

**PRELIMINARY DRAFT OF THE CONVENTION
ON THE PROTECTION OF THE DIVERSITY OF CULTURAL CONTENTS
OF ARTISTIC EXPRESSIONS**

ANALYSIS AND COMMENTARY

BY

IVAN BERNIER

(1): Mr. Ivan Bernier is an emeritus professor at Université Laval Faculty of Law in Québec, Canada. He is one of the independent experts appointed by the UNESCO Director-General to develop the preliminary draft Convention on the Protection of Cultural Contents and Artistic Expressions

(2): To help you read and understand Professor Bernier's study, please refer to the official preliminary draft convention:
http://portal.unesco.org/culture/fr/file_download.php/35a6b86d9e15924177c3fd96c3f2d396Fr-ProjetConv-conf201-2.pdf (French)
http://portal.unesco.org/culture/en/file_download.php/1076646ddafe81baa79c6213f7a9190eEng-PreliminaryDraftConv-conf201-2.pdf (English)

(3): The Government Secretariat for Cultural Diversity (GSCD) of Ministère de la Culture et des Communications (MCC) du Québec wish to thank the Intergovernmental Agency of the Francophonie (IAF) for kindly authorizing him to translate and post this text on his website:

http://www.mcc.gouv.qc.ca/international/diversite-culturelle/eng/pdf/draft_analysis-commentary_2004.pdf (English)
http://www.mcc.gouv.qc.ca/international/diversite-culturelle/esp/pdf/anteproyecto_analisis-comentarios_2004.pdf (Spanish)

INTRODUCTION

1. Subject of the convention

Under the terms of the mandate given by the General Conference to the Director General of UNESCO, the convention addresses 'the protection of the diversity of cultural contents and artistic expressions.' Its purpose is not to protect cultural diversity at large (i.e., encompassing aspects as diverse as the sum of distinctive traits distinguishing a society or group, or in other words, culture in the sociological sense, cultural rights, cultural heritage in all its forms, copyright, cultural expression, multiculturalism), but rather a specific aspect of cultural diversity, the diversity of cultural contents and artistic expressions. This is not to say that the convention has no relation to these other aspects of cultural diversity. However, to the extent that a relation is established, it must contribute to achieving convention goals. A number of these other aspects of cultural diversity, it is necessary to recall, have already been taken into consideration in other conventions. Should amendments or additions to these documents be required, it is not the role of the future convention on the protection of cultural contents and artistic expressions to make them.

The expression 'diversity of cultural contents and artistic expressions' found in the title has been interpreted as referring to the diversity of cultural expressions in a broader sense. It is this terminology, defined in consequence, that is used throughout the convention.

2. General organization of the preliminary draft of the convention:

The preliminary draft is composed of a preamble, six chapters, and four annexes. The first two chapters, respectively entitled “Objectives and Guiding Principles” and “Scope of Application and Definitions,” circumscribe the scope of the convention. Chapter 3, the longest, which deals with the rights and obligations of States parties, is the instrumental section, and sets out the means to achieve the objectives of the convention. It is subdivided into two sections, the first on rights and obligations at the national level, and the second on rights and obligations at the international level. Chapter 4 is composed of a single article on the relationship of the convention to other international instruments. Chapter 5, entitled “Follow-up Bodies and Mechanisms,” describes the mechanisms required for convention implementation and measures that will give the convention binding force. The sixth and final chapter, entitled “Final Clauses,” assembles a series of provisions typically found in international conventions concerning issues such as ratification, accession, entry into force, denunciation, amendments, authoritative texts, and registration. As for the annexes, the first two are composed of illustrative lists that provide a more complete definition of the “cultural goods and services” and “cultural policies” referred to in Chapter 2. The last two annexes spell out the arbitration and conciliation procedures envisaged under the convention.

Regarding substance, the draft convention is a response to the observation in the preamble to the effect 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.” The response is structured around several mutually supportive basic ideas that shed light on how the convention will work. The first of these ideas is that it is impossible to secure the right of individuals, groups, and societies to create, disseminate, distribute and have access to cultural goods and services - or in other words their right to express themselves culturally - without first ensuring the sovereign right of states to adopt policies and measures to protect and promote the diversity of cultural expressions within their territory. The second idea is that in consideration of this right, states parties must undertake to take positive action to preserve and promote the diversity of cultural expressions within their territory. The third idea is that given that the phenomena that directly affect the preservation of the diversity of cultural expressions -and by the same token the preservation of cultural diversity itself - are essentially international, states parties absolutely must cooperate to create international conditions conducive to cultural development. The fourth idea is that given that the cultural expressions under greatest threat are often in developing and less developed countries, it is urgent to consolidate international cooperation and solidarity in order to enhance the ability of developing societies to protect and promote the diversity of their cultural expressions. The fifth idea is that to ensure that the convention is acted upon and implemented in a way that adapts to societal changes worldwide, appropriate follow-up and dispute mechanisms are vital. Finally, the sixth and last idea is that to the extent possible, steps must be taken to avoid a situation where protecting the diversity of national cultural expressions comes at the expense of openness to other cultures. It remains to be seen now how these ideas were transposed in the preliminary draft of convention

ANALYSIS AND COMMENTARY

Preamble

The role of the preamble in an international convention is to briefly mention the convention's purpose, to emphasize its significance and to place it in its legal context. The text of the preliminary draft can generally be seen as very satisfactory from this point of view. The provision most likely to be challenged is probably the one stating that if globalization processes afford unprecedented conditions for enhanced interaction between cultures, they "also constitute a threat to diversity and carry with them a risk of impoverishing cultural expressions". A request to have the reference to threats of any kind removed should be expected. In our opinion, any request that may downplay the need for this convention should be resisted.

Chapter I: Aims and principles

3. Aims (Article 1)

As regards aims, it is useful to distinguish between those connected with the ultimate purpose of the convention and those connected with its implementation. In the preliminary draft, the first two aims may be perceived as being connected with the ultimate purpose of the convention and the five others, with its implementation. The aims are set out in relatively simple terms and form a coherent whole.

The only criticism of this list of aims lies in the fact that it leaves out a condition essential to the protection of the diversity of cultural contents and artistic expressions, which is the recognition of the right of States to take the measures required for this purpose. I would therefore suggest that changes be made to paragraph (d), whose concrete meaning is difficult to grasp as it stands, as follows: "To set up a framework of rules and practices supporting the right of States to maintain or to adopt measures adapted to the development of cultural expression and the promotion of cultural diversity".

4. Principles (Article 2)

The list of principles in article 2 is quite long. Not many international conventions contain as many principles. A first draft of this list contained only those principles required for the convention to operate (the principles in paragraph 8 and 9); in a later draft, these two principles were supplemented with several other principles showing the convention's underlying basic values. Some of these principles, however, seem more like an argument in favour of the protection of the diversity of cultural expression and could easily be transferred to the preamble. This particularly applies to the principle of the complementarity of economic and cultural aspects of development (paragraph 5), and to the principle of sustainability (paragraph 7).

Among the principles listed, there are two that raise issues on which conflicting views have been expressed. The first of these is the principle of the equal dignity of all cultures, where the addition of the words "including minorities and indigenous peoples" after "equal dignity and the equal respect of societies and groups" raises the question of how appropriate it is to introduce an explicit reference to the treatment of minorities and indigenous peoples, which has already been the subject of a number of international instruments, in a convention on the protection of the diversity of cultural content and forms of artistic expression. It would not be surprising to see this issue raised within the framework

of the negotiations. The second principle is the principle of balance, openness and proportionality. Despite its title, article 2(8) fails to refer to the notion of balance and does not provide a clear idea of the nature of the balance concerned. The notion of balance within the very body of paragraph 8 should be reintroduced at the very least, and it should be specified that, pursuant to this principle, the party States see to it that maintaining and promoting forms of cultural expression on national level is reconciled with opening up to other cultures. As it is, paragraph 8 seems to deal exclusively with opening up to other cultures.

In some of the other principles, finally, the expression “cultural diversity” rather than “diversity of cultural content and artistic expression” or “diversity of cultural expression”, which refer to the actual purpose of the convention, is used: this could create some confusion. In principles 2 and 3, however, a pertinent link is established between “cultural diversity” and “cultural expression” which justifies leaving the principles as they are. This does not apply to principle 7 on sustainability which only refers to cultural diversity.

Chapter II: Scope of application and definitions

5. Scope of application (Article 3)

Article 3 simply states that the Convention applies to “cultural policies and to measures that States Parties take for the protection of the diversity of cultural expression”. The article is clear insofar as the meaning of the expression “cultural policies” is agreed on. This last expression is defined in article 4 and is accompanied with an illustrative list in schedule 2. We think that as it stands, the definition seems acceptable but the list in schedule 2 poses a serious problem because it is too extensive. This problem will be examined in more detail in the following section.

6. Definitions (Article 4) when terms and expressions of a definition are examined.

The purpose of a definition in a convention is to specify the meaning of a term or of an expression in the precise context of the convention concerned and according to its ultimate purpose. It is not to explain all the possible meanings of this term or of this expression, and only terms or expressions actually used to specify the rights and obligations of the States Parties can be the object of a definition. The preliminary draft of the Convention does not entirely fulfil these prescriptions and is open to criticism. But the work done is nevertheless valuable and there are few real problems, as we shall see.

- “Culture”: The definition of “culture” is derived from the one proposed by the World Conference on Cultural Policies (MONDIACULT) held in Mexico in 1982 and used in the preamble of UNESCO’s Universal Declaration on cultural diversity. This definition refers to two fundamental conceptions of culture, one associated with sociological and anthropological aspects of culture and the other, with cultural expression. Its definition is certainly acceptable but its pertinence in the context of the preliminary draft of the convention is not necessary obvious, since the term “culture” is rarely used in it. But it should perhaps be kept, if only to underscore the very broad scope of this notion.

- “Cultural diversity”: The definition used is less of a definition than it is a reflection on the notion of cultural diversity. The actual definition is found in the first sentence. I am not sure that cultural

diversity can be defined as the many different means by which cultures of social groups and of societies find their expression. I would rather speak about the diversity of ways through which the cultures of social groups and of societies express themselves. However, I prefer the definition provided by the international network on cultural policy which more or less says the same thing but in a more dynamic and stimulating way: cultural diversity is defined here as “the multiplicity and interaction of forms of cultural expression which coexist in the world and which enrich the humanity’s common heritage”.

- “Cultural expressions”: First, I think that the notions of cultural expressions and of cultural content should be dealt with in different paragraphs. In my mind, the definition of the notion of cultural expressions that is proposed puts too much emphasis on the means used. I would suggest the following definition which is shorter and simpler and which contains the main ideas, namely, creation and communication: “Cultural expression” means the creation and the communication of cultural contents and of artistic expressions by whatever means, existing or to be created”. As far as the definition of “cultural content” is concerned, I do not think the one proposed is particularly useful because its concrete meaning is not clear. I would rather say “the concrete result of creative work of individual artists and of cultural industries as incorporated in cultural goods and services”.

- “Cultural goods and services”: In my opinion, the definition itself appears acceptable, although it is relatively long, but I would modify the non exhaustive list in schedule 2 by removing the final paragraph which deals more with sociological and anthropological aspects of culture.

-“Cultural industries”: The definition is simple and clear. One may almost wonder whether it is necessary.

-“Cultural capital”: The concept is relatively new. Its definition is interesting and establishes a link between the protection of the diversity of cultural expressions and sustainable development. Its pertinence could be questioned insofar as, leaving out the principle of sustainability; it is not really taken up in the rest of the convention. It can nevertheless be retained because its pertinence could quickly emerge once the convention comes into force.

-“Cultural policies”: The definition as such is interesting but it should be specified that the policies in question are policies specifically aimed at protecting the diversity of forms of cultural expression because the non exhaustive list of cultural policies in Schedule 2, to which the definition refers, is quite troubling. The latter broadens the scope of “cultural policies” considerably and hence, the scope of the convention, to the extent that it becomes difficult to determine what is covered and what is not covered by the convention. If an illustrative list of cultural policies must be maintained, the list currently contained in schedule 2 should be thoroughly revised; but a better solution perhaps would be to do away with such an illustrative list.

Chapter III: Rights and obligations of party States

7. General rules on rights and obligations (Article 5)

In conformity with paragraph 1, the States Parties recognize each other’s sovereign right to adopt policies and measures towards protecting and promoting the diversity of cultural expressions in their territory and in return, undertake to protect and to promote it within their territory and at the global

level. This fundamental statement is developed in the chapter's following articles. The second paragraph restricts the right of the States Parties to adopt policies and measures to protect and promote the diversity of cultural expressions in their territory by specifying that the exercise of this right shall comply with the Convention, its objectives, its principles and its scope. It is difficult to see what the mention of scope adds to this list. In our opinion, this second paragraph would be more effective at the end of article 6 which deals precisely with the exercise of the right concerned.

Section 3.1: Rights and obligations at national level

8. Rights of Party states at national level (Article 6)

Article 6 deals with the concrete exercise of the sovereign right acknowledged in Article 5. Article 6.1 stipulates more precisely that "taking into account its own particular circumstances and needs, each State Party may adopt measures, especially regulatory and financial measures, aimed at protecting and promoting the diversity of cultural expressions within its territory, particularly in cases where such expressions are threatened or in a situation of vulnerability". In fact, this first paragraph is about the right of each State Party to choose the kind of measures it deems suitable to protect and promote the diversity of forms of cultural expression, as is made abundantly clear in paragraph 2. However, the addition of the words "particularly in situations where such expressions are threatened or in a situation of vulnerability" at the end of paragraph 1 is rather perplexing in the context of a provision asserting a right, making it appear as if the exercise of that right was more justified in certain circumstances than in others. Since Article 8 deals specifically with the obligation of States Parties to protect vulnerable forms of cultural expressions, the question of the treatment of vulnerable forms of expression should be left to that Article. Finally, insofar as measures taken at national level could aim at promoting exchanges and intercultural dialogue (by facilitating distribution or broadcasts abroad, for instance), the words "and abroad" should follow the words "in its territory".

The second paragraph of Article 6 provides an illustrative list of the kind of measures that can be taken by the States Parties. This paragraph will no doubt be described by some as an encouragement to adopt measures that are incompatible with the commitments of the States Parties under existing trade agreements. But the truth of the matter is that if the States Parties may adopt any one measure mentioned in article 6.2, they are under no obligation to do so; it is up to them to decide which measure they want to adopt according to their own particular circumstances, needs and legal commitments. Secondly, none of the five types of measures mentioned is totally prohibited. As a matter of fact, the only type of measure that could be described as prohibited is the one relating quantitative restrictions (quotas), and only when such measures apply to goods. If they apply to services, which includes audiovisual services such as film, television and cinema, only those States that have made complete commitments with regard to market access within the framework of the GATS could have problems. Currently, only a limited number of States have made such commitments. Article 6.2 (a) therefore remains an option for all the other States. It should also be pointed out that in practice, a large number of States use quotas in the fields of radio and television. Furthermore, in their recent free-trade agreements, the United States themselves have recognized the legitimacy of measures of this kind in the audiovisual sector, going as far as accepting the implementation of existing as well as future measures of quantitative restrictions in certain cases. With regard to measures that grant public financial aid, referred to in paragraph (c), they remain for the moment beyond the scope of the GATS and authorized, except in a few limited circumstances, in

the GATT. Not surprisingly, in the recent free-trade agreements signed by the United States, subsidies are completely excluded in the chapter on services as well as in the chapter on investment. The fact is that the vast majority of States, including the United States, financially encourage the production of cultural goods and services to varying degrees. Finally, the other types of measures referred to in article 6.2 do not raise questions of incompatibility with the WTO. This clearly shows that States still have room to manoeuvre when the time comes to choose cultural policies and as a result, that the list of measures mentioned in article 6 remains completely pertinent.

There is a further category of measures that one could have expected to see mentioned in this list and which does not appear: these are foreign investment control measures. A good number of States are in favour of national property requirements in the area of the media and those States that do not possess such measures presently may wish to adopt them in the future. This category of measures is remains authorized within the framework of the WTO, except for those States that have voluntarily committed themselves not to use such measures. An explicit reference to this category of measures in article 6.2 should therefore be considered.

9. Obligation to promote the diversity of cultural expression (Article 7)

In article 5.1, we have seen that in return for the recognition of their sovereign right to adopt measures to protect and promote the diversity of cultural expression, the States Parties have committed themselves to protect and promote the diversity of cultural expression within their territory. This close relationship between right and obligation as regards the protection of the diversity of cultural expression is at the core of the convention's operation. But the preliminary draft of the convention will be seen by many as going too somewhat far in imposing obligations on States Parties. In article 7.1, States Parties must offer the possibility to all individuals in their territory to create, disseminate and distribute their own cultural expressions, etc. as well as access to the cultural expressions, goods and services representing cultural diversity in other countries of the world. However, as it is set out, this obligation raises two problems which need to be examined. The first involves the use of the expression "all individuals" which, within the context of article 7.1, implies that even foreigners living in the national territory could ask to benefit from the possibilities referred to above. The second problem is much more serious. As it is written, article 7.1 is an obligation of result (the obligation is not fulfilled if a party State fails to provide opportunities for all individuals in its territory to create, circulate and distribute their forms of cultural expression etc. as well as to enable them to have access to the forms of expression, and cultural goods and services representing the cultural diversity of the rest of the world). For the vast majority of States, a commitment of this kind is practically impossible to respect. This may be seen as of no consequence in view of the fact that individuals do not have access to the dispute settlement mechanism. But in theory, it remains that the non fulfilment of this obligation could result in a complaint from another State Party, even if it is unlikely to occur in practice. Instead of staying with a fictitious obligation, one may wonder whether article 7.1 should not be made into an obligation of means rather than of result by insisting that party States use all the means at their disposal towards offering their citizens the possibility to create, circulate and distribute their own cultural expression.

The second paragraph of Article 7 is also problematic in certain respects. It is equally written as an obligation of result, first requesting that the States Parties provide artists with a legal and social status in compliance with existing international instruments. The obligation applies even if a State Party has not ratified the instruments in question. This could raise problems as several States are known to have failed to ratify one or more of the instruments in question. Still under the terms of the

second paragraph, the party States “shall ensure that intellectual property rights are fully respected and enforced ... particularly through the development or strengthening of measures against piracy”. If this obligation is strictly construed, it could make it possible for one State Party to complain against another State Party for failing to enforce full compliance of intellectual property rights. In a case like this, the question will arise as to whether it is actually the role of the Convention to enforce compliance with intellectual property rights, a task that the TRIPS agreement has already largely taken over in the context of the WTO. On a symbolic level, however, such a commitment would probably be viewed as sending a powerful message in favour of the convention.

10. Obligation to protect vulnerable forms of cultural expression (Article 8)

This article illustrates the paramount importance that the preliminary draft of the Convention gives to the protection of vulnerable forms of cultural expression. But it places such a burden on the States Parties and its implementation could turn out to be so complex that one may wonder whether the article should not be substantially revised, or even completely deleted. In its current form, it states the following. A party State shall take the appropriate steps towards protecting those forms of cultural expression in its territory that are threatened with possible extinction or that may be seriously weakened (introductory paragraph). If it fails to do this, any other party State may inform the Intergovernmental Committee of situations requiring action (paragraph 8 (a)). The Intergovernmental Committee will then examine the case and if it decides that action is necessary, it will request the State concerned to take the necessary steps within a reasonable period (paragraph 8 (b)). If the latter is unable to comply with this requirement, it may appeal for international assistance (paragraph 8 (c)). The development just described is all the more likely that the very incapacity to fulfill the prescribed obligation is not a valid excuse for not taking appropriate steps to protect vulnerable forms of cultural expressions. Let us now see how things could work out in practice.

One must start with the obligation imposed on each State Party to take the appropriate steps towards protecting vulnerable or threatened cultural expressions in its territory. Judging by the introductory paragraph in article 8, this obligation only arises if some cultural expressions are deemed to be vulnerable or threatened. If, according to a State, no cultural expressions in its territory are threatened with possible extinction or are seriously weakened, it will not consider itself obliged to intervene and it will certainly look unkindly on the intervention by a foreign State questioning its assessment of the facts. This gesture will in fact very probably be perceived as an unjustified intervention in the internal affairs of a sovereign State. However, since article 8 very clearly invites whistle-blowing by another party State, the question will be raised as to who determines, in a case like this, if forms of cultural expression are actually vulnerable or threatened, and as to the bases on which this will be determined. On this last point, article 8 stipulates that the Intergovernmental Committee will examine each case based on the criteria drafted by the Advisory Group referred to in article 22. In its paragraph (a), article 22 stipulates that the Advisory Group will address “requests for opinions by the Director General of UNESCO and/or the Intergovernmental Committee on the implementation of the Convention and on related matters, including cases of cultural expressions which are deemed to be vulnerable or threatened with possible extinction”. It can be deduced from this provision that it will be the responsibility of the Advisory Group to first draft the criteria that will be used to determine whether forms of cultural expressions are threatened. But since the role of this Group is consultative, it will not be responsible for adopting these criteria as such. This function, it seems, should be performed by the General Assembly of Parties on the recommendation of the Intergovernmental Committee, at least based on article 21 (f) which entrusts the Intergovernmental Committee with the role of “proposing the appropriate actions to be taken in situations brought to its

attention by States Parties in accordance with article 8”. Since this power is one of recommendation, it normally falls to the General Assembly which has, in accordance with article 20.4 (c), the power to “approve the operational directives drafted by the Intergovernmental Committee”. All this applies to the procedure to be followed towards determining the criteria applicable in a situation referred to in article 8. As regards the power of determining, on a case by case basis, if cultural expressions are threatened, it would seem that the decision lies with the Intergovernmental Committee on the recommendation of the Advisory Group, under the terms of the operational directives on article 8’s implementation, but this is not clearly established.

Article 22 (b) also entrusts the Advisory Group with a role in this area which is far from negligible. In fact, it authorizes it, on its own initiative, to alert and advise the Director General and/or the Intergovernmental Committee, on its own initiative, with respect to all questions concerning the implementation of the Convention, “in particular in the case of a threat to the diversity of cultural expressions”. Now, we know that article 8 (a) stipulates that each State Party may at any time bring before the Intergovernmental Committee situations which may require action in accordance with the criteria drafted by the Advisory Panel. The question then arises as to whether the Advisory Group intervention before the Intergovernmental Committee regarding cases of cultural expression seen as vulnerable or threatened by the possibility of extinction or serious curtailment will result in officially referring the issue to the Intergovernmental Committee. If this is the case, which we think it is, we are then faced with two distinct ways of referring a case to the Intergovernmental Committee, one that goes through the States, the other, through the Advisory Group. Under these conditions, and considering the number of situations such as those envisaged by Article 8 that exist in the world, quite a number of disputes regarding these issues could arise, which is certainly not the best way to solve the problem of the vulnerable forms of cultural expression. If this article cannot be rewritten in a less binding and a more proactive way, it would be better to eliminate it.

11. Obligations of information and transparency

Article 9 transposes into detailed rules the principle of transparency stated in article 2. It has also a role to play in the operation of the Observatory for cultural diversity mentioned in article 15. It is written clearly, although one may question the pertinence of paragraph (c) whose role is not very clear in relation to paragraph (d). Although essential to the Convention’s monitoring Article 9 raises a practical problem in that it places a heavy administrative burden on States Parties that are more and more swamped with requests for information in their international agreements. For this reason, it might be appropriate to consider lighter burden on the States Parties, either in terms of the frequency of reports or in terms of their content.

12. Obligation to educate the public and to foster public awareness (Article 10)

This obligation is meant to be a response to a comment very often heard that action towards protecting the diversity of cultural content and forms of artistic should go hand in hand with educating the public and with fostering public awareness. The drafting of this provision echoes the provision found in the Convention on the protection of intangible cultural heritage (article 14). This is an obligation of means (best efforts) which should not raise serious problems.

13. Responsibility and involvement of civil society (Article 11)

This provision is largely taken from the *Convention for the protection of intangible cultural heritage*. It encourages the States Parties to include civil society in their efforts to protect and to promote the diversity of forms of cultural expression. But paradoxically, no room is made for civil society in the way in which the Convention itself operates, not even to allow their presence at General Conference meetings. One may want to look at UNESCO's recent practice in this regard.

Section 3.2 Rights and obligations in terms of international cooperation

14. General comments

Articles 12 to 15 of this section are meant to be general whereas articles 16 to 18 more specifically concern development cooperation. However, the distinction is not always respected, as will be seen. In both cases, the actions to be taken are considered international in that they imply collaboration between two or more States.

15. Aims (Article 12)

The drafting of article 12 is somewhat confusing insofar as paragraph 1 is clearly general whereas paragraph 2 seems to restrict international cooperation to development cooperation. To make things clearer, it is suggested to change paragraph 2's introduction by deleting the words "within the framework of their development agreements" and continuing with the words "shall foster actions connected with the protection and promotion of the diversity of cultural expression, particularly within the framework of their development cooperation agreements". The aim stated in paragraph (d) of this list, "to promote the free movement of artists and designers", will certainly be seen as raising complex problems in practice but it echoes a longstanding claim of developing countries that need to receive all the attention it deserves.

16. International consultation and coordination (Article 13)

This provision plays a major role in the Convention's general organization insofar as it promotes the Convention's principles and aims in the international arena, including with the WTO. It is especially through this provision that the fulfilment of one of the Convention's aims is considered, which is "to foster respect for the diversity of cultural expressions and raise awareness of its value at the national and global levels" (article 1 (f)). It operates on three levels that need to be distinguished. The first level is that of consultation between States Parties with a view to drawing up common approaches. The second level involves the taking into consideration of the Convention's aims when commitments are made by a State Party at the international level and the third level involves the promotion of the Convention's principles and aims within international organizations themselves.

Article 13 may be perceived by some as too timid. In the first sentence, indeed, one might have expected a commitment by States Parties not only to keep the Convention's aims in mind when they make international commitments but also to positively refrain from making commitments that could endanger the fulfilment of these aims. In the second sentence, also, it would be clearer and simpler to delete the words "if appropriate" after "they undertake...".

It remains to mention that under article 21 (g), it is the responsibility of the Intergovernmental Committee to establish procedures and other consultative mechanisms in order to promote the Convention's aims and principles in other international arenas. It is unclear, however, if these consultative procedures and mechanisms form part of the operational directives that need to be approved by the General Assembly of States (Article 20.4 (c)).

17. Aid for co-production and dissemination (Article 14)

Co-production and co-distribution agreements in the areas of film and television are very common between developed countries as well as between developed and developing countries. In the latter case, they often contribute significantly to the development of national audiovisual production. Curiously enough, article 14 makes exclusive reference to cinematographic works whereas television works are also frequently referred to in existing co-production and co-distribution agreements. It would therefore be appropriate to change article 14 by adding "and television" after "cinematographic works". One may also wonder whether reference should not be made to co-production and co-distribution agreements in other areas such as books, for instance.

18. Establishment of a cultural diversity observatory (Article 15)

The setting up of an Observatory for cultural diversity responds to an all the more pressing need since UNESCO put a stop, more than three years ago, to the publication of its World Report on Culture, that, with its tables and cultural indicators, fulfilled a crucial need for information on the cultural level. Since this time, UNESCO's Statistical Institute took over and it will probably be together with it that the Observatory's mission will be fulfilled in due time. For the time being, some confusion still surrounds the role it will play. While the title of article 15 of the Convention's preliminary draft speaks of an Observatory for cultural diversity, paragraph 1 of the same article speaks of the exchange of information and expertise "relating to the data and to the statistics on the diversity of forms of cultural expression, as well as to good practice towards their protection and promotion". The confusion may be seen as insignificant insofar as cultural diversity obviously includes the diversity of forms of cultural expression. But it nevertheless remains that the scope of operation of an Observatory for cultural diversity is obviously broader than the scope of an Observatory for the diversity of cultural expressions. Given the expectations that the setting up of an Observatory of this kind would certainly generate, it seems important to clarify this issue immediately.

19. Cooperation for development (Article 16)

Article 16 provides an inventory of the main forms that cultural development cooperation can take but the list is not exhaustive as is made clear in article 16 (f). In this list, special attention should be paid to the reference, in paragraph (e), to the setting up of a possible international fund for cultural diversity the characteristics are left to be determined by the Intergovernmental Committee. One will note, by the way, that the fund in question applies to cultural diversity and not to the diversity of cultural expressions. This wording is likely to result in misunderstanding on the part of contributors as well as beneficiaries, which is unlikely to contribute to the fund's long term survival. It may come as a surprise that a firmer stand on this issue was not taken. But it should be said that the growing number of such funds at the international level (the last one in the list being the one mentioned in the *Convention on the protection of tangible cultural heritage* whose negotiation has apparently been difficult) made the launching of yet another initiative of this kind rather problematic. The assumption

is not at all dismissed but is mentioned as a possibility along with other means of financial assistance. The choice of modalities for this kind of fund is, according to article 16 (e), up to the Intergovernmental Committee that could, in this case, seek the assistance of the Advisory Group. Given the importance of financial aid in development cooperation, it may be necessary to request the Intergovernmental Committee to give priority to this issue.

20. Preferential treatment in the case of developing countries (Article 17)

This provision aims to adapt to the cultural sector the concept of “special and preferential treatment in favour of developing countries”, which is well known in international economic law where it has been the subject of an official declaration acknowledging that “the provisions relating to special and preferential treatment form an integral part of WTO agreements”. This special and preferential treatment is granted to developing countries in recognition of the fact that it is not enough, in order to help them develop their cultural expressions, to provide them with technical and financial assistance but that measures must also be taken to facilitate the international circulation of their creators and of their production. As it appears in the preliminary draft, article 17 will probably be criticized for entering the domain of commercial regulations. But insofar as its aim is essentially cultural and is connected with development, it will be difficult to eliminate it. Within the framework of a UNESCO cultural convention, this article certainly has its place.

21. Partnerships for development (Article 18)

Partnerships for development are meant to be a flexible means of cooperation, open to different forms of participation (governmental, private or mixed; bilateral, regional or multilateral). They are at the core of the strategy put into place by the Convention towards assisting developing countries to develop the infrastructures, the human resources and the policies required for a sustainable use of their cultural resources. Their implementation begins with a request for assistance submitted by a developing country accompanied by an inventory of its infrastructures, of its policies and of its concrete actions in favour of the development of cultural expressions. The aim of this inventory is to provide information on the most immediate needs of the country in question and to direct development cooperation as a result. The requesting State thus becomes the primary agent of its development.

Chapter IV: Relationships with other instruments

22. Relationships with other instruments (Article 19)

On 11 April 2003, during the examination of a proposal aiming to include the issue of “a preliminary study on the technical and legal aspects relating to the advisability of a normative instrument on cultural diversity” on the agenda of the 32nd session of the General Conference, a lively debate erupted within UNESCO’s Executive Council regarding the incorporation of a draft amendment on “links between the new instrument and other instruments already existing or in preparation”. The draft amendment in question, which aimed at specifying that the new instrument “would be without prejudice to other existing instruments or those being prepared by the WTO”, received the support of ten Council member countries. This draft, perceived as unacceptable by fifteen other member countries because it would have the effect of subordinating completely and permanently the instrument concerned to the WTO, provoked a heated discussion. Finally, on the basis of a sub-

amendment requesting that the Director General's report include a reference to pertinent international instruments, a decision was unanimously adopted in favour of the original proposal, but without the basic conflict having been resolved.

Ten months later, at the opening of the first session of the meeting of governmental experts on the preliminary draft of the convention, the question remained unresolved. In fact, the range of points of view on the ways to solve the problem had widened, going all the way from a clause that would acknowledge the superiority of the Convention over all other agreements, like article 103 of the United Nations Charter that gives priority to the Charter over other international treaties, to a clause that would subordinate the Convention to the WTO, as was the case in the proposed amendment mentioned previously, with, between the two, various recommendations of the kind found in the preliminary draft prepared by the group of independent experts.

The fact is that it is more and more common to find a clause called "Relationships with other international agreements" in international agreements. The large number of international agreements in existence covering practically all areas of activity makes provisions of this kind more and more necessary in order to facilitate the resolution of conflicts between two or more of these agreements. The concrete effect of a clause of this nature is to establish the legal status of the agreement or of the convention that contains the said clause in relation to other agreements or conventions. There are three approaches here.

A first model is that of the North America Free Trade Area (NAFTA) in which Article 103 (2) gives priority to that agreement over other agreements in the event of incompatibility, including WTO agreements. But this priority only applies between NAFTA signatory Parties and does not narrow the scope of their commitments towards third party States in any way, as we will see below. A second model is, in a way, the reverse of the previous model, where the provisions of an agreement specify that it is subordinate to a previous or later treaty or that it must not be interpreted as being incompatible with another treaty. A third and final model specifies purely and simply that the parties to a treaty confirm existing rights and obligations they have towards one another under other agreements to which they are party. In this model, the group of treaties signed by a party are legally deemed to be on an equal footing. Most of the clauses relating to links with other treaties found in international agreements reproduce this model. It is this model that will apply by default under international law (subject to the provisions of the Vienna Convention on the Law of Treaties concerning the application of successive treaties relating to the same-subject-matter) when an agreement fails to address the issue of links with other agreements. These were the models that were presented to the members of the Group of independent experts when they opened their discussions on the theme of the relationship between the Convention and other international agreements. The difficulty of reaching a consensus on the subject resulted in recommending a text containing two options, as a last resort.

Option A itself contains two paragraphs 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 or the fulfilment of these obligations would cause serious damage or threat to the diversity cultural expressions.

The first of these two paragraphs, which may be seen as an exception to the second one, implies that in the event of a conflict between the provisions of the Convention and those of an existing international instrument on intellectual property, the provisions of the Convention will be construed in a such a way as to avoid any conflict with the provisions of the other agreement. In concrete terms, it means that the Convention is subordinate to existing international instrument relating to intellectual property rights. The link thus created can be surprising at first but does not really pose any problem from a cultural point of view insofar as the protection of copyright has always been perceived as being closely linked with the protection and the promotion of cultural expressions. Under these circumstances, keeping it seems justified.

The second paragraph is drafted differently. First of all, it adopts a neutral stand which excludes any hierarchical relationship in favour of or against the Convention: it does this by simply repeating one of the basic rules of international law, which is that except under very special circumstances (identities of the parties and same topic) an international agreement cannot modify the rights and obligations arising out of another international agreement. But the second paragraph does not stop here. It immediately adds afterwards that this rule no longer applies “if the exercise of these rights or the fulfilment of these obligations caused serious damage to the diversity of cultural expressions or seriously threatens it”. This exception, which almost repeats the terms of article 21.1 of the *Convention on the diversity of biological species*, implies that the Convention can modify rights and obligations arising out of other international agreements. Since the provision concerned goes against the basic rule stated above, it raises doubts about the extent to which it can, at least as formulated, deprive signatory States of other international agreements of their rights under those agreements. Legally speaking, therefore, it runs the risk of being contested when the negotiation of the Convention really begins. Its aim is nevertheless legitimate and it addresses an argument of urgency and necessity which definitely belongs in the debate. For this reason, it deserves to be supported but in a modified form. Politically speaking, the exception also runs the risk of being criticized because it applies only if the exercise of rights or the fulfilment of obligations arising out of an existing international agreement causes “serious” damage to the diversity of forms of cultural expression or “seriously” threatens it. But, since it is an exception clause, it is difficult to see how it could be approved if the notions of damage and of threat are not qualified in any way.

Option B of the preliminary draft of the convention is written much more simply and reads as follows “Nothing, in the present Convention, shall modify the rights and obligations of party States in respect of other existing international instruments”. We will note in passing that this statement practically reproduces the statement of paragraph 2 in option A. The same comment therefore applies here: in relation to other international agreements, option B adopts a neutral stand which, in principle, excludes any hierarchical relationship in favour of or against the Convention. But, for certainty’s sake, it could be useful to supplement option B with a statement, taken from the *Cartagena Protocol on the prevention of biological hazard*, specifying that the statement in question is not to be understood as subordinating the Convention to other international agreements.

Chapter V: Follow-up bodies and mechanisms

23. General remarks

The issue of the administrative cost of the follow-up bodies and mechanisms will undoubtedly raise serious questioning during negotiations. UNESCO's member States, which are responsible for determining the extent to which they are prepared to go financially to ensure the successful operation of this Convention, will be concerned about the financial repercussions of a Convention whose organisational structure may be seen as detailed and complex. However, the significance of the issue should neither be undermined nor exaggerated. It should be particularly kept in mind that the basic mechanisms proposed, with the exception of the Advisory Panel, are replicas of a structure commonly used in the UNESCO system. Furthermore, there is reason to believe that individuals representing their State at UNESCO's General Conference, for instance, could also represent it at meetings of the General Assembly of States Parties, which could be organized to take place at approximately the same time. A similar approach could be used in the case of the Intergovernmental Committee. As for the Advisory Group, its restricted composition and the fact that it meets once a year should be enough to limit its costs to an acceptable level.

24. General Assembly of parties (Article 20)

The first three paragraphs of the article are taken directly from the *Convention for the protection of intangible cultural heritage* (article 4). The first paragraph refers to the General Assembly as the sovereign organ of the Convention and the two other paragraphs establish its procedures. A fourth paragraph was added to clarify the duties of the General Assembly of States Parties. In addition to electing the members of the Intergovernmental Committee, the General Assembly's main duty is to approve the Intergovernmental Committee's operational directives. It is through this power of approval that it more specifically exercises its control over the Intergovernmental Committee's activity. Based on the details provided in article 21.3 (b) regarding the nature of the "operational directives", this control could be more significant than meets the eye.

25. Intergovernmental Committee (Article 21)

The first two paragraphs of this article are also taken from article 5 of the *Convention for the protection of intangible cultural heritage*. They deal with the composition of the Committee, with the election of its members as well as with the frequency of its meetings. A third paragraph specifies the functions of the Intergovernmental Committee. Among other things, the Committee shall "prepare and submit operational directives relating to the implementation and to the enforcement of the Convention's provisions in different situations, to the General Assembly for approval" (paragraph 3 (b)). As it is written, the expression "operational directives" is likely to cover quite a lot of things. In practice, one may think that everything in the form of a regulation would have to be submitted to the General Assembly. Among the Intergovernmental Committee's other functions, the function of setting up the Observatory for cultural diversity (paragraph 3 (d) and the function of recommending the appropriate measures to take in situations that party States bring to its attention (paragraph 3 (f)), should be emphasized.

26. Advisory Group (Article 22)

The suggestion to integrate an Advisory Group made up of independent experts into the Convention's operation seems particularly appropriate in a convention on the diversity of forms of cultural expression and is definitely the most original contribution to the preliminary draft. Its role is to offer a point of view on the Convention's implementation which will be essentially cultural and separate from any consideration of national interest. This may be seen as a form of challenge of the control of the States over the Convention, but since the role of the Group is strictly consultative, the States Parties are unlikely to see their control seriously affected. In fact, one can easily imagine that they will want to use it to facilitate decision-making on complex and technical matters as well as to delay decision-making on politically controversial issues. For this reason, it is important to ensure that the work of the Group of Experts is done with the greatest transparency. The best way to do that would be to modify Article 22 to add that all opinions, proposals and announcements of the Advisory Group are made public.

27. Secretariat (Article 23)

The provision is clear and in itself does not raise any problem: UNESCO will be in charge of the Secretariat of the General Assembly of the party States, of the Intergovernmental Committee and of the Advisory Group. Although it is difficult to appreciate the importance of the new duty imposed on UNESCO, one would think that it will not impose too much of a burden in the first years.

28. Dispute resolution (Article 24)

There were two possibilities to choose from with regard to dispute resolution. The first one was the mechanism of the *Convention on biological diversity* and the second was mandatory arbitration, or, if one prefers, arbitration at the request of a single party. The first possibility is the one that was finally retained in the preliminary draft but it leaves out certain aspects of the mechanism in question that should be mentioned.

The procedure in short is as follows:

1. If there were no good offices or mediation or if the dispute could not be resolved through negotiation, good offices or mediation, the parties concerned can have recourse to one of the following means of dispute resolution :
 - (a) At the joint request of the parties, arbitration in accordance with the procedure established in Annex III to the present Convention; the arbitration award is enforceable and the parties apply it in good faith;
 - (b) At the joint request of the parties, the dispute is submitted to the International Court of Justice.
2. If the parties concerned fail to accept either of the two procedures specified in the above paragraph, the dispute is subject to conciliation in accordance with the procedure contained in Annex 4 to the present Convention. The parties examine in good faith the solution of the dispute proposed by the conciliation board.

The first two options only apply at the joint request of the parties. For reasons easy to understand, chances are that the options in question will rarely be used in practice. But the possibility of seeing either option accepted would be improved if the preliminary draft had borrowed in totality the dispute settlement mechanism of the *Convention on biological diversity*. The latter stipulates that when the Convention is ratified, accepted, approved or acceded to, and at any time afterwards, any State can inform the Depository in writing that, in the event of a dispute that has not been resolved differently, it will accept to consider either mode of resolution mentioned as mandatory. If this kind of procedure, which makes it possible for arbitration or submission to the International Court of Justice to be accepted in advance, were to be used by a relatively large number of States, it could contribute towards giving the dispute resolution procedure of the preliminary draft a more binding character. This is why, in our opinion, it should be integrated into the text of article 24.

This procedure's main weakness is that it is not binding. It ends, by default, in a conciliation report drafted by a Conciliation Commission made up of five members which transmits to the parties a proposal for resolution that they must examine in good faith. In order to give a maximum impact to that procedure, it should be specified that the report of the Conciliation Commission, once it is issued, should be made public. This procedure will never replace a decision of a legal nature made by arbitrators or by the International Court of Justice, but it could at least contribute to develop a truly cultural perspective on issues which were mostly examined up to now from a commercial perspective in trade organizations .

Even if the possibility of a mandatory arbitration procedure was rejected in the preliminary draft of the convention, it will probably come up again within the framework of negotiations. Various arguments in favour of rejecting it permanently will be presented, such as, for instance, the exorbitant cost of this procedure which make it inaccessible to the majority of developing countries. But the truth is that if it is rejected, it will be essentially because the majority of UNESCO members, including almost all developed countries, do not want to have it.

Chapter VI: Final provisions (Articles 25-31)

29. General remarks

The final provisions are relatively standard clauses found in most international conventions. The ones in the preliminary draft have been taken from the *Convention on the conservation of intangible cultural heritage* but adapted as required, wherever necessary. The main issue to be dealt with here was the one concerning the number of instruments of ratification required for it to come into force, which was set at 30. The question of whether it was necessary to include a "regional integration" clause was left to the discretion of the member States. The question of whether reserves should be authorized was not addressed by the Group of independent experts.

GENERAL COMMENTS

30. The mandate of the Group of Independent Experts

The preliminary draft of the convention on the protection of the diversity of cultural content and forms of artistic expression is the result of the work of a group of independent experts who met at the invitation of the Secretary General of UNESCO in order to prepare a text that would serve as the

springboard for the negotiation proper of a convention of this kind. The role of the Group of Experts in this context was not to produce a text that the States would agree on in all respects, which was impossible is the task that falls precisely on the States and their experts, but, within a framework where cultural concerns were a priority, to propose a clear, innovative and coherent idea of what a convention on the diversity of cultural content and forms of artistic expressions could be.

31. The overall result

As it is, the preliminary draft of the convention has the merit of providing states and their experts with a clear text that addresses the main problems related to the protection and promotion of the diversity of cultural expressions and suggests concrete and sometimes quite innovative solutions. Even more importantly, the text is the product of extensive discussion by experts from the principal regions of the globe and represents a wide variety of approaches to culture. In this respect, it can be viewed as a relatively accurate reflection of the concerns that will undoubtedly surface during the coming round of negotiations. Evidently, the text is not above criticism and is sure to spark numerous demands for changes, additions, and even omissions. However, the fact remains that the convention makes no attempt to skirt controversial issues and, in terms of both structure and substance, provides a useful base for the next phase in negotiations.

32. Future negotiation

Future negotiation will certainly be difficult. The most controversial issues had already been known even before the preliminary draft of the convention prepared by the Group of Experts was made public. This is particularly the case of the link between the Convention and the other international agreements and the issue of dispute resolution. But other issues were raised since the draft came out which had not been perceived as particularly controversial previously. These concern, among others, the scope of the Convention, which some States see as too restricting and others, too broad, its organisational structure, which some have already criticized for its weight and its anticipated operational costs, and finally, the commitments of certain party States at national level, which are deemed to be impracticable.

But we believe that none of these issues, in itself, is likely to compromise the negotiation of the Convention if its final purpose is kept in mind. There are indeed solution possibilities and even responses to these different issues, as we have tried to show earlier. What may be more worrying is that negotiation may become the opportunity for a debate on the pros and cons of globalization and trade liberalization, on the supremacy of trade over culture or the reverse, of culture on trade. In a case of this kind, various strategies could easily be put into place towards removing any concrete meaning from the Convention, either by unduly delaying negotiation, by diluting its purpose or by seeking to make the Convention itself as least binding as possible.

Our own hope is that the Convention will be seen in a positive light during negotiation, that it will be perceived as a frame of reference and as a code of conduct for all the States for whom the protection of distinct cultural expression and of cultural diversity is an essential element of globalization. As a frame of reference and a code of conduct, the Convention will define a set of rules and disciplines governing the cultural intervention of member States based on a common understanding of cultural diversity that will focus on the protection of existing cultures as well as on an opening up to other cultures. With an increasing number of States acceding to this frame of reference, a new legal system will be established in the cultural domain which will reflect a common vision of cultural exchange, a

vision where the development of cultural exchange will go hand in hand with cultural development, without placing cultures in danger. This frame of reference will not only guide the actions of member States at national level but will also unite their approach in international negotiations. As a cooperation tool, the Convention will provide assistance to those member States with difficulty in fulfilling their commitments, it will assist in resolving the disputes which may arise between them and it will contribute towards establishing common approaches in all the areas connected with the protection of the diversity of forms of cultural expression. The Convention envisaged is far from being a static or protectionist instrument. On the contrary, it will prove to be decisive for the development of cultures, of cultural exchange and of the diversity of forms of cultural expression.