

The First Intergovernmental Meeting of Experts on UNESCO's Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions: Implications for the Following Meeting

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The first intergovernmental meeting of experts on the preliminary draft version of the UNESCO Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions was held in Paris from September 20 to 24, 2004. In his opening address, Mr. Koïchiro Matsuura, Director-General of UNESCO, emphasized how important this first phase of negotiations was for the Organization, stating that the first outline of the proposed draft was a good starting point for discussions. He added, "I hope that this first meeting will be an opportunity for a genuine debate on an international scale on the crucial issue of the protection and the promotion of the diversity of cultural expressions in today's world." At the end of this first meeting, which did not give rise to a real debate as the Director-General of UNESCO would have liked, but which certainly established the essential elements for one, it seemed appropriate, rather than try to give a detailed account of the sequence events of the meeting, to bring to light its real contribution to the establishment of a negotiation dynamic and to underscore, based on the initial comments regarding the draft version of the convention, certain ambiguities which need to be clarified so that the issues of the negotiation are clearly understood. In other words, what particularly interests us in this first meeting of government experts are its implications for the following round of negotiations.

1. The contribution of the first meeting to establishing a negotiation dynamic.

Three developments occurred during this meeting which appear likely to direct the future course of negotiations. The first development concerns establishing the negotiation structure itself, in other words electing the Conference Chairman, setting up the Board, and instituting a Drafting Committee composed of 24 members. Although these various structures and nominations were clearly the subject of prior discussions among various groups of States, they are worth examining more closely to understand their implications on following negotiations. The second development is related to the emergence, during the debate on the preliminary draft, of quite different perspectives on the type of convention to establish. Although these perspectives don't express definitive positions on the content of the convention, they are still likely to have a significant impact on the debate by leading it in opposing directions. The third development lies in the practically unanimous acceptance by the States of the preliminary draft of the convention as a useful basis for discussion and their agreement to work from it. This consensus, one of the rare instances of it during the first meeting of government experts, has provided a framework of discussion that could help refocus the debate should it go too far off course. However, to better understand how these developments are likely to direct the negotiations, it's necessary to take closer look at each one.

- *Establishing the structure for negotiations*

Establishing the structure for negotiations occurred in two phases. On the first day of the meeting, the Conference Chairperson was elected and the Bureau was set up. Two days later, a Drafting Committee was constituted on the basis of a decision by the Bureau.

In any negotiation, the most important position to fill is that of Conference Chairperson as its success will depend, to a substantial degree, on his or her authority and ability to lead discussions. Thus, it is not surprising that this position is often coveted and its choice is almost always the subject of prior discussions between the States. In this case, the choice does not seem to have caused serious difficulties. Officially nominated on behalf of the African Group (Group 6) by the representative of Madagascar, the election of Professor Kader Asmal from South Africa to the position of Chairman of the Conference was supported by the representatives of Oman, Mexico, Afghanistan, Sri Lanka and the USA on behalf of the five other groups. In his address at the opening session, Professor Asmal revealed a remarkable comprehension of the issues to be negotiated, recalling that while freedom of expression and the free flow of ideas and knowledge are the foundations of any effort in promoting and protecting the diversity of cultural expressions, without multiple, distinct cultural expressions, there would be no true intercultural dialogue. With a mix of firmness and humour, Professor Asmal proved himself to be particularly concerned with efficiency as Chairman, so much so that the meeting, which was originally supposed to be from September 20-24, 2004, finished a day early. This is a remarkable achievement, considering that 132 Member States, 19 IGOs, and 20 NGO/IGOs participated in the meeting and nearly one hundred oral presentations were given during the discussions, and can be considered a good omen. However, it is regrettable that, given the available time, further effort were not made to establish ties between the various opinions expressed, resulting in a set of rather disparate points of view, which may coincide at times, but from which it is difficult to draw any conclusions concerning the existence of a consensus. The impression we are left with from the first meeting is that the States, either due to insufficient preparation or because they felt there wasn't enough time to express themselves (at least 45 of them even felt the need to provide a written text in addition to their oral presentation), merely gave summaries of their viewpoints and observed what others had to say.

The role of the Bureau is not clearly defined, but it is agreed that it is generally responsible for ensuring that negotiations are carried out in compliance with the established procedure. It is called upon on a regular basis to evaluate progress made, and it must be able to intervene, particularly if difficulties arise. In addition to the Conference Chairperson, the Bureau comprises a Rapporteur whose role is to record the content of discussions during plenary sessions and provide a report once the meetings are over. The Rapporteur is typically counted on to clarify discussions and draw conclusions from them. It is also established that the Plenary Rapporteur act as a technical resource for the Drafting Committee in order to fulfill the Plenary's instructions. In performing this duty, the Rapporteur, assisted by the Secretariat, works closely with the Conference Chairperson and the Bureau. Four Vice-Chairpersons complete the Bureau, for a total of six positions to be filled in accordance with geographic representation requirements. The position of Rapporteur was filled by Artur Wilczynski of Canada and the four Vice-Chairperