

THE UNESCO CONVENTION ON THE PROTECTION AND PROMOTION
OF THE DIVERSITY OF CULTURAL EXPRESSIONS:
A CULTURAL INSTRUMENT AT THE JUNCTION OF LAW AND POLITICS

Ivan Bernier*

Although the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* is quite clearly a cultural agreement negotiated in a cultural context and pursuing cultural objectives, it is strange to find that a majority of the legal analysis of its text realized since its adoption in 2005 address the subject from a trade law perspective, as if the Convention was of interest essentially for its implication on the trade regime¹. But this should not come entirely as a surprise since the Convention itself is intimately linked to a political debate concerning the interface between culture and trade that goes back to the 1920's (when European countries began resorting to screen quotas in order to protect their film industry from an influx of American films considered as a threat to their culture), that resurfaced after the Second World War in the GATT negotiations (where it was considered important enough to justify a provision recognizing the cultural specificity of cinema) and that evolved over the years, fueled by a growing number of trade disputes regarding cultural goods and services and numerous articles and conferences bearing on the interface between commerce and culture².

By the end of the 1990's, however, the debate had taken a completely different direction. Until the creation of the WTO, in 1995, it had essentially focused on exempting cultural products from international trade agreements. In the following years, a paradigm shift occurred. This shift

¹ See for instance, Voon, T., *Cultural Products and the World Trade Organization*, Cambridge University Press, 2007; Bossche, Van den, Peter, *Free Trade and Culture. A Study of Relevant WTO Rules and Policy Options for the Protection of Cultural Values*, Boekmanstudies, Amsterdam, 2007; M. Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law', 9 *Journal of International Economic Law* 9 (2006), 515-552; T. Voon, 'UNESCO and the WTO: A Clash of Cultures?', 55 *ICLQ*, (2006) pp. 635-650. ; C. B. Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO', 9 *Journal of International Economic Law* (2006) pp.553-574; A. Khachaturian, 'The New Cultural Diversity Convention and its Implications on the International Trade Regime: A critical Comparative Analysis' 42 *Texas International Law Journal* (2006) pp. 191-209; A. Boudier, 'The UNESCO Convention on Cultural Diversity: Treacherous Treaty or Compassionate Compact', 18 *Policy Papers on Transnational Economic Law*, (2005) pp. 1-7; J. Pauwelyn, 'The Unesco Convention on Cultural Diversity, and the WTO: Diversity in International Law making ? *ASIL Insight* (November 15, 2005).

² For a short history of the trade and culture debate, see Ivan Bernier 'Trade and Culture', in Macrory, Patrick F. J., Appleton, Arthur E., Plummer, Michael G. (Eds.), *The World Trade Organization. Legal, Economic and Political Analysis*, Springer, 2005, Vol. II, p. 747. The most recent example of a cultural dispute is that opposing China and the United States in *China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products*, WTO, Request for the Establishment of a Panel by the United States, Doc_ WT/DS363/5, 11 October 2007.

* Mr. Ivan Bernier is professor emeritus at the Université Laval Faculty of Law in Québec City.

coincided with a number of events such as the decision handed down in 1997 by the WTO's Dispute Settlement Body in the case 'Canada – Certain Measures Concerning Periodicals'³, the failure of the OECD negotiations on a multilateral agreement on investments in October 1998⁴ and the failure of the Seattle WTO Ministerial Conference in December 1999⁵. It is in this context that the idea of a new international instrument on cultural diversity gradually emerged, an instrument that would no longer consider the protection and promotion of cultural diversity as an impediment to trade to be addressed from a trade law perspective, but rather as a cultural problem in itself to be addressed from a cultural perspective.

A demand that UNESCO undertake the negotiation of such an instrument was formally submitted to the Organization in February 2003⁶ and the decision to move ahead with the negotiation of a convention regarding "the diversity of cultural contents and artistic expressions" was taken by the General Assembly in October 2003⁷. In October 2005, finally, after three meetings of independent experts and three intergovernmental meetings of experts, the *Convention on the Protection and promotion of the Diversity of Cultural Expressions* was adopted by the General Assembly. In essence, the text in question, recognizing at the outset the distinctive nature of cultural activities goods and services as vehicles of identity, values and meaning"⁸, reaffirms the sovereign right of States "to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory"⁹ and proposes a program of action designed "to protect and promote the diversity of cultural expressions" and "to create the conditions for cultures to flourish and freely interact in a

³ WTO. Dispute Settlement, Canada – Certain Measures Concerning Periodicals, DS 31 (1997)

⁴ During these negotiations, which began at the OECD in 1996, a number of countries spoke in favor of an exception for cultural industries and France formally proposed a draft clause to that effect. The negotiations in question, which were finally abandoned in 1998, prompted a strong reaction from cultural actors in many countries.

⁵ Fred Bergsten, former Assistant Secretary for International Affairs of the U.S. referring to the protests in Seattle, Davos, Bangkok and Washington, which he considered as a superficial manifestation of a very real problem went so far as to declare in 2001 that "the world economy today faces a more fundamental set of challenges because the backlash against globalization is much more than economics. ... There is also a huge cultural dimension which raises a mass of contentious and difficult issues of its own." Institute of International Economics, <http://iie.com>

⁶ UNESCO, Flash Info, 07-02-2003. The demand that an item entitled "Development of an international convention on cultural diversity" be entered on the agenda of the hundred and sixty-sixth session of the Executive Council was made by Germany, Canada, France, Greece, Morocco, Mexico, Monaco and Senegal, all members of the International Network on Cultural Policy (INCP), except Germany. (see <http://unesco.org>)

⁷ UNESCO, General Assembly, Resolution, Resolution 32C34, Desirability of Drawing up an International Standard-Setting Instrument on Cultural Diversity, 13 October 2003. See Records of the General Conference, 32nd Session, Paris, 29 September to 17 October 2003, Volume 1, Resolutions, p. 64.

⁸ Article 1 (g)

⁹ Article 1 (h) and, in a slightly different language, Article 5.1

mutually beneficial manner”¹⁰. Following a rapid succession of events that saw the entry into force of the Convention on March 18, 2007, the first ordinary session of the Conference of Parties in June 2007 and the first ordinary session of the Intergovernmental Committee in December 2007, which itself decided in conclusion of its work to hold an extraordinary session in June 2008 and a second ordinary session in December 2008, the time appears ripe now to ask what potential this Convention holds for the future.

In attempting to answer that question, we shall consider not only “the terms of the treaty in their context and in the light of its object and purpose”¹¹ but also “the preparatory work of the treaty and the circumstances of its conclusion”¹² as well as the developments that have taken place in its implementation so far. Three questions will be examined more closely from that point of view. The first question concerns the purpose and scope of the Convention (how it relates to other aspects of cultural diversity), the second the action plan of the Convention (how it proposes concretely to protect and promote the diversity of cultural expressions) and the third the approach of the Convention in situations where trade considerations interfere with cultural considerations.

1. The purpose and scope of the Convention

In Resolution 32C34, the General Conference decided in 2003 “that the question of cultural diversity as regards the protection of the diversity of cultural contents and artistic expressions shall be the subject of an international convention”¹³. Quite clearly, the purpose of the Convention envisaged was not the protection of cultural diversity in the broad sense of the term (including cultural heritage in all of its forms, cultural development, copyright, multiculturalism, cultural rights, status of the artist, linguistic rights), but rather the protection of a specific aspect of cultural diversity, namely the diversity of cultural contents and artistic expressions¹⁴. Later, in the course of the negotiations, the words “cultural contents and artistic expressions” were replaced by “cultural expressions” for reasons of simplicity and clarity (cultural contents to be known have to be expressed in one form or another and artistic expressions are also cultural). In the Convention as finally adopted, the overall purpose, as expressed in the title and reiterated in Article 1 (a), had become “the protection and promotion of the diversity of cultural expressions”.

¹⁰ Article 1 (a) and 1(b) of the Convention

¹¹ Article 31 of the Vienna Convention on the Law of Treaties

¹² Article 32 of the Vienna Convention on the Law of Treaties

¹³ See supra note 7

¹⁴ The Executive Council of UNESCO itself, before submitting resolution 32C34 to the General Conference, had eliminated three options which had been identified in a preparatory document prepared by the Secretariat (Document 166EX28), namely 1) a new comprehensive on cultural rights, 2) an instrument on the status of the artist and 3) a new protocol to the Florence Agreement of 1950, retaining the fourth option proposed which was that of an instrument on the protection of the diversity of cultural contents and artistic expressions.

The concept of “cultural expressions” occupies a central place in the Convention, being mentioned more than forty times in the document. Article 3 of the Convention, which determines the scope of the Convention, confirms this pre-eminence: “This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions”. The term “cultural expressions”, as defined in Article 4 (3), refers to those expressions “that result from the creativity of individuals, groups and societies and that have cultural content”. Cultural expressions are primarily embodied and conveyed in the “creation, production, dissemination, distribution of and access to cultural goods, services, and activities”.¹⁵ During the negotiations, the reference to the words “cultural goods and services” was the object of lengthy discussions, the United States opposing their use because in their view they had an obvious trade connotation¹⁶. But this appropriation of the words cultural goods and services exclusively for trade purposes was considered by the vast majority of States as not warranted and as a result they were retained.

The overall goal of the Convention, as mentioned before, is to protect and promote the diversity of cultural expressions. In the Preamble of the Convention, it is made quite clear that the diversity of cultural expressions is under pressure. Thus, in the 9th paragraph, the need is recognized “to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment”. In the 19th paragraph, it is also noted “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, they also represent a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries”. The use of the words “protect” and “protection” in that context was again strongly opposed by the United States. However, it was demonstrated during the debates regarding the use of those words that it was conform to the prior practice of UNESCO¹⁷. In the end, the word “protection” was defined in Article 4.7 as “the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions” and the word “to protect” was defined as meaning “to adopt such measures”.

¹⁵ Article 4 (6) of the Convention.

¹⁶ Voir Bernier, Ivan, “La négociation de la convention de l’UNESCO sur la protection et la promotion de la diversité des expressions culturelles », *The Canadian Yearbook of International Law*, Vol. XLIII (2005), p. 3, at 26 and 29-30.

¹⁷ The word “protection” is to be found in the title of three other UNESCO conventions, namely the Convention on the Protection of the Underwater Cultural Heritage of 2001, the Convention on the Protection of the World Cultural and Natural Heritage of 1972 and the Convention on the Protection of Cultural Property in the Event of Armed Conflict of 1954.

The importance of cultural expressions for the protection of cultural diversity must not be underestimated. The Convention in Article 4.1 makes explicit the link between the two when it states that:

Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.

The truth is that cultural expression, as a mode of communication, meets an essential need for every community. It is a key element in the adaptation of different cultures to the transformations imposed by globalization. Cultural creators and cultural players play a primary role in this regard in that they create a forum for critical confrontation between national and foreign values, between values and behaviour of the past and perspectives for the future. In this sense, we can say that the preservation of cultural diversity can only occur through the preservation of cultural expressions. Furthermore, the diversity of cultural expressions being "an important factor that allows individuals and peoples to express and to share with others their ideas and their values"¹⁸, it contributes by this very fact to the public debate and constitutes a significant element of the democratic process. Thus, the preservation and promotion of the diversity of cultural expressions, far from being a minor issue, is proving itself to be one of the major challenges of our time.

The fact that the Convention limits itself to this specific aspect of cultural diversity does not lessen the importance of other aspects of cultural diversity. Indeed, a number of those aspects are already covered by other conventions (this is particularly the case for aspects related to the preservation of cultural heritage, human rights, and intellectual property rights). Furthermore, the Convention itself makes reference to some of those other aspects in its text. These references, which are to be found in the Preamble as well as in some of the Articles of the Convention, are intended to situate the Convention with regard to these other preoccupations without treating them as specific objects of the Convention¹⁹. Article 2 (5), for instance, provides that "since culture is one of the mainsprings of development, the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and to enjoy". This perspective is further developed in Article 13 which deals with the integration of culture in sustainable development²⁰. Another example is linguistic diversity.

¹⁸ Preamble of the Convention, paragraph 13.

¹⁹ The Preamble refers in particular to such aspects as human rights and fundamental freedoms, linguistic diversity, minorities and indigenous peoples, and intellectual property rights.

²⁰ Article 13 reads as follows : "Parties should endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this

It appears first in the Preamble where the 14th paragraph recalls that “linguistic diversity is a fundamental, element of cultural diversity” and subsequently, in Article 6.2 (b), which mentions, among the measures that the Parties can take at the national level, those relating to the language used for cultural activities, goods and services. But the Convention is not concerned with linguistic rights in areas of life others than those that relate to cultural expression, such as education, advertising, consumer protection etc. Finally, although the Convention is practically silent on the issue of heritage preservation for the good reason that it deals with a distinct preoccupation and raises different problems, the fact remains that cultural expressions and heritage are intimately linked since the cultural expression of the present is the cultural heritage of the future.

From what has been said so far concerning the purpose and scope of the Convention, it will be understood also that it does not purport to protect cultures in a sociological and anthropological sense (referring to lifestyles, ways of living together, value systems, traditions and beliefs). But again, there is a close tie between the preservation of cultures in the sociological and anthropological sense, and the preservation of cultures in the sense of a community’s cultural expression. If globalization and the liberalization of trade lead to significant changes in cultures in the anthropological and sociological sense, it doesn’t necessarily mean that such changes should be rejected because they affect the content of the cultures in question. Asserting the contrary would give a set meaning to the notions of culture and cultural identity, a meaning that could only serve those who wanted to use them as instruments of political control. In reality, any culture, if it is to survive, has to adapt over time to a variety of both internal and external changes. And this, as we have seen, is where cultural expression plays a particularly important role.

2. The action plan of the Convention with regard to the protection and promotion of the diversity of cultural expressions

The action plan of the Convention with regard to the protection and promotion of the diversity of cultural expressions has two overall objectives. The first objective is to establish clearly the sovereign right of the States “to maintain, adopt, and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory”²¹, the right in question being a prerequisite for the realization of the second objective. The second objective is, broadly speaking, “to create the conditions for cultures to flourish and to

framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions”

²¹ Article 1 (h) and Article 5.1 of the Convention

freely interact in a mutually beneficial manner"²². This last objective meets three distinct preoccupations relating, successively, (1) to the actions to be undertaken by the Parties on their territory to create an environment which encourages individuals and social groups to create, produce, distribute and have access to their own cultural expressions as well as to the cultural expressions of other countries of the world²³, (2) the actions to be undertaken by the Parties at the international level "to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions"²⁴ and (3) the actions to be undertaken by the Parties "to support cooperation for sustainable development and poverty eradication, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector"²⁵. We shall deal with those various aspects of the action plan of the Convention in that order.

2.1 The sovereign right of States to formulate and implement their cultural policies as a basis for cultural action.

During the negotiations, many delegations expressed the view that the general rule on rights and obligations found in Article 5 was a capital element of the proposed Convention²⁶. In the final text, the importance of the statement concerning the sovereign right of States to formulate and implement their cultural policies in the Convention could not have been made clearer. It appears in Article 1 as a goal of the Convention, in Article 2 as a principle of the Convention and again in Article 5, where it is more fully developed as a right reaffirmed by the Convention. It is further confirmed in Article 6 which states in its first paragraph that within the framework of its cultural policies and measures, "each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory" and then goes on to provide in its second paragraph an illustrative list of such measures. In order to understand the significance of that right in the context of the Convention, it is necessary to go back first to the sources mentioned in Article 5.1, that is, the Charter of the United Nations, the principles of international law and universally recognized human rights instruments.

The right in question is not a new right created by the Convention. It is part and parcel of one of the most basic principle of customary international law, that of State sovereignty, which was to

²² Article 1 (b) of the Convention

²³ Article 7 of the Convention

²⁴ Article 12 of the Convention

²⁵ Article 14 of the Convention

²⁶ Oral Report of the Rapporteur, Mr. Artur Wilczinski at the Closing Session of the First Intergovernmental Meeting of Experts on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, UNESCO, Paris 20-25 September 2004, p. 5

become, after the Second World War, one of the pillars of the Charter of the United Nations²⁷. State sovereignty involves the exclusive right to exercise the competence of a State, independence from other States, as well as the legal equality of States. The concept encompasses all matters in which a State feels justified to intervene, including the choice of political, economic, social, and cultural systems and the formulation of foreign policy. However, the freedom of action of States is not absolute; it remains subject to the respect of their obligations under international law, including under treaties to which they are parties²⁸.

The sovereign right of a State to formulate and implement its cultural policies is also related to another category of rights that have taken a particular significance in international law, that is to say, human rights. Article 5 of the UNESCO Declaration on Cultural Diversity states in this regards:

Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights.

Article 27.1 of the Universal Declaration on Human Rights states that “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits” and Article 15 of the International Covenant on Economic, Social and Cultural Rights reproduces, in a slightly different form, the same view²⁹. What these references to human rights imply, in the specific context of Article 5 of the Convention, is that it is impossible to transpose into reality the right of individuals, to participate in the cultural life of the community, in other words their right to cultural expression, without insuring at the outset the sovereign right of States to adopt policies and measures to protect and promote the diversity of cultural expressions on their territory.

Generally speaking, there was a very large consensus on Article 5.1 and its adoption raised few serious difficulties, presumably because the provision in question essentially reaffirmed an

²⁷ Article 2.1 of the Charter states : The Organization is based on the principle of the sovereign equality of all its Members

²⁸ As clearly explained in the Case of the S.S. Wimbledon, Permanent Court of International Justice, 1923, Series A, no. 1

²⁹ Article 15 paragraph 1 reads as follows: “The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.

existing right. One might query whether it was necessary or useful to include such a provision. The answer, from a cultural perspective, is quite obvious. Article 5.1 was necessary first because it is a reminder that unless States have voluntarily limited their capacity to act in the cultural field, they are totally free to formulate and implement their cultural policies and to adopt whatever measures they consider necessary to protect and promote the diversity of cultural expressions. By the same token, it is a reminder that before making new international commitments, they should take into account their impact on their capacity to formulate and implement their cultural policies. Article 5.1 is important, secondly, because it conveys a strong message that Parties to the Convention will not question measures adopted by other Parties in order to protect and promote the diversity of cultural expressions, provided such measures are consistent with the provisions of the Convention as specified in paragraph 2 of Article 5³⁰.

The assertion in Article 5.2 that “When a Party implement policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of the Convention” must be read in conjunction with Article 2.8 (Principle of openness and balance). The principle in question reads as follows: “When States adopt measures to support the diversity of cultural expressions, they should seek to promote, in an appropriate manner, openness to other cultures of the world and to ensure that these measures are geared to the objectives pursued under the Convention”.³¹ These two provisions, taken together, show quite clearly that the intent of Article 5 has is not to restrict cultural exchanges. A few Members of UNESCO expressed concerns during the negotiations regarding the possibility that Article 5.1 might result in some conflict with other international treaties such as GATT and GATS and asked for the inclusion in 5.2 of the words “and consistent with their international obligations” in the first paragraph. This view was rejected by the majority who considered that the problem raised concerned the relationship between the Convention and other international treaties, a question to be considered at a later stage. Following the adoption of Article 20 (Relationship to other treaties: supportiveness, complementarity and non-subordination) towards the end of the negotiations, it was decided that no changes to Article 5 were necessary.

Article 6 is essentially an illustrative list of measures that Parties may adopt in order to protect and promote the diversity of cultural expressions within their territory. The list is not limitative as can be seen from the use of the words “Such measures may include” immediately before the list as such. The measures themselves are optional and there is no obligation on the Parties to

³⁰ In international law, States are always free to decide whether or not they will question the measures of another State that might be in breach of their rights.

³¹ The original version of Article 2.8 in the Preliminary Draft Convention was more constraining, using the words “commit themselves to guaranteeing, in an appropriate manner, the openness...”

have recourse to any of them. What is striking in that list is the variety itself of the measures that can be used in order to protect and promote the variety of cultural expressions. The obvious message is that protecting and promoting the diversity of cultural expressions is a complex matter and that there is more than one way of approaching this preoccupation depending on the particular conditions and circumstances of each Party. During the negotiations, concerns were again raised by certain States that some of those measures, in particular those envisaged in paragraph 2 (b) and 2 (d), could conflict with existing trade agreements. But as in the case of Article 5, the majority considered that the possibility of conflict between the Convention and the WTO agreements was a matter to be considered at a later stage and that it was up for each party to decide in full knowledge of their cultural needs and of their existing international commitments what measure they would use.

2.2 Creating the conditions for cultural expressions to flourish and to freely interact in a mutually beneficial manner

The second objective of the action plan of the Convention is, in a sense, the counterpart of the first. The Parties, having their sovereign right to formulate and implement their cultural policies confirmed, are expected to create the conditions for cultural expression to flourish and to freely interact in a mutually beneficial manner. This objective is truly at the heart of the Convention and the success of the latter will be assessed in the future by reference to what it will have realized in that respect. As explained previously, this broad objective can be subdivided into three distinct preoccupations that we shall consider now.

2.2.1 Actions to be undertaken by the Parties on their territory

There are basically five different types of actions that should be undertaken by the Parties on their territory according to the Convention. Two of them are directly related to the finality of the Convention. They are found in Article 7 (Measures to promote cultural expressions) and in Article 8 (Measures to protect cultural expressions). The other three are more auxiliary in nature, concerning education and public awareness (Article 9), participation of civil society (Article 10) and integration of culture in sustainable development (13).

Article 7 is much broader in scope than Article 8 and more positive in its approach, effectively projecting an overall picture of what the Convention wants to realize in the future. Implicitly, it reflects the view that the best way of insuring in the long-term the diversity of cultural expressions is to promote its development. Article 7 encompasses questions such as the creation, production, dissemination and distribution of the cultural expressions of the Parties with a particular attention paid to the special needs and circumstances of women as well as various

groups, including persons belonging to minorities and indigenous peoples, access to cultural expressions from other countries of the world and finally recognition of the important contribution of artists and others involved in the creative process, and their central role in the nurturing of the diversity of cultural expressions. This is a vast program that will require a great deal of conviction and efforts to be realized. The Preliminary Draft Convention of the independent experts imposed in this respect a strict obligation to promote the diversity of cultural expressions³². At the December 2004 session of the Drafting Committee where in-depth discussion took place on Article 7.1, a significant number of Committee members considered that the text should not create new rights, a view that was to prevail in the Plenary. What Article 7 says now is that the “Parties shall endeavour to create in their territory an environment which encourages individuals and social groups ...” which, in international law, is a good faith commitment to do their best.

Under Article 8 of the Convention, when a Party determines that there exists on its territory special situations where cultural expressions are at risk, under serious threat, or otherwise in need of urgent safeguarding, it may take all appropriate measures to protect and preserve those cultural expressions in a manner consistent with the provisions of the Convention. When it takes such measures, however, it is asked to report to the Intergovernmental Committee the measures taken to meet the exigencies of the situation, and the Committee may make appropriate recommendations. In its original version, this Article was going much further, providing for action by the intergovernmental Committee that could go as far as to require the relevant Party to take appropriate measures within a reasonable period of time. This version was the object of important modifications and in the final text it was made clear that the intervention of the Committee would be limited to making recommendations. The duty to report the measures to the Committee may still be seen as a form of intervention in the internal affairs of the Party concerned. But the purpose of the Article is quite different. Basically, it puts in place a procedure for helping to those states that, by their own reckoning, are confronted with situations of the type described in Article 8. Article 8 should be read from that point of view in conjunction with Article 12, which asks that the Parties, when they develop their bilateral, regional and international cooperation to create the conditions conducive to the promotion of the diversity of cultural expressions, should take particular account of Articles 8 and 17, and Article 17 of the Convention which says that “States shall cooperate in providing assistance to each other, and, in particular to developing countries, in situations referred to under Article 8”. How this will work out in practice

³² Article 7.1 of the Preliminary Draft Convention read as follows: “States Parties shall provide all individuals in their territory with opportunities: (a) to create, produce disseminate, distribute, and have access to their own cultural expressions, goods and services, paying due attention to the special circumstances and needs of the various social groups, in particular minorities and indigenous peoples; (b) to have access to the cultural expressions, goods and services representing cultural diversity in other regions of the world”: UNESCO, Doc. CLT/CPD/2004/CONF.607/6, 23 December 2004.

remains to be seen because if the situations described in Article 8 arguably are numerous, it is far from sure that the Parties themselves will readily accept to involve the Intergovernmental Committee in their internal matters. But further development on this question may not be too long in waiting. It is interesting to note in this regard that the Conference of Parties, at its first ordinary session in June 2007, requested the Intergovernmental Committee to prepare operating guidelines, giving priority attention to Articles 7 and 8, 11 to 17 and 18 of the Convention and to submit to it at its second ordinary session (scheduled for December 2008) the result of its work for consideration and approval³³.

The other types of actions to be undertaken by the Parties on their territory are essentially in support of the previous two. The first one concerns education and public awareness (Article 10). The Parties are asked among other things to encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions and to encourage creativity and strengthen production capacities by setting up educational, training and exchange programs in the field of the cultural industries. Article 10, not being in the list of Articles designated for priority consideration for the purpose of developing operational guidelines, will therefore have to wait. But in the meantime, this does not prevent individual initiatives by the Parties to explain for example the importance of the protection and promotion of the diversity of cultural expressions.

The second type of actions concerns civil society. Article 11 acknowledges that civil society has an important role to play in protection and promoting the diversity of cultural expressions and asks the Parties to encourage the participation of civil society in their efforts to achieve the objectives of the Convention. The Intergovernmental Committee, at its first session in December 2007, examined, as requested by the Conference of Parties, the question of the role and participation of civil society in the implementations of the provisions of the Convention³⁴. Following the debate on this issue, it invited the Secretariat to prepare draft operational guidelines that would include criteria for the accreditation of civil society having interests and activities in the fields covered by the Convention as well as modalities by which representatives of civil society can contribute to the Committee's work and implementation of the Convention. It also requested the Secretariat to organize, with the full participation of all Parties to the Convention, a session of exchange of views with representatives of civil society, on the role and participation of civil society. The importance that the Committee gave to that issue and its decision to come back to it at an extraordinary session to be held in June 2008 augurs positively for the future.

³³ UNESCO, Doc. CE/1.CP/CONF/209/Resolutions, Resolution1.CP6, p. 13

³⁴ UNESCO, Doc. CE/1.IGC/Dec., Decision 1.IGC 5, December 13, 2007

The third and last type of supportive actions concerns integration of culture in sustainable development. Article 13 states that “Parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions”. The signification of that provision is not obvious at first sight but it becomes clearer when it is read in conjunction with the principle of the complementarity of economic and cultural aspects of development (Article 2.5) and with the principle of sustainable development (Article 2.6) and, more importantly, in light of the historical involvement of UNESCO in the question of the contribution of culture to development. In 1970, UNESCO organized an Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies in Venice that was the first of a series of regional conferences aimed at developing ideas on the issue of determining how cultural policies might be integrated into development strategies³⁵. These activities led to the UN’s declaration of the World Decade for Cultural Development 1988-1997, whose mission was to place culture at the center of development³⁶ and whose primary achievement was to create the independent World Commission on Culture and Development and publish the Commission’s report, entitled *Our Creative Diversity*³⁷. At the end of the World Decade for Cultural Development, UNESCO organized an important conference on “Cultural Policies for Development” to be held in Stockholm in 1998. The primary objective of the conference was to transform the new ideas in the World Commission on Culture and Development Report into policies and practices³⁸. The ideas expressed at this conference were further discussed during a conference jointly held by the World Bank and UNESCO in October 1999 in Florence, entitled *Culture Counts: Financing, Resources and the Economics of Culture in Sustainable Development*³⁹, and were also discussed by the Inter-American Development Bank⁴⁰. Finally, in November 1999, a Round Table of Ministers of Culture organized for the 30th session of the UNESCO General Conference examined the general theme of *Culture and Creativity in a Globalized World*⁴¹. It is in this context that the demand of Article 13 that culture be integrated in the development policies of the Parties at all levels intervenes. Article 13, from that point of view, may be seen as a continuation of that development but with a particular

