort, they were deleted and replaced by a new sentence reiterating the same idea but in a different form which no longer opens the door to a restrictive interpretation of article 6 (1)¹². This new sentence, in square brackets, remains subject to re-examination on the basis of the outcome of deliberations on article 8 and the new article 15, which are still ongoing.

- Article 7

Articles 7 and 9 through 11 of the composite text concern the obligations of States Parties at the national level. More specifically, article 7 deals with the obligation to promote and protect the diversity of cultural expressions. The original text of the article used a compulsory language which could give rise to a complaint if the obligations at issue were not respected. During the first meeting of the Drafting Committee in December 2004, a significant number of Committee members felt that this text should not create new rights and also expressed their concern with regard to the ability of States Parties to honour these obligations. It was then suggested that the expression “giving individuals the opportunity” be replaced with less compulsory wording, such as “favouring the creation of an environment” or “creating an environment favourable to”. In the Plenary Assembly, these suggestions were accepted and transmitted to the Drafting Committee, which incorporated them into article 7, such that it would now be difficult to complain about any non-compliance with the obligations in question. It is not mean that the article is not important. Quite to the contrary, for several countries that have only a few or no cultural policies in place, this article is even crucial. But for this incitement to act bears fruit, it is important that it be monitored, not with the aim of forcing the hand of countries that have difficulties implementing the obligations in question, but rather to support them in their efforts. This is why the follow-up mechanisms are important in the general economy of the Convention.

Paragraphs 3 and 4 of article 7 deal more specifically with the protection of intellectual property rights. Paradoxically, as reticent as the Members appeared in making strict commitments in terms of paragraphs 1 and 2, they did not hesitate to do so with regard to intellectual property. Paragraph 3 of article 7, which reproduces the original text of the revised version of the Preliminary Draft almost in its entirety, reads as follows in the composite text: “[States Parties] shall ensure [intellectual property rights] are [fully respected and enforced] according to existing international instruments to which States are parties, particularly through the development [or strengthening] of measures against piracy”. Such a commitment, at first sight, could lead to a complaint for not ensuring full protection to intellectual property rights or for not acting effectively against piracy. This text is all the more surprising in that several Members, such as Australia, New Zealand, Canada, China and Luxembourg, on behalf of the European Union, had requested in the Plenary that this paragraph be deleted, stressing that the appropriate forums to deal with the protection of intellectual property rights were the World Intellectual Property Organization (WIPO) and the WTO. In addition, some Members, in favour of retaining paragraph 3, had expressed the desire to delete the last part thereof, which deals with the strengthening of measures against

¹² The new sentence in question reads as follows: “These measures may include those that take into consideration cases where cultural diversity is threatened or in a situation of vulnerability”.

piracy. The United States was in favour of keeping the provision as is, but specifying that no new rights were to be created.

Paragraph 4 of article 7 integrates a completely new provision proposed by Brazil, which reads: “[States Parties] undertake to ensure in their territory [protection against unwarranted appropriation] of traditional and popular [cultural contents and expressions], [with particular regard to preventing the granting of invalid intellectual property rights]”. Backed by a good number of developing countries, this provision, despite the marked opposition of many developed countries which saw therein the creation of a new intellectual property right (with the United States and Japan, in particular, expressing strong views on the subject), was included in the composite text, but with square brackets casting doubt on its possible fate. But if it is not appropriate to recognize new intellectual property rights (as would be the case with Brazil’s proposal), one can wonder why it would be more suitable to impose a strict duty of ensuring that intellectual property rights are respected, particularly in terms of the fight against piracy, when the Convention is not equipped to ensure that this duty is respected and that there is still no international understanding on what is meant by “piracy”.

In light of the preceding comments, it does not come entirely as a surprise that paragraphs 3 and 4 of article 7 no longer appear in the consolidated text prepared by Chairman Asmal. The Convention, as several Members have stressed, is not the appropriate forum for dealing with the protection of intellectual property rights. However, the distance between the version of these two paragraphs found in the composite text and that found in the consolidated text is vast and it is difficult to see how a complementary reading of the provisions in question can help reach a consensus.

- Articles 9 through 11

The debate on articles 9 through 11, in both the Plenary and the Drafting Committee, moved forward relatively quickly and on a largely consensual basis. With respect to article 9, which deals with the obligation of information and transparency, the two main changes made with regard to the original text are the removal of paragraph 3, which was considered as not corresponding to the objective of article 9, and the modification of the frequency of reports requested from the States Parties relative to any new measures taken with a view to protecting and promoting the diversity of cultural expressions. As it currently reads in the composite text, article 9 stipulates that the States Parties shall (a) designate or appoint a point of contact responsible for information-sharing with relation to this Convention; (b) share and exchange information relating to the protection and promotion of the diversity of cultural expressions, and (c) provide appropriate informative reports to UNESCO every four years of the new measures that have been taken. The predominant concern in examining this provision was obviously to minimize the administrative burden required of the States Parties in terms of information. While recognizing the legitimacy of this concern, we should not lose sight of the fact that it is first and foremost on the basis of information transmitted that commitments are monitored and international cooperation can be developed. Article 10, on education and public awareness, and article 11, on the participation of civil society, underwent only minor changes. In the consolidated text prepared by Chairman Asmal, articles 9-11 of the composite text are reproduced without any major modifications, simply simplifying the language here and there.

- Articles 12 through 15

Articles 12 through 15 of the composite text are the fruit of efforts to rationalize 12 and 14 through 18 of the revised version of the Preliminary Draft (the Plenary had previously agreed that article 13 on international consultation and coordination would be examined at the same time as article 19 on relationships to other instruments). Brazil launched the debate in the Plenary with an argument testifying to the importance of culture in the development of countries and of cooperation in the protection and development of cultural expressions in the South. Articles 12 and 14 through 18 were then the subject of numerous interventions as well as written proposals (Japan, South Africa, Niger). At the end of this discussion, the Chairman tasked India and South Africa with forming an informal working group and integrating the various proposals made by the delegations.

The report submitted a few days later by the informal working group met with a favourable reception – all the more so as it was the result of a broad consensus of the Group’s members, except for article 14, on preferential treatment for developing countries. The restructuring of articles 12 and 13 was especially appreciated. Article 12 is now entitled, “Promotion of international cooperation”, and targets international cooperation in general. Pursuant to this latter, the States Parties:

“shall endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions, taking particular account of the different forms of vulnerability of such expressions, in order to:

(a) facilitate dialogue among States Parties on cultural policy;

(b) enhance public sector strategic and management capacities in cultural public sector institutions, through professional and international cultural exchanges and sharing of best practices;

(c) reinforce partnerships with and among civil society, non-governmental organizations and the private sector in fostering and promoting the diversity of cultural expressions;

(d) promote the exchange of information and expertise through data collection, analysis and dissemination of information, through existing mechanisms and institutions such as the UNESCO Institute of Statistics;

(e) promote the use of new technologies and encourage innovative partnerships to enhance information sharing and cultural understanding, and foster the diversity of cultural expressions;

(f) encourage, when possible and appropriate, the conclusion of production and codistribution agreements”.

The only provision of this article that gave rise to a debate is paragraph (f), on production and codistribution agreements. A few States asserted that the provision in question could come into conflict with WTO commitments for some countries. But the majority felt that this provision held an obvious position in the framework of the Convention, with production and codistribution agreements contributing to an often significant extent to the development of audiovisual production in developing countries. The provision in question is kept in the consolidated text prepared by Chairman Asmal, but in a more compulsory language,

eliminating the words “when possible and appropriate”. Another paragraph has also been removed from the consolidated text: paragraph (d) on the exchange of information and expertise, which is already the subject of a specific article (article 19) in the new text.

Almost two pages in length, article 13 of the composite text concerns more specifically the promotion of the central role of culture in sustainable development. Pursuant to paragraph 1, the States Parties shall endeavour to incorporate the dimension of culture in their development policies for the creation of conditions conducive to sustainable development, which is inseparable from cultural development. Pursuant to paragraph 2, the States Parties shall encourage the development of innovative partnerships in order to cooperate with developing countries in the enhancement of their capacities in the protection and promotion of the diversity of cultural expressions. Lastly, paragraph 3 mentions various means the States Parties can adopt to support cooperation for sustainable development, in accordance with the specific needs of developing countries to foster the emergence of a dynamic cultural sector. More specifically, these means concern the strengthening of the cultural industries in developing countries, capacity-building, technology transfer and financial support. For a good number of developing countries, the most important provision in this set of means is undoubtedly that which appears in paragraph 3(d) (i), which, among the means used to assist developing countries, mentions “the establishment of an International Fund for Cultural Diversity, contributions to which will be voluntary and the modalities of which would be determined by the General Assembly of States Parties to the Convention”.

A note associated with the paragraph in question mentions that there was a general trend favouring the principle of establishing a fund and that the objective of the fund should be elaborated in the draft convention itself. In this respect, some developing countries would have liked the language used to be more concrete and closer to that of the *Convention for the safeguarding of intangible cultural heritage*. As a whole, the new text of article 13 is an undeniable improvement with regard to the scattered provisions of the original text of the consolidated Preliminary Draft on the same topic. Having said this, it should be stressed that the legal language used is not as compulsory, which was probably inevitable in order to reach a consensual text. More troubling is the fact that almost no specific follow-up has been stipulated concerning the implementation of these provisions, contrary to the text of the revised version of the Preliminary Draft. From now on, implementation of cooperation commitments for sustainable development will be left, in the composite text, entirely to the individual initiative of States Parties.

This article has been rearranged extensively in the consolidated text prepared by Chairman Asmal. It was first split into three. A first, rather short article, article 13 approaches the issue of incorporating culture in sustainable development separately. For the most part, the first paragraph of former article 13 is reproduced. A second, much longer article deals in a distinct manner with cooperation for development. It reproduces paragraph 3 of former article 13 almost in full. Lastly, a third article addresses cooperation agreements previously covered by paragraph 2 of article 13. It must be acknowledged that this substantive amendment is a marked improvement to article 13 of the composite text.

As should have been expected, article 14 of the composite text, which tackles the issue of preferential treatment for developing countries, triggered a debate concerning its compatibility with Member States’ WTO commitments. At the suggestion of some members, although not without opposition, the informal working group resolved this problem by

adding wording to the effect that such preferential treatment would be granted by the States Parties only “in accordance with their international obligations”. The addition of this latter wording gave rise to a debate in the Plenary: some Member States questioned the relevance of such wording while others considered it important to keep it. In the end, it was retained. Rather than developing a specifically cultural vision of that which this type of treatment could have been, the working group thus chose to yield to the commercial vision of trade agreements, in this respect. However, in the consolidated text prepared by Chairman Asmal, this provision, numbered article 16, has been simplified and no longer refers to the requirement to comply with international obligations¹³.

But the major benefit of the consolidated text prepared by Chairman Asmal in so far as concerns international cooperation is undoubtedly the incorporation in the Convention of a new article numbered 18 entitled “International fund for cultural diversity”. This meets the request made by a good number of developing countries to include in the text of the convention provisions stipulating the way in which this fund functions. In the composite text, this Fund was simply presented as a desirable measure of financial support, which should be established pursuant to modalities determined by the Assembly of States Parties. The new article borrows its content from the corresponding provision of the *Convention for the safeguarding of intangible cultural heritage*.

- **Provisions relating to the administrative framework**

The Plenary Assembly did not address the provisions relating the administrative framework (articles 20-23 of the revised version of the Preliminary Draft) until the very end of the second session, and it did so in a rather cursory manner. From the outset, Japan asserted that the original text of the revised version of the Preliminary Draft concerning the General Assembly of States Parties (article 20) was too heavy and that in order to simplify it, the General Assembly of States Parties should meet every two years at the same time as the Plenary Conference. This proposal, which appeared to suggest that the General Assembly of States Parties could meet as an ad hoc committee of the General Conference, was subsequently backed by the United States. In response to this suggestion, St. Lucia asserted that the General Conference of UNESCO members should not be confused with the General Assembly of States Parties, because only the signatory members of the Convention would be part of the latter and that given the circumstances it was out of the question that the General Conference establish the operating rules of the General Assembly. Following this speech, the Chairman ruled that the General Assembly of the States Parties would report to the General Conference but would not come under the control thereof. At the suggestion of Costa Rica, it was also decided that to avoid any confusion with the United Nations General Assembly, the General Assembly of States Parties would be renamed the Conference of States Parties. There was very little discussion of the powers of this Conference of States Parties during the Plenary, not because there was a consensus on the subject, but because there was not enough time.

¹³ The article in question now reads as follows: “Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional frameworks, preferential treatment to their artists and other cultural professionals and practitioners, as well as to their cultural goods and services”.

With regard to article 21, which provides for the creation of an Intergovernmental Committee, a broad consensus was immediately apparent in favour of such a body, with, however, an addition specifying that it should function on the basis of two explicitly expressed principles: the principle of equitable geographical distribution and the principle of rotation. It was clearly established that only States Parties to the Convention could become members of the Committee, with elections to be held every four years. Lastly, in the absence of a clear indication of the Plenary on the subject, it remains to be decided whether the rules of procedure of the Committee should be adopted by the Conference or the by the Committee itself.

As almost no member spoke in favour of maintaining article 22, which provided for the establishment of an advisory group, it was deleted. Finally, article 23, which stipulated that UNESCO shall provide the Secretariat of the General Assembly of States Parties, the Intergovernmental Committee and the Advisory Group, was approved without discussion.

On the whole, there is reason to be pleased that the essential elements of the administrative framework envisaged in the revised version of the Preliminary Draft, i.e. the Conference of States Parties and the Intergovernmental Committee and the Secretariat, were kept. This solution was not necessarily a given at the start of the process, with some members declaring themselves in their written comments in favour of deleting all of this administrative framework. But there is also cause for concern about the fact that the role played by the bodies in question in the implementation of the Convention was not addressed in the Plenary, introducing uncertainty as to the nature of the follow-up procedure to be established. The consolidated text prepared by Chairman Asmal, essentially reproducing the corresponding provisions from the composite text, has however corrected this gap, presenting a reviewed and corrected list of the functions of the bodies in question, taking into consideration the amendments made to the rest of the Convention.¹⁴

III – THE UNRESOLVED ISSUES

Two types of unresolved issues can be distinguished: those for which it has not yet been possible to reach a consensus and those which have not yet been examined. The so-called cross-cutting issues are included in the first group, as well as those relating to the relationship of the Convention to other instruments (articles 13 and 19). The preamble and article 24 on dispute settlement are included in those measures that have not yet been examined. In the pages that follow, we will focus only on issues that we felt were the most important and the most contentious. Accordingly, we will address, in order, the cross-cutting issues relating to the use of the terms, “cultural expressions”, “protection” and “cultural goods and services”, the issues relating to relationships to other instruments (articles 13 and 19) and the issue of dispute settlement (article 24).

- **The cross-cutting issues**

¹⁴ The functions of the Conference of States Parties remain essentially the same. However, the same is not true of the functions of the Intergovernmental Committee, which have been reduced from 10 to 7, to take into consideration the deletion of the Cultural Diversity Observatory and the Advisory Group, among other aspects.

- The term “cultural expressions”

Without a doubt, the most significant cross-cutting issues concern the use of the term “cultural expressions”. Indeed, this latter plays a central role in the Convention, appearing therein by far the most often. It was already used in the Preliminary Draft Convention prepared by the independent experts. In his report of July 2004 on the Preliminary Draft in question, the Director General wrote: “The experts suggested that the term “cultural expressions” be used in the text of the Preliminary Draft Convention, because it is more focused and includes the notions of both ‘cultural contents’ and ‘artistic expressions’. This does not entail amending the objective or scope of application of the Convention”¹⁵.

During the Drafting Committee meeting of December 2004, the issue of the use of the term “cultural expressions” was brought up for the first time with respect to the very title of the Convention. Of the 16 options proposed concerning the title in question, which still focuses on the protection of the diversity of cultural contents and artistic expressions, the term “cultural expressions” comes up seven times, either alone or together with the term “contents”. Other expressions were also proposed, including “cultural contents and artistic expressions”, which comes up six times and “cultural diversity”, which comes up three times. In the end, the Drafting Committee decided that the Plenary should choose between these terms in so far as concerns the title. The same issue was equally debated at length during the examination of article 4 (3), which concerns the definition of “cultural expressions”. In addition to the original text, five options were introduced therein, four of which proposed modifications to the original text and one of which requested that this definition be deleted. The remarks of the Drafting Committee on the general direction of debates on this subject demonstrated broad support in favour of the original text and some support for option 4, which is quite similar to the original text, while options 1, 2 and 3 received only limited support and option 5, in favour of deleting this definition, was rejected.

In a way, the second session was a repeat of the December 2004 meeting of the Drafting Committee, when the latter examined the issue of the use of the term, “cultural expressions”. With regard to the title, for example, following a lengthy debate, it was decided that it would subsequently be examined based on instructions from the Plenary and taking into consideration the comments received by the Secretariat in November 2004 and new proposals received in December 2004. With regard to article 1 (a), the term “cultural expressions”, used alone or together with the term “contents”, was placed in square brackets with a footnote indicating that the expressions “cultural contents and expressions”, “cultural contents”, and “artistic expressions and cultural expressions” should be examined in greater detail and be re-examined for purposes of harmonization once the title and scope of the Convention have been determined. Thus, whenever the term “cultural expressions” appears in the Convention, it is placed in square brackets. At the end of the second session, no decision had been made with regard to the use of this term, which seems paradoxical to say the least, considering that it is the most frequently used term in the Convention.

To understand why that is the case, we must look to the debates on the definition of the term “cultural expressions”, both in the Plenary Assembly and the Drafting Committee. Two types of objections were made against its use. First, there are objections related to the fact that the term in question is overly restrictive and focuses too much on commercial considerations.

¹⁵ See: <http://unesdoc.unesco.org/ulis/fre/circulars/cl3726.pdf>, page 5

The close relationship established in this definition between cultural expression itself, i.e. the act of expressing oneself at the cultural level, and the means or forms of such expression, in this instance cultural goods and services as well as other cultural activities, appears to be especially problematic. For example, the United States objects to the inclusion of the words “cultural goods and services” in this definition, Saudi Arabia believes that the term “cultural expressions” is slanted to essentially commercial considerations, and Japan, which wants to remove any reference to cultural goods and services, questions what “cultural expressions”¹⁶ is trying to say. But in fact, underlying this type of objection to the use of the term “cultural expressions” is a refusal to recognize the dual nature of cultural goods and services, which are both objects of trade and vehicles of cultural expression. This point will be revisited below when the issue of the use of the expression “cultural goods and services” is addressed.

In the second type of objection, the relationship between “cultural expressions”, “cultural contents” and “artistic expressions” is perceived as problematic. Some States, such as Benin, assert that the relationships between “cultural contents” and the rest of the definition need to be clarified. Others, such as Algeria, complain that “artistic expressions” is moved to the back burner in the original definition. Still others, such as Lebanon, remind that “cultural contents” and “artistic expressions” go hand-in-hand in the mandate given to the Director General. In response to these observations, France speaking for the European Union, suggests that two definitions be developed: one for “cultural contents” and the other for “cultural expressions”. Senegal goes a step further, proposing three distinct definitions: one for “cultural expressions”, the second for “cultural contents” and the third for “artistic expressions”.