³⁵ See UNESCO, *UNESCO and the Issue of Cultural Diversity: Review and Strategy, 1946-2004*, 2004 : http://portal.unesco.org/culture/en/ev.phpURL_ID=12899&URL_DO=DO_TOPIC&URL_SECTION=201.html

³⁶ UNESCO, *Guide pratique de la Décennie mondiale du développement Culturel 1988-1997*, Vendôme, Presses universitaires de France, 1987, Annexe, pp. 17-18

³⁷ UNESCO, World Commission on Culture and Development, Report: *Our Creative Diversity*, 1995

³⁸ See: http://www.unesco.org/culture/laws/stockholm/html_eng/index_en.shtml

³⁹ See : http://www.unesco.org/culture/development/highlights/activities/html_fr/florence.htm

⁴⁰ See: Inter-American Development Bank, Press release NR-60/99, “Forum on Development and Culture Stresses Role of Citizen Participation”, 13 March 1999.

⁴¹ See : http://www.unesco.org/culture/development/highlights/activities/html_fr/roundtable1.htm

emphasis on aspects relating to the protection and promotion of the diversity of cultural expressions. Interestingly, at its first regular session in December 2007, the Intergovernmental Committee invited Parties to the Convention to make proposals by the end of June 2008 on the modalities for implementing Article 13 regarding the integration of culture in sustainable development policies, with a view to their examination by the Committee at its session in December 2008⁴².

2.2.2 The actions to be undertaken by the Parties at the international level

The actions envisaged here concern international cooperation in general (leaving aside cooperation for development) and are elaborated in Articles 9 (Information sharing and transparency), 12 (Promotion of international cooperation) and 19 (Exchange, analysis and dissemination of information). Since Article 12 is of a general character we shall consider it first, and then examine Articles 9 and 19 together as they both deal with information.

Article 12 encourages the Parties to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions and draws up a list of specific goals to be pursued in those contexts. The list in question includes the facilitation of dialogue among Parties on cultural policy, professional and international cultural exchanges and sharing of best practices, the reinforcement of partnerships with and among civil society, non-governmental organizations and the private sector, the promotion of the use of new technologies to enhance information sharing and the conclusion of co-production and co-distribution agreements. Regarding the facilitation of dialogue on cultural policy and international cultural exchanges, there are already a number of multilateral and regional organization that pursue more or less similar objectives, such as UNESCO, the International Network on Cultural Policy, the International Organization of the Francophonie, the Council of Europe, the Convenio Andres Bello in Latin America etc. and the Parties should work with those networks to stimulate dialogue on those issues that relate more specifically to the protection and preservation of the diversity of cultural expressions. The last goal mentioned in the list, the encouragement to conclude co-production and co-distribution agreements, is bound to raise some questions with regard to its compatibility with the WTO, but there again it is impossible to conclude from a trade law perspective that such a practice would be incompatible with existing trade commitments in all circumstances⁴³. From a cultural perspective, however, there is no doubt that such agreements have played and still play an important role in the development of the cinema and television industry of developing countries. Article 12 will be on

⁴² UNESCO, Doc. CE/07/1.IGC/Dec. 1. IGC 5B

⁴³ See on this Hahn, *supra*, note 1, p. 541-542.

the agenda of the Intergovernmental Committee for consideration at its second regular session in December 2008.

Article 9 and 19 of the Convention deal with an important aspect of the Convention, which is information gathering and information sharing. It is interesting to point out in this respect that Article 9 is one of the few provisions of the Convention which can be described as truly compulsory. It reads as follows:

Parties shall:

(a) provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level;

(b) designate a point of contact responsible for information sharing in relation to this Convention;

(c) share and exchange information relating to the protection and promotion of the diversity of cultural expressions.

The reports mentioned in paragraph (a) are to be sent to the Intergovernmental Committee who is responsible to transmit them to Conference of Parties together with comments and a summary of their contents⁴⁴. The Conference itself, according to Article 22.4 (b), receives and examines the reports in question.

Article 9 sets out the basic mechanism put in place by the Convention for monitoring the implementation of the Convention by the Parties. It offers an opportunity to each Party to take the measure of what already exists in other Parties, to reflect on their own attainment of the Convention objectives and to identify useful levers that could serve for the purpose of protecting and promoting the diversity of cultural expressions. In this regard, Article 9 must be read in light of Article 19.1 of the Convention which specifies that "The Parties agree to exchange information and share expertise concerning data collection and statistics on the diversity of cultural expressions as well as on best practices for its protection and promotion". Cultural statistics play a particularly important role when the time comes to formulate and implement cultural policies and to adopt measures to protect and promote the diversity of cultural expressions. Unfortunately, cultural statistics are lacking in many countries of the world, particularly in developing countries, and this may prove with time a serious impediment to the implementation of the Convention. A serious effort will have to be made to correct this situation. Article 19 of the Convention offers some hope in this respect when it calls on UNESCO to "facilitate, through the use of existing mechanisms within the Secretariat, the collection analysis and dissemination of all

⁴⁴ Article 23.6 (c) of the Convention

relevant information, statistics and best practices (paragraph 2) and, in order to facilitate the collection of data, to “pay particular attention to capacity-building and the strengthening of expertise for Parties that submit a request for such assistance” (Paragraph 4). But the financial and technical resources will have to be found and this is where actions of the Parties in support of cooperation for development become important. Meanwhile, considering the key role that the collection, exchange, analysis and dissemination of information will play in the implementation of the Convention, it may be useful to start thinking immediately about the operational guidelines that will be necessary to implement the pertinent provisions of the Convention, even if Article 9 and 19 are not among the articles that have been given priority attention by the Conference of Parties.

2.2.3 Actions in support of cooperation for development

Leaving aside Article 17, which simply asserts that the Parties shall cooperate in providing assistance to each other, in particular to developing countries, in situation of serious threat to cultural expressions, there are four Articles in the Convention that deal specifically with cooperation for development. These Articles must themselves be read in light of the principle of international solidarity and cooperation (Article 2.5) which says that “International cooperation and solidarity should be aimed at enabling countries, especially developing countries, to create and strengthen their means of cultural expressions, including their cultural industries, whether nascent or established, at the local, national and international levels”.

The first one, Article 14, enumerates different means that Parties could use in order to foster the emergence of a dynamic cultural sector in developing countries. The means in question are regrouped in four categories which are: 1) the strengthening of the cultural industries in developing countries; 2) capacity-building; 3) technology transfer; and 4) financial support. For each category, various types of actions are proposed including, under category 4, the establishment of an International Fund for Cultural Diversity. The list of means enumerated in Article 14 is characterized by its pragmatic approach to cultural development, closely reflecting in that the orientation suggested by the principle of international cooperation and solidarity. The list in question, apart from guiding the actions of the Parties, contributes to delimit the types of actions to be undertaken under Article 15 (collaborative arrangements) 16 (preferential treatment

for developing countries) and 18 (International Fund for Cultural Diversity), the three practical mechanisms envisaged by the Convention to put into effect Article 14⁴⁵.