But there is a danger in increasing the number of definitions to clarify the term “cultural expressions”. It must be understood that “cultural expression”, understood as a creative act, cannot be separated from its form and content. What needs to be protected and promoted is cultural expression as a whole. Accordingly, a definition of the term “cultural expressions” that includes all of these elements is key. Another, more worrying debate, which attempts to separate the creative act from its contents, paying particular attention to the latter, is emerging on the heels of this debate on the relationships. Some States are even suggesting that the term “cultural contents” be made the main concept of the Convention. Saudi Arabia and Benin in particular expressed this position, requesting that the definition found in Proposal 3¹⁷ be used, which reads: “The term, ‘cultural contents’ refers to the symbolic meaning and values conveyed by cultural manifestations recognized as such by the community in which they originate, whether or not they be equally regarded as activities of an artistic, civic or religious character”. This proposal, the effect of which would be to narrow down the definition of “cultural expressions” as the Chairman of the Drafting Committee himself pointed out, was not received. But there is every reason to believe that the debate on this point is not over, as at the very end of the session, some twenty States demonstrated the wish to reconsider article 1 (a), which makes the protection and promotion of the diversity of cultural expressions the primary objective of the Convention. But the Chairman refused the request, which was considered to be late, ruling that it would need to be revisited during the third session instead.

¹⁶ Work of the Drafting Committee, Tuesday, February 8, 2005, 6:30 pm – 9:00 pm.

¹⁷ Revised version of the Preliminary Draft, proposals for new articles, page 47 (French text)

The consolidated text prepared by Chairman Asmal on the definition of the term “cultural expressions” can be considered to constitute progress in the sense that it opts resolutely for a comprehensive definition, which links the creative act closely to its expressions and contents. It reads as follows: “‘Cultural expressions’ are expressions conveyed by cultural activities, goods and services resulting from the creativity of individuals, groups and societies, containing cultural content. The cultural content of these activities, goods and services includes the symbolic meaning, artistic dimension and cultural values contained therein”. However, the advantages of this simple, coherent definition are called into question in part through the addition of a new definition that specifies the meaning of the expression “cultural activities”. The term in question, meant in a limited sense to designate a mode of cultural expression that cannot be compared to a good or a service, may have a place in the Convention. But as defined in the consolidated text¹⁸, the term “cultural activity” is confusing and invites the sociological and anthropological aspects of culture to be taken into consideration, which may take the Convention in unexpected directions.

- The terms “protection” and “protect”

The second cross-cutting issue concerns the use of the terms “protection” and “protect”, which come up some twenty times in the composite text of the Convention, including in the title. During the first meeting of the Drafting Committee in December 2004, the term “protection” received widespread support – when accompanied by the term “promotion”. There was also limited support in favour of replacing “protection” with “preservation”.

During the second session, the debate on this issue proceeded in two phases. The first phase began with the Plenary Assembly examining the title and objectives (article 1) of the Convention on the very first day. A very clear trend in favour of retaining the term “protection”, used together with “promotion”, came to light at that point. But the United States, opposed to the use of this term, insisted that the term be placed in square brackets. The debate on this point was to continue in the informal working group created that same day by the Chairman with a view to bringing out the essential elements of the debate on the title and objectives of the Convention. In the report transmitted the following day in the Plenary, three options were put forward for the title, two of which using the term “protection” in square brackets, and a third replacing the term “protection” with “preservation”. But as we know, this report was not ratified by the Plenary. This initial phase of the debate ended with the Drafting Committee examining article 1 (a), which established the primary objective of the Convention as “protecting and promoting the diversity of cultural expressions”. At the end of a rather lengthy debate, it was agreed that the term “protection” would be retained, but in square brackets, leaving the Plenary to decide the issue.

The issue was not brought up until the final days of the session, when the Chairman came back in the Plenary to the cross-cutting issues that had been put aside until then, including the use of the terms “protection” and “protect”. Following an inconclusive discussion, the debate was transferred to a new informal working party on the terms “protection” and

¹⁸ The definition given is as follows: “Cultural activities encompass the various ways in which individuals or groups may communicate symbolic meaning or convey cultural values, which derive from or express their cultural identity, beliefs, traditions and/or cultural practices. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services as defined hereafter”.

“cultural goods and services”, created on the penultimate day of the session to return finally to the Plenary in the final hours of the session. This second phase, which we are going to examine a bit more in-depth, gave rise to a more structured debate, which made it possible to better define the positions on the subject, but for all that without managing to settle the issue.

Late on Wednesday, February 9, the Chairman opened the debate in the Plenary on the term “protection”, reminding delegates that the mandate the General Conference of UNESCO gave the Director General used this term and that therefore it was up to those who considered it unacceptable to express themselves on the topic. Brazil took the floor immediately, first to lament the atmosphere of suspicion surrounding the debate on this issue, and next to stress that the term had an extremely broad scope and that as a result, it was important to define it, relating back thereto to a proposal that it had already made, which read as follows: “The term protection designates any measure considered appropriate to maintain the conditions of existence of the diversity of contents and cultural expressions. Accordingly, it can apply equally to measures aimed at groups or activities and measures aimed at all of society, at the national and international levels”. India took the floor, saying that it preferred the definition proposed by the Chair in a text that he had distributed earlier, which stated: “For the purposes of this Convention, ‘protection’ means the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions”. Several other speeches followed, either in support of Brazil’s proposal (South Africa, Argentina), or in support of the Chair’s proposal (Australia), or to suggest that the term “protection” be replaced with “preservation” (Japan), or else to assert that it was simply unnecessary to define this term, the meaning of which in the context of the Convention and in UNESCO practice was clear (United Arab Emirates, Switzerland). But, due to the late hour, the Chair was obliged to close this interesting debate, putting it on hold until the following day.

The United States was the first to speak the next day. After having explained that the term “protection” was ambiguous and could imply that the Convention was dealing with issues relating to trade, investment and intellectual property, the United States expressed the desire to see the term in question be replaced by “preservation”. However, in a broad spirit of compromise, the United States said it was prepared to accept the definition proposed by the Chair, but with an addition designed to eliminate any ambiguity. The whole thing would read as follows: “For the purposes of this Convention, ‘protection’ means the adoption of measures aimed at the preservation and enhancement of the diversity of cultural expressions. The meaning and use of this term shall not enlarge, diminish or otherwise affect rights, obligations and responsibilities of the States with respect to trade, investment or intellectual property rights”. The Chair immediately pointed out that the definition omitted the word “safeguard”, which was included in his own definition, to which the USA responded that this term could also lead to a certain amount of confusion. Other Members then took the floor, declaring that it was technically not appropriate to include restrictions on the definition of the term “protection”, when the problem affected by such restrictions was addressed directly in article 19 (Venezuela), or to stress that the US proposal needed to be examined very carefully, because it really restricted the application of the Convention, reducing everything to trade, investment and intellectual property (Zimbabwe). At this stage in the discussion, Mexico suggested to the Chair, who agreed, that the issue be sent to an informal working group tasked with reporting on the topic the next morning.

During the meeting of the informal working group on the afternoon of February 10, several delegations added to this latter to continue the debate on the term “protection”. The group’s two joint chairs, Costa Rica and South Korea, opened the discussions by presenting the three proposed definitions on the table, from Brazil, the United States and the Chair of the Plenary. Mexico took the floor first in support of the American position. India added to this, saying that as the Convention had to be ratified by the United States to be effective, its minimal position therefore had to be complied with in an attempt to reach a consensus on a formula that would clearly state that the Convention was not fulfilling protectionist aims. The continuation of the debate, which incited nearly forty interventions, did not result in much more progress in terms of the debate in the Plenary Assembly. The same major trends were seen both for and against a definition of the term “protection”, for and against the Chair’s proposal, and for and against the American proposal. In the report transmitted orally to the Plenary the next day, the joint chairs were only able to reiterate this assessment in the form of the following four statements:

- 1) *Various delegations thought that a definition of protection is not necessary;*
- 2) *The Chair’s definition was supported by various delegations, with some proposing modifications;*
- 3) *Some delegations insisted on a definition of protection eliminating any possibility of conflicts with trade;*
- 4) *Several delegations underlined the close link between the issue discussed here and article 19.*

Interestingly enough, following this statement, the joint chairs were able to conclude that consensus on this term was close at hands.

The fact is that almost all of the participants agreed that the Convention under consideration was not pursuing protectionist objectives. In this sense, a possibility of rapprochement did exist. But the points of view split on the interpretation given to this affirmation, and at this stage, is far from obvious that they are on the verge of rapprochement. Indeed, for some States, the simple fact that UNESCO is concerned with the cultural consequences of globalization, liberalization of trade and changes in technology leads to a risk of conflict with the objectives of the WTO and may be considered as opening the door to a form of protectionism. However, for most States, the Convention only aims to transpose into today’s concrete reality the right of individuals, groups and societies to create, disseminate and distribute their cultural goods and services and to have access thereto – their right to express themselves culturally, in other words. Thus , what is perceived as protectionism, when considered from a commercial point of view, is not necessarily so when considered from a cultural point of view.

- The term “cultural goods and services”

During the Drafting Committee meeting in December 2004, the original definition of this term was widely supported, except for the reference to the illustrative list of Annex I and paragraph (c), which the majority of members wished to have deleted¹⁹. At the start of the

¹⁹ The text in question reads as follows: “Cultural goods and services, a non-exhaustive list of which is annexed to the Convention, (see Annex I) refer to those goods, services and activities that embody or yield cultural expressions and have the following characteristics: (a) they are the outcome of human labour (industrial, artistic or artisanal) and require the exercise of human creativity for their production; (b) they express or convey some form of symbolic meaning, which

second session in the Plenary Assembly, the different points of view on this definition ranged from simply deleting it,²⁰ to retaining the original version, either as is or without paragraph (c). Most Members supported this latter option. But as opposition to the subject appeared marked, the Chairman, after transmitting article 4 on the definitions to the Drafting Committee, set up an informal working group with a view to examining the issue in greater depth. Article 4 came before the Drafting Committee on February 8. With regard to the expression “cultural goods and services”, it was decided to simply place it in square brackets, adding a footnote indicating that the Plenary needed to reach a decision on this definition. On February 9, the informal working group on the definition of cultural goods and services met for the first time and engaged in a fundamental debate on the subject, which was expected to continue the following day, February 10.

As president of the group, France (speaking on behalf of the European Union) launched the debate, suggesting that two significant words that emerged during the Plenary debate, “function” and “specificity”, serve as a basis for reflection. Brazil, which agreed with this approach, continued immediately, proposing a definition that would establish a link with the particular function of cultural goods and services as vectors of “cultural expressions”: “Cultural expressions are manifestations that are conveyed by goods, services and activities that result from the creativity of individuals, groups and societies, which have cultural content. The cultural content of such goods, services and activities includes the symbolic meaning, the artistic dimension and cultural values”. Mexico went further, showcasing the definition proposed by the Chairman himself, which closely resembled Brazil’s definition: “Cultural goods and services are those goods and services that embody or yield cultural expressions conveying symbolic meaning, ideas, traditions and ways of life, and possessing as such a cultural value distinct from whatever commercial value they may have”; but it continued, requesting that the following wording be added to this definition: “in compliance with the rights and obligations of the other parties in the framework of other international organizations”.

This last suggestion took the debate in a new direction, wherein the problem no longer had anything to do with the content of the definition as such but rather with the use of the words “goods and services”, closely identified by some States with international trade, and thus likely to encroach upon commitments made in other international agreements. Accordingly, two solutions were available to the States in question: either these terms could be replaced with other terms (which was the position of the United States and Japan), or wording should be added to the effect that the definition provided in no way affected the rights and obligations of the parties in accordance with other agreements to which they are signatories (Mexico, which would return to the subject several times). But for other States, such as Brazil, Canada and South Africa, the issue of the definition of “cultural goods and services” had to be set apart from that of the relationship between the convention and other international agreements specifically targeted in article 19.

The debate resumed on February 10, making it possible to go over the substantive content of the notion of “cultural goods and services”. For a moment, it looked like there could be the

endows them with a cultural value or significance distinct from whatever commercial value they may possess; (c) they generate, or may generate, intellectual property, whether or not they are protected under existing intellectual property legislation.”

²⁰ Japan, in particular, which from the outset proposed that it be replaced with a new notion of “cultural activities”, as well as the United States.

beginning of a consensus on the subject. From the outset, France proposed starting with a level-specific approach, wherein the creative process was the first level, cultural expression was the second level and cultural goods and services, as vectors of cultural expressions, was the third level. This approach, supported by Brazil, was qualified as interesting by Japan and useful by the United States which added that they were prepared to explore this avenue. But very quickly, Japan and the United States returned to their initial position, asking that these terms be replaced with another expression, such as objects, manifestations or activities, and the debate was closed with Mexico announcing that it had been won over to the idea of using different terms. A few hours later, the chair of the working group reported the results of their deliberations to the Plenary Assembly, thereby presenting the commonly understood elements:

- 1) *It was agreed that the definition shall be drafted for the purposes of the convention only;*
- 2) *It was agreed that the concept must cover both activities with commercial value and activities without commercial value;*
- 3) *It was agreed that the fundamental role of cultural goods and services in this context was to convey meaning, values and world views;*
- 4) *Finally, it was agreed that it was not feasible to draft an illustrative list.*

Beyond that, differences of views on how the problem should be settled remained essentially what they were before. After receiving this report, the Chairman asked the group to continue its work. But on a proposal made by Brazil and India, it was decided that a single group would be formed to consider both the definition of “cultural goods and services” and the concept of “protection”. A report was to be presented on this latter the following day. But as could have been expected, the report in question, submitted at the end of the session, largely resembled the report presented the previous day and the Chairman of the Plenary had no choice but to refer the issue to the next session.

What clearly comes out from this long debate on the definition of the terms “cultural goods and services” is that the basic issue with regard to them concerns the relationship between the Convention and other international agreements. The problem raised by these terms, in the eyes of certain States, is that they are used commonly in international trade agreements. Accordingly, to avoid any confusion, they should not be used in a convention on culture, or at least should be accompanied with words to the effect that their use could in no case encroach on international trade regulations. But this way of settling the problem negates the dual nature of cultural goods and services, at objects of trade and vehicles of identity, values and meaning. In reality, it is a barely disguised way of affirming the predominance of commercial considerations over cultural considerations. Agreeing that these terms, which, in the context of the convention, refers very clearly to the basic vectors of cultural expressions, be removed because they are also found in commercial language, is already recognizing in a certain manner that the commercial perception of the trade/culture interface takes precedence over the cultural perception.

- **Issues relating to the relationship between the Convention and other international instruments (articles 13 and 19)**

The issues relating to relationship between the Convention and other international instruments (more particularly, international trade agreements), as can be seen, are clearly at the heart of that which divides the Member States with regard to the type of convention to adopt. In fact, we can go so far as to say that the mistrust of some States concerning the objectives pursued by this convention is at the root of the division that exists between the Members on this subject.

Paradoxically, despite the significance that these issues have taken in the convention negotiations, they were not the subject of very long debates during the second session. They were addressed for the first time in the Plenary Assembly at the beginning of the second week only, and the provisions at issue, former articles 13 and 19, have still not been examined by the Drafting Committee. Furthermore, the Plenary debate on these issues was quite brief, with members very often confining themselves to simply mentioning their preferences from among the proposed solutions, without really explaining the reasons for their choices. Thus, very little can be gleaned from examining the debates, other than an indication of Members' positions and a few thoughts, often perfunctory, on the subject. At the very end of the debate, Luxembourg, speaking on behalf of the European Union, submitted the text of a written proposal on articles 13 and 19, which was meant as a new approach and could have influenced the course of the debate. But as it was presented after the debate was closed, this proposal was simply distributed to Members²¹.

The revised version of the Preliminary Draft prepared by the Drafting Committee in December 2004 on this subject simply presented the original text of articles 13 and 19, along with a number of options taken from the written remarks transmitted by the Members in the fall of 2004. The text of article 13 read as follows: "States Parties shall bear in mind the objectives of this Convention when making any international commitments. They undertake, as appropriate, to promote its principles and objectives in other international fora. For these purposes, States Parties shall consult each other within UNESCO in order to develop common approaches." The five options that accompany the text in question varied from deleting the article to placing it immediately before article 19, as well as various amendments to the original text. With regard to article 19, the original text comprised two alternatives. Option A included two paragraphs of its own, which read as follows:

1. *Nothing in this Convention may be interpreted as affecting the rights and obligations of the States Parties under any existing international instrument relating to intellectual property rights to which they are parties.*
2. *The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.*

Option B read as follows:

²¹ The text in question read as follows: "The Contracting Parties shall protect and promote the diversity of cultural expressions in an appropriate manner in those international instruments likely to affect cultural diversity. Bearing in mind the specificity of cultural goods and services, the Contracting Parties shall comply with the provisions of this Convention when interpreting and applying international instruments. The Contracting Parties shall promote mutual support between this Convention and other international instruments. This Convention is not subordinate to other international agreements. Similarly, other international agreements are not subordinate to this Convention."

Nothing in this Convention shall affect the rights and obligations of the States Parties under any other existing international instruments.

In addition to completely deleting this article, options proposed included various amendments to the original texts as well as proposals offering new alternatives.

When the debate on these two articles opened, some basic choices were presented to the Members. With regard to article 13, they had to choose from the outset between deleting this provision or keeping it in its original form or a form that has been modified to a greater or lesser extent. Indeed, a limited group of States proposed that the provision be deleted, with some asserting that it added nothing to the Convention (United States, Tunisia), while others asserting that it could complicate the work of governments in the international arena (Japan), and still others asserting that it was more idealistic than realistic in nature (the Indies). But the vast majority came down in favour of retaining the provision, either by deleting the last sentence thereof (Brazil and Turkey) or by removing the reference to UNESCO as a forum of consultation (Luxembourg on behalf of the European Union, Canada, Switzerland and the United Arab Emirates). As for article 19, two basic choices were initially offered to Members. They could, as suggested in the revised version of the Preliminary Draft Convention, select option A or option B. But they could also reject the choice they were given in favour of a third option. In practice, 19 States chose option A, eight States chose option B and seven States expressed the desire to see a third option advanced.

Although few States went to the trouble of providing a detailed explanation of their choice, some arguments or explanations were nevertheless given and merit mentioning. Thus, the United States, to justify its choice of option B, relied on the basic rules of international law which affirms that the States must respect their commitments by fulfilling them in good faith, and that when two or more commitments of a State come into conflict, they must be interpreted where reasonably practicable in such a way that each one is respected, failing which the State in question shall be responsible for non-compliance with one or another of its commitments. Japan, to justify its choice of the same option, simply explained that option A opened the door to conflicts with other international instruments. Along the same line, Australia justified its choice of option B by declaring that the relationship between the convention and other international instruments should be one of complementarity and not superiority, as was the case with option A. The only explanations provided for the choice of option A were given by Venezuela, which simply affirmed that this option was in line with the convention, which aimed to protect the diversity of cultural expressions. Lastly, among the States that claimed to be dissatisfied with options A and B and seeking another solution, three in particular – Switzerland, Luxembourg and Canada – explained themselves on the topic. For Switzerland, the most advantageous formula in order to promote and protect cultural diversity needed to be found, but without endangering the adoption of and membership in the Convention. For that purpose, it was important to recognize the legal equality of the Convention and other international instruments, while reassuring that the aim of the Convention was not to modify the rights and obligations resulting from other international agreements. As an example of a provision that could be acceptable, it simply referred to a proposal that it had featured in its written remarks²². For Luxembourg, the

²² The proposal in question, which is found at the bottom of page 94 of the revised text of the Preliminary Draft, reads as follows: "(1) The provisions of this Convention shall not affect the international rights and obligations deriving from other

Convention and the other instruments had to be able to grow mutually stronger, not to oppose each other. Accordingly, any form of subordination in one direction or the other had to be excluded. In other words, there could be no hierarchy between the Convention and other international instruments. Options A and B did not meet these requirements. As a result, a third way had to be found. Finally, Canada, which agreed with many of the ideas expressed by Luxembourg, declared that it wanted a strong and effective convention that would take its place in the international legal system, would not be based on hierarchical relations, and that would apply in accordance with the rights and obligations resulting from the other international agreements.

At the end of this debate on articles 13 and 19, the Chairman noted that there was quite a broad consensus on retaining article 13, but with a less restrictive language and without reference to UNESCO as a forum of consultation. With regard to article 19, the situation was more difficult, with a rather pronounced rift continuing to exist between the members on the content of this provision. In order to move forward, he invited Luxembourg and Canada as well as the other countries that showed themselves to be in favour of a third option to submit a specific text which would incorporate, among other elements, a reference to the requirements of complementarity and non-hierarchy.

This latter suggestion, which may be perceived as an implicit rejection of options A and B, seems all the more interesting as there is now, with the proposal submitted by the European Union, a concrete example of what could be a third option. It reads as follows:

The Contracting Parties shall protect and promote the diversity of cultural expressions in an appropriate manner in those international instruments likely to affect cultural diversity.

Bearing in mind the specificity of cultural goods and services, the Contracting Parties shall respect the provisions of this Convention when interpreting and applying international instruments.

The Contracting Parties shall promote mutual support between this Convention and other international instruments.

This Convention is not subordinate to other international agreements. Similarly, other international agreements are not subordinate to this Convention.

If the first paragraph, which is more about international consultation and coordination, topics already targeted by article 13, is disregarded, this proposal inserts into the debate on relationships with other international instruments new elements that had started to emerge in the Plenary but had not yet been the subject of concrete proposals. This is the case of the idea of non-subordination, in paragraph 4, the wording of which is perhaps not terribly elegant but is easily understood. This is also the case of the idea of mutual support, set out in paragraph 3, the scope of which is unfortunately not very clear. Finally, the second paragraph introduces the idea of consistency by asking the signatory States to respect their

existing international agreements. (2) For the purposes of interpreting the relationship between this Convention and other international agreements, States Parties shall give preference to an interpretation ensuring complementarity of the international instruments, in keeping with international law and having due regard to the objectives of the agreements in question".

commitments in terms of the Convention while interpreting and applying other international instruments. If not for the fourth paragraph, this latter, as drafted, could have been understood as giving priority to the Convention over other international instruments. Although this first attempt at a third option concerning article 19 was not discussed during the second session, traces of it are found in the consolidated text prepared by Chairman Asmal.

Articles 13 and 19 of the composite text have now been reversed in the consolidated text and numbered as 20 and 21. The new article 20, entitled “*Relationship to other instruments*” reads as follows:

“1. This Convention shall not modify the rights and obligations of the States Parties under any other international agreements. Similarly, no other international agreement shall modify the rights and obligations of the States Parties under this Convention.

2. When they interpret and apply other instruments or when they enter into other international obligations, the States Parties bear in mind the objectives and principles of this Convention”.

The first paragraph is a reformulation, in a more legal style, of the principle of non-subordination and non-hierarchy set out in paragraph 4 of the European proposal. The second paragraph reiterates the fundamental idea set out in the second paragraph of the European Union’s proposal for article 19. The language is less compulsory, but the scope of the provision is broader, including not only situations wherein the parties are called on to interpret and apply other international instruments, but also those in which they enter into new commitments. The advantage of this addition is to encourage the parties to show more caution when they enter into such commitments.

This status of the issue of the relationship between the Convention and other international instruments clearly brings out two fundamental findings that must be kept in mind in order to reach a solution. It must first be noted that Members are separated by a major gap on this issue. The essential problem is their opposing views on how to manage the culture/trade interface, understood here as the point where cultural concerns intersect with commercial concerns. For a number of Members, it must be clear that under no circumstances may cultural concerns interfere with commercial concerns in any way whatsoever. In other words, commercial concerns, in such situations, must prevail over cultural concerns. But a vast majority of Members find this unacceptable. The second finding is that to bridge the gap separating Members on this issue, the two options suggested in article 19 will likely have to be dropped, putting forward a third option based on the absence of hierarchy, or, better still, the absence of any relationship of subordination between the Convention and other international agreements. This is the price that must be paid to ensure that measures that aim to insure a certain coherence in the management of the culture/trade interface may be developed – measures that themselves meet this requirement of no hierarchy or no subordination.

- **Dispute settlement (article 24)**

As we know, due to a lack of time, the issues relating to dispute settlement were not addressed during the second session. Accordingly, to get an idea of where Members stand on the subject as well as of the direction that a possible consensus could take, we must go back to the debates of the first session as well as the written comments and proposed amendments transmitted in late 2004. Upon examination thereof, a number of trends come to light that can be presented briefly as follows. A first trend is that of the States which are requesting that article 24 be deleted because they feel it is inappropriate to include a provision that presupposes a legal conflict in a convention established by UNESCO, an organization that seeks to work tirelessly for world peace through mutual understanding and dialogue between cultures (Japan, India, Turkey).

A second trend comes to the same conclusion, but on the basis of slightly different reasoning to the effect that paragraphs 1 through 3 are pointless because they do nothing but indicate options that are already available to the States in international law, independently of the clauses of the Convention (United States). In contrast to these two points of view, a third trend comes down in favour of keeping article 24 as is, because the proposal that appears in the original text ensures a suitable balance between negotiations and voluntary recourse to arbitration, on one hand, and obligatory conciliation, on the other hand (New Zealand). Finally, a fourth trend comes down in favour of article 24, but with substantial modifications with a view to simplifying its functioning (Madagascar, Senegal), or with a view to making recourse to arbitration or the International Court of Justice available at the request of a single party (Algeria, Cameroon).

In the revised version of the Preliminary Draft of the Convention, which served as the basis for the second session, the original text of article 24 appears as follows:

1. *In the event of a dispute between States Parties concerning the interpretation or the application of this Convention, the parties concerned shall seek a solution by negotiation.*
2. *If the parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.*
3. *If good offices or mediation are not undertaken or if there is no settlement by negotiation, the parties concerned may have recourse to one of the following means of dispute settlement:*
 - (a) *arbitration, at their joint request, in accordance with the procedure laid down in Annex 3 of this Convention; the arbitral award shall be binding. Parties shall implement the award in good faith;*
 - (b) *submission, at their joint request, of the dispute to the International Court of Justice.*
4. *If the parties concerned have not accepted either of the two procedures provided for in paragraph 3 above, the dispute shall be submitted to conciliation in accordance with the procedure laid down in Annex 4 of this Convention. The parties shall consider in good faith the proposal made by the Conciliation Commission for the resolution of the dispute.*

This text is accompanied by a relatively small number of proposed amendments concerning either all of article 24, or one or another of the paragraphs thereof. In terms of all of article 24, the only option proposed requests that this article simply be deleted. In terms of the options concerning the content of one or another of the paragraphs, the most significant ones refer to removing the terms “jointly seek” in paragraph 2 and the terms “at their joint request” in paragraphs 3 (a) and 3 (b), or else to deleting paragraph 3 (b), which deals with recourse to the International Court of Justice.

The consolidated text prepared by the Chairman at the request of the Plenary Assembly simply reproduces the text of the revised version of the Preliminary Draft Convention in its entirety, except for a few modifications to bring it in line with the rest of the text. The Chairman’s only comment on the subject is that article 24 was transferred to part VII on final clauses.

Thus, on the eve of the third session, there are two fundamental issues concerning article 24 that the Plenary Assembly must settle in order. The first issue is to find out if there is cause to establish a dispute settlement mechanism. The first type of argument put forward against inserting such a mechanism is that which holds that it is inappropriate to include a provision presupposing a legal conflict in a convention on the protection of cultural diversity. But accepting this argument would imply that conflicts between States in the area of culture do not exist or can only be commercial in nature. However, such conflicts between States are nothing new (it would be easy to give a list of such conflicts – old as well as recent ones) and in almost every instance have a predominantly cultural dimension. If parties involved in a cultural dispute are not given the option of having access to a dispute settlement mechanism, the ruling of which would be based on cultural rather than commercial considerations, these latter would have no other option than to leave it to the dispute settlement mechanism of the WTO, which, as we know, rules exclusively on the basis of the commercial slant underlying all agreements governed by the WTO. The second argument in favour of deleting article 24 is that the various recourses envisaged are still possible in international law and that the parties concerned need only to agree to use them as they see fit. But the argument in question in no way prohibits the establishment of a flexible and effective dispute settlement procedure, which could be implemented quickly, take into consideration the cultural specificity of conflicts and result in a report drafted by cultural experts.

The second issue that must be settled, if it is agreed that a dispute settlement mechanism is necessary, is that of the nature of the mechanism in question. Here, there is a basic choice between a mechanism like the one in article 24, which offers the parties diverse options, and, should they disagree, leads to an obligatory conciliation mechanism, or else an obligatory arbitration mechanism, which could be implemented at the request of a single party. In light of these choices, the question that must be asked is that of the basic objective being pursued by establishing a dispute settlement mechanism. Is it, borrowing from the WTO’s commercial model, to force a party to respect its commitments in the terms of the Convention, under threat of penalty? It is difficult, a priori, to see what type of penalties UNESCO could apply in the cultural sector (the only suggestion made in that respect is to authorize the complainant State to suspend the protection that it is granting to the intellectual property rights of the State found guilty of violating its commitments, a solution that is not very credible). Furthermore, it is far from obvious that a majority of States would be willing

to agree to obligatory arbitration and penalties. Or rather is it about getting the States to submit their cultural disputes to a settlement mechanism provided for in the Convention, because this is the only way that solutions – other than commercial solutions – will be able to be found for disputes on cultural issues and that legal precedents supported by cultural considerations may develop over time? If this is the objective of the Convention in terms of dispute settlement, then the procedure already stipulated in article 24 offers every possibility to achieve it.

CONCLUSION

As can be seen, the results of the Second Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions are far from negative. Significant work was accomplished with regard to the content of the convention and we now have a better idea of the points on which disagreement remains. However, for the moment it is still impossible to predict what type of convention will eventually emerge from this negotiation process. The overall structure is in place and the various parts are developing in an appropriate manner, but too many provisions have content that has not yet been established. Accordingly, such a judgment cannot be made.

In this respect, it must be noted that the differences of opinion that had started to appear among the Members during the first session have not truly been reduced during the second negotiation session. It is true that the negotiation procedure itself has not always encouraged the search for consensus. But the main explanation for the little progress made in resolving the contentious issues does not lie herein. When the debates surrounding these issues are examined more closely, we note that they are based on two quite distinct views on the type of convention to be established, views that need to be clearly understood.

The first view brings together in a rather lax manner a majority of the States which expressed themselves during the second session. These latter, consider "*that while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, these same processes also constitute a threat to diversity and carry with them a risk of impoverishing cultural expressions*"²³. They have been in favour from the outset of establishing an international convention that would recognize the specificity of cultural goods and services as well as the right of States to implement measures aimed at preserving and promoting their cultural expressions, while remaining open to other cultural expressions. This instrument would encourage these same States to take the necessary measures with a view to preserving and promoting their own cultural expressions and would commit them to concretely enhance cooperation for development in the area of culture. To ensure that the convention does not go unheeded and can evolve over time, they would also be favourable to incorporating a follow-up mechanism and a dispute settlement mechanism, provided that any heavy bureaucracy is avoided and that the costs of the mechanisms in question remain low. After all is said and done, they are seeking recognition and confirmation of their right to take part in the dialogue of cultures, in their own way.

²³ Composite text of the Preliminary Draft Convention, preamble, paragraph 11.

The second view is shared by a markedly lower number of States, but this apparent disadvantage in the debate is compensated in part by the economic weight of the States in question. The States rallying to this view consider the negotiation of an international convention on the protection and promotion of the diversity of cultural expressions much more cautiously, being first concerned about the economic repercussions of such a convention on trade. Accordingly, this view maintains serious reservations on several key aspects of the preliminary draft convention. These reservations concern first the scope of the Convention, which is considered to be overly focused on cultural goods and services and on the protection of cultural expressions and not enough on the promotion of cultural diversity. They also concern about the assertion of the sovereign right of States to adopt measures that they consider necessary to protect and promote the diversity of cultural expressions on their territories, deemed to be potentially incompatible with the parties' WTO commitments; the commitment of the signatory States to promote the objectives and principles of the convention in other international fora and to consult each other to this end, considered to be a threat; the follow-up and dispute settlement mechanisms, which should be reduced to their simplest expression or else removed because they are not appropriate in the area of culture; the coproduction agreements and preferential treatment for developing countries, considered to be incompatible with the parties' WTO commitments; and lastly article 19 on the relationship to other international instruments, which should establish clearly that the convention will always comply with other existing and future international agreements. All in all, this view is wary of the draft convention on the diversity of cultural expressions, which is seen as pursuing protectionist goals. For the States that hold that view, the convention considered should focus on the promotion of cultural diversity in a broad sense rather than on the protection and promotion of the diversity of cultural expressions and rely for the realization of its objectives on dialogue and cooperation rather than on commitments as such.

Thus, a rapprochement between these two views of the Convention will not be easy and some heated exchanges about many of the issues that we have examined must be expected during the third session. In order to reach a consensus, the dual nature of cultural goods and services –as objects of trade and as vectors of identity, values and meaning – must be recognized from the start. Only if this condition is met can conflicts on the use of terms such as “protection” and “cultural goods and services” or on the relationship between the convention and other international agreements be defused. The fact is that the Convention on the Protection and Promotion of the Diversity of Cultural Expressions is not concerned with the commercial aspects of cultural goods and services, which are already being fully taken into consideration in other agreements, and has no protectionist aims. The objective being pursued first and foremost is the concrete transposition of the fundamental right of each individual to freely take part in the cultural life of the community. As for the trade/culture interface, the aim of the Convention is to ensure that in the future, cultural concerns are considered as being as important as commercial concerns.