Article 15 encourages “the development of partnerships, between and within the public and private sectors and non-profit organizations, in order to cooperate with developing countries in the enhancement of their capacities in the protection and promotion of the diversity of cultural expressions”. The partnerships envisaged have something in common with those developed in the context of UNESCO’s Global Alliance for Cultural Diversity and could certainly benefit from the experience gained in that context⁴⁶. However, the narrower concern of the Convention and its focus on the development of cultural policies and measures as means of protecting and promoting the diversity of cultural expressions will no doubt impose a certain degree of adaptation. The partnerships envisaged in Article 15 could benefit also from the resources of the International Fund for Cultural Diversity but, as we shall see in discussing the Fund, all decisions to this effect must remain the exclusive purview of the Intergovernmental Committee deciding on the basis of guidelines determined by the Conference of Parties. At its December 2007 first ordinary session, the Intergovernmental Committee decided to put on the agenda of an extraordinary session to take place in June 2008 issues related to the elaboration of operational guidelines concerning among other topics, the concept of, and modalities for, partnerships⁴⁷.

The second mechanism envisaged by the Convention is the granting of preferential treatment for developing countries (Article 16). This preferential treatment is to be granted more specifically to artists and other cultural professionals, as well as to cultural goods and services from developing countries. In the case of artists and other professionals, the preference could apply either at the moment of entry into the country (that would not necessarily be easy in view of the security questions that would inevitably be raised but not impossible either judging by Article 3 of the Protocol on Cultural Cooperation annexed to the EU-CARIFORUM States Economic Partnership Agreement of December 2007⁴⁸) or once inside (where the preference could more realistically apply to grants, admissions to school, colleges or universities, etc.). In the case of cultural goods and services, various options would be open but they would have to be considered in light of the rights and obligations of the Parties in other agreements, particularly trade agreements. The negotiators of Article 16 were rather circumspect from that point of view, qualifying the good faith

⁴⁵ At the extraordinary session of the Intergovernmental Committee of December 2007, it was decided that the question of the orientations on the use of the Fund (Article 18) would be examined together with that of cooperation for development (Article 14): CE/1.IGC/Dec” Decision !.IGC 7

⁴⁶ See for more information concerning the Global Alliance : http://portal.unesco.org/culture/en/ev.php-URL_ID=24468&URL_DO=DO_TOPIC&URL_SECTION=201.html

⁴⁷ CE/07/1.IGC/Dec, p. 20

⁴⁸ For the text of the Protocol, see :

www.acp-eu-trade.org/library/files/CARIFORUM-EC_EN_161207_EPA-main-text.pdf

commitment to grant preferential treatment with the words “through appropriate and legal frameworks”. But the granting of preferential treatment to developing countries is not something uncommon, particularly in the context of the WTO⁴⁹. The possibilities are there and from a cultural perspective could yield interesting results. The interest and potential of Article 16 were considered important enough to justify the Intergovernmental Committee

to invite the Secretariat to select in consultation with the Chair of the Committee, six qualified experts, representative of the different perspectives relating to preferential treatment (Article 16 of the Convention) and coming from countries in different stages of economic development. Each of the experts will be tasked with preparing a factual document on this issue, enumerating definitions, regulations and existing practices, which will be submitted to the Committee for examination at its session in December 2008⁵⁰.

The third and last mechanism envisaged by the Convention is the International Fund for Cultural Diversity. As we have seen previously, cultural policies and measures play a crucial role in the protection and promotion of cultural expressions. The developed countries have understood this, and the vast majority of them have put in place an elaborate array of cultural policies and measures that substantially meet their needs. The developing countries also have cultural policies and measures, but they tend to be much less elaborate and may not be implemented for lack of sufficient funds. In this light, the Fund is seen as a concrete means of helping them.

The key provision concerning the Fund is Article 18 which creates it. With the exception of the rules on funding, Article 18 is virtually identical to Article 25 of the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage* and Article 15 of the 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage*. With respect to funding, however, there is a major difference. In the case of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, the parties are under no obligation to contribute to the Fund, whereas the opposite is true for the other two conventions. The decision to make Fund contributions by the Parties voluntary under the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* will undoubtedly have disadvantages. One very serious disadvantage is the resulting uncertainty about regular contributions to the Fund, and the subsequent challenges of developing a structured approach to assisting developing countries in the short and medium term. To remedy this situation, an effort will have to be made not only to encourage as many Parties as possible to contribute to the Fund “on a regular basis,” but also to

⁴⁹ The WTO agreements include numerous provisions giving developing and least-developed countries special rights or extra leniency — “special and differential treatment”. Among these are provisions that allow developed countries to treat developing countries more favorably than other WTO members.

⁵⁰ Decision 1.IGC 5 B of the Intergovernmental Committee

identify alternative funding strategies based on the other funding modes mentioned in Article 18. To do so, however, the funding issue will need active, ongoing attention⁵¹.

The first mention of the Fund in the Convention, as we have seen previously, is in Article 14 which lists various means to foster the emergence of a dynamic cultural sector in the developing countries. The specific reference to the Fund as a means of financial support in the last paragraph of the article suggests that it be used in relation to the means of action envisaged in the preceding paragraphs. Article 18.5 stipulates that the Intergovernmental Committee may accept contributions and other forms of assistance for general and specific purposes relating to specific projects, provided that it has given these projects its approval. Grounds for refusing contributions are mentioned in Article 18.6, i.e., that no political, economic, or other conditions incompatible with the objectives of the Convention may be attached to contributions made to the Fund. Article 18.4 of the Convention stipulates that the use of Fund resources shall be determined by the Intergovernmental Committee on the basis of guidelines set out by the Conference of Parties.

At its December 2007 session of the Intergovernmental Committee, in answer to the request of the Conference of Parties that the Committee submits to it for approval at its second ordinary session in 2009 draft guidelines on the use of the resources of the Fund, a lengthy discussion on that topic took place. At the end of the discussion, it was decided to continue the preparation of the operational guidelines for further discussion at the second ordinary session of the Committee in December 2008 and request was made to the Secretariat to prepare, in light of the debates of the first session and of the written contributions to be submitted to the Secretariat before the end of February 2008, an interim report to be presented at the extraordinary session of June 2008⁵². Quite clearly, there is a strong will among the Parties to the Convention to see the Fund put into operation as quickly as possible. Already a number of them have announced their intention to contribute to it and the amounts effectively pledged at the end of the December 2007 session of the Intergovernmental Committee already exceeded one million dollars.

3. The potential conflicts between the Convention and other agreements

During the negotiations, the Convention has been characterized by certain States as intended to subtract culture from trade agreements, a view that has also been picked up by some writers⁵³.

⁵¹ See Ivan Bernier, *An Important Aspect of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions: The International Fund for Cultural Diversity* (2007), p.17 : see <http://www.diversite-culturelle.qc.ca/index.php?id=133&L=1>

⁵² UNESCO, doc. CE/07/1.1GC/Dec., p. 21 (Decision 1.1GC 6)

⁵³ See for instance M. Hahn, *supra* note 1, p. 515. The author writes, speaking of the Convention: "Its *raison d'être* is to create a safe haven for protectionist measures aimed at ensuring cultural diversity,

In support of that view, reference is made to specific provisions of the Convention that allegedly have the potential to conflict with existing or future trade agreements, such as Articles 6.2 (b) and (d), Article 8 (measures to protect cultural expressions at risk), Article 12 (e) (co-production and co-distribution agreements) and Article 16 (preferential treatment for developing countries). Such conflicts effectively cannot be excluded but there is no certitude on the other hand that they would take place and that holds true even when the question is examined from a trade law perspective. Depending on the circumstances, those measures could be used without entering at all in contradiction with trade agreements or other agreements. Many other conventions such as environmental conventions, health conventions or labor conventions also have the potential to conflict with trade agreements but this has rarely, if ever, given rise to actual conflicts. Furthermore, it is important to point out that the possibility of conflicts between the Convention and trade agreements appears rather limited considering the limited number of strict commitments imposed to the Parties to the Convention. As we have seen in the previous section, the essential trust of the work program of the Convention is geared towards the development in the territory of the Parties of an environment encouraging individual and social groups to create, produce, distribute and have access to their own cultural expressions and to the cultural expressions of other countries of the world, something that can hardly be considered at first sight as threatening the WTO.

However, since the possibility of conflict could not be totally discarded, it had to be faced. From a cultural point of view, the solution researched was one that would make sure that cultural concerns were taken into consideration without undermining prior commitments of the Parties. This is precisely what Articles 20 and 21 of the Convention pretend to do. It remains to see how they operate.

3.1 *The relationship between the Convention and other treaties (Article 20)*

Article 20 of the Convention reads as follows:

1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,

(a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and

read: For allowing WTO members to legally provide shelf-space for domestic productions in television programs and cinemas” (p. 533). But having said that, the author curiously continues: “The purpose to serve as an ersatz cultural exception is underlined by the almost complete lack of enforceable substantive provisions and a dispute settlement mechanism worth mentioning only as being reminiscent of the very early days of modern international law”.

(b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

It is only at the very end of the negotiations that Article 20 was finally adopted, after complex and lengthy discussions. For those who saw the Convention as a disguised attempt to subtract culture from the WTO, it had to be clearly stated that the Convention would in no circumstances prevail over trade agreements. For the vast majority, however, cultural concerns had to find their place among other legitimate concerns and for that, it was necessary that the Convention clearly asserts the non-subordination of the latter to other international agreements.

Those two seemingly contradictory views have found their way in the text finally adopted. A first reading of Article 20 immediately reveals a certain tension between its first and second paragraphs. The first one, in a rather elaborate language, is manifestly intended to provide a contextual basis for the interpretation of the second. Without entering into the details of the negotiations on Article 20, it is easy to see that paragraph 2 generally speaking is an answer to the trade preoccupations of the minority and that paragraph 1 reflects the cultural preoccupations of the majority. Since it is largely agreed that paragraph 2 adequately protects the trade concerns of WTO members (asserting that the Convention cannot “be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties” is another way of saying that it cannot prevail over those treaties)⁵⁴, we shall concentrate our attention here on the contribution of paragraph 1 to the cultural concerns of the Parties to the Convention.

The paragraph begins with a reminder that the parties shall perform in good faith their obligations under the Convention and all other agreements to which they are parties. This is nothing more than a restatement of a basic principle of international law, that of good faith, but it is interesting to note that the obligation concerns equally the Convention and the other agreements. Then the paragraph goes on to elaborate on the type of conduct expected from the Parties acting in good faith. There are three elements in that paragraph that can be considered as addressing specifically cultural concerns. The first is the statement regarding the non-subordination of the Convention to other treaties, the second the reference to mutual supportiveness and the third the obligation made to the Parties to take into account the relevant provisions of the Convention

⁵⁴ Article 20.2 discards two possibilities regarding the impact of the Convention on other treaties. First it eliminates the possibility of looking at the Convention as an application of Article 41 of the Vienna Convention (Agreement to modify multilateral treaties between certain of the parties only); second, it eliminates the possibility that the Convention, to the extent that it is considered as related to the same subject as the other treaties, modifies the right and obligations of other treaties entered into force at an earlier date (Article 30.3 and 30.4 of the Vienna Convention).

when they interpret or apply other treaties or when they enter into other international obligations. There is a common thread between them: they convey the same message that protecting and promoting the diversity of cultural expressions is a concern that has to be taken into account on a footing of equality with other concerns.

This is obviously the message conveyed by the affirmation regarding the non-subordination of the Convention. Article 30 of the *Vienna Convention on the Law of Treaties* gives the following examples of situations where a treaty will be considered as subordinate to another treaty. This happens when a provision in a treaty explicitly envisages such a situation. Article 30.2 of the Vienna Convention states in this respect: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty will prevail". But this is not what Article 20.2 of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* says. It does not use the expressions "subject to" and "incompatible with" to describe the relationship between the Convention and other treaties. What it does instead is to proclaim in clear terms that the Convention will not modify the rights and obligations of the Parties under any other treaties to which they are parties. In other words, it will not prevail over those other treaties. Now this is not the same as saying that the Convention is subordinate to those other treaties as some writers affirm⁵⁵. When both paragraph 1 and paragraph 2 are read together, it becomes clear that if the Convention does not prevail over the other treaties, the other treaties themselves do not prevail over the Convention. In other words, they stand on an equal footing.

But the Convention is not satisfied with this neutral solution. It goes on to suggest positive ways of addressing the interface between trade and culture. It asks, in sub-paragraph 20.1 (a), that the Parties shall foster mutual supportiveness between the Convention and other treaties. In other words, they should make efforts in good faith to accommodate both the cultural concerns and the trade concerns. This, however, is not a one way operation as the word "mutual" clearly suggests. To the extent that the Parties are members of both the Convention and of the trade agreements, the effort to reconcile the divergences should operate in both contexts. This is confirmed by the demand, in sub-paragraph 20.1 (b) that the Parties take into account the relevant provisions of the Convention when they interpret and apply the other treaties or when they enter into other international obligations.

The language of Article 20.1 (b), it must be noted, imposes a positive duty on the Parties to take into account the relevant provisions of the Convention. The expression "to take into account" is sometimes seen as a weak obligation because it does not insure a specific result. But this is a

⁵⁵ M. Hahn, *supra*, note 1, p. 546.

misunderstanding of the nature of the obligation which is not a substantive obligation but a procedural obligation. Now procedural obligations are not insignificant⁵⁶. Depending on the context, the non-respect of an obligation to take into account may be sufficient to invalidate a process or a decision. The scope of an obligation of this type is normally clarified by precisions concerning on the one hand what is to be taken into account and on the other hand the circumstances that give rise to the obligation. Regarding Article 20.1 (b) of the Convention, what has to be taken into account are “the relevant provisions of the Convention”. This is rather vague and leaves much room for appreciation to the Parties. But the circumstances which give rise to the obligation are much more specific: it is when they interpret or apply other treaties or when they enter into other international obligations. This is precise enough to allow a question regarding whether, on a specific issue, the taking into account has taken place, which could be ascertained by looking at the practice of the individual Parties. Apart from putting pressure on them to clarify their positions, this would not necessary yield a concrete result as the Parties individually are not in a position to influence the application or the interpretation of a treaty or, for that matter, the content of a new treaty. A more practical way of realizing that goal is that proposed in Article 21 which deals with international consultation and coordination to promote the objectives and principles of the Convention in other international forums.

3.2 International consultation and coordination (Article 21)

According to Article 21, not only do the Parties undertake to promote the objectives and principles of the Convention in other international forums but they shall also “consult each other, as appropriate, bearing in mind these objectives and principles”. The original version of this Article in the preliminary Draft Convention provided that this consultation would take place within UNESCO⁵⁷. During the negotiations, the reference to UNESCO was deleted, leaving it to the Parties to organize such consultation. But they were not left entirely at themselves. In the final text of the Convention, mandate is given to the Intergovernmental Committee to “establish procedures and other mechanisms for consultation aimed at promoting the objectives and principles of the Convention in other international forums”⁵⁸. It is difficult for the moment to tell when and how these procedures and mechanisms will be put in place. Article 21 was not among the provisions of the Convention identified by the Conference of Parties for priority consideration by the Intergovernmental Committee.

⁵⁶ As the Dispute Settlement Body of the WTO made clear in the case of European Communities – Measures Affecting the Approval and Marketing of Biotech Products, case DT/DS291, 29 September 2006 when it verified if the conditions for the taking into account of the 1992 Convention on Biological Diversity and 2000 Cartagena Protocol on Biosafety were met.

⁵⁷ Article 13 of the Preliminary Draft Convention: UNESCO, Doc. CLT/CPD/2004/CONF.607/6, December 2004

⁵⁸ Article 23.6 (e) of the Convention

Nevertheless, since sooner or later the matter will have to be considered, it may be useful to throw some preliminary reflections concerning the types of procedures or other mechanisms for consultation that could be put in place. Considering the well known concern of the Parties regarding initiatives that tend to burden the functioning of the Convention, it would seem indicated to proceed in that respect with a step by step and pragmatic approach. An approach for instance that would build on the work done by the Conference of Parties, the Intergovernmental Committee and the Secretariat for the elaboration of operational guidelines regarding the implementation and application of the provisions of the Convention. This approach, as far as can be determined, begins with a preliminary phase centers on a definition of the terms of the question and the preparation of background material to serve as a starting point for the consultation of the Parties. The second phase is that of the consultation of the Parties themselves in order to obtain their viewpoint on the question at issue, This is followed by a third phase which is that of coordination between the parties in order to develop a common perspective on how to implement the provision concerned. When the question at issue is one that has the potential to interfere with other international agreements, as for instance in the case of Article 16 that deals with preferential treatment for developing countries, the Parties could subsequently undertake, in a fourth phase, to promote their view on this specific subject in the other international forums potentially concerned, such as the WTO, the CNUCED, or the United Nations Development Programme. With the experience gained, the procedure and mechanisms could be refined and other subjects explored that relate either to the implementation of the Convention itself or to developments that take place in other forums and that could potentially interfere with the Convention. In this way, mutual supportiveness could concretely develop between the Convention and other treaties. However, to achieve such a result, the subject of the elaboration of operational guidelines concerning Article 21 still has to be put first on the agenda of the Conference of Parties and second on that of the Intergovernmental Committee (the next Conference of Parties being scheduled for June 2009). But this procedure, judging by the mandate given to the Intergovernmental Committee in Article 23, would not exclude initiatives by the Parties to have the question of the establishment of “procedures and other mechanisms for consultation” put on the agenda of the Intergovernmental Committee in the meantime⁵⁹.

CONCLUSION

⁵⁹ Contrary to Article 23.6 (b) which gives mandate to the Intergovernmental Committee to “prepare and submit for approval by the Conference of Parties, upon its request, the operational guidelines for the implementation and application of the provisions of the Convention”, Article 23.6 (e), without making reference to a prior request given by the Conference of Parties, gives mandate to the Intergovernmental Committee to “establish procedures and other mechanisms for consultation...”

Ever since it was launched in 2003, the project of a new international convention on the protection of the diversity of cultural contents and artistic expressions has received a remarkable degree of support from the Members of UNESCO. Many observers have stressed the dynamism that has marked not only the negotiation of the Convention but also its ratification and the first meetings of the Conference of Parties and of the Intergovernmental Committee. This dynamism was driven by an obvious desire to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning, to protect and promote as a consequence the diversity of cultural expressions and to create the conditions for cultures to flourish and freely interact in a mutually beneficial manner.

Our analysis of the Convention was intended to clarify its scope and to highlight its potential as a cultural instrument. We have seen in that respect that the negotiators have succeeded in elaborating an international instrument whose basic objectives are clear, that has a coherent structure of intervention and whose legal status among other international instruments is one of equality. But that does not mean that the Convention is beyond criticism. It would be easy to point out for instance that the Convention, when compared to WTO agreements, has practically no compulsory obligations and no compulsory dispute settlement mechanism accompanied by sanctions⁶⁰ and to conclude that the best forum for resolving the interface between culture and trade remains the WTO itself⁶¹. But two remarks must be made in that respect. The first one is that such a judgment takes for granted that the WTO is the ultimate forum for addressing important issues of international governance. Leaving aside the fact that the WTO has enough problems of its own for the moment, one may certainly question, from a global governance point of view, the need to give a quasi constitutional status to an organization that views reality from an exclusively commercial and economic view point. The second clarification is that constraint is not the only way to give life to a convention, especially in areas where it does not appear particularly suited, such as culture. More important perhaps than legal constraint is the conviction of the signatory Parties that they are pursuing a worthwhile goal and their political will to realize that goal. Now if there is one lesson to learn in that respect from the process that has led to the adoption of the Convention and to its prompt ratification, it is that a strong conviction shared by a

⁶⁰ This does not mean that the procedure will remain unused. It must be remembered that the procedure in question can be engaged upon the request of only one of the parties to a dispute, which means that if disputes actually arise, chances are that the conciliation procedure will be used: see Article 25 of the Convention and Annex.

⁶¹ This is the conclusion reached by Tania Voon in her 2007 book entitled « Cultural Products and the World Trade Organization ». See note 1, p. 253. In the final analysis, her main argument for that conclusion is that the Convention could diminish the effectiveness of the WTO, which remains a one-sided view of what is at stake. Her solution for dealing with the interface commerce/culture in the context of the WTO, judging from the experience of the past, appears as a remote possibility. See also for a similar viewpoint, Peter Van den Boosche, *supra* note 1.

very large number of States can go a long way in ensuring the success of a convention. In this sense, one can say that the Convention on the Protection and Promotion of the Diversity of Cultural Expressions is a cultural instrument that really stands at the junction of law and politics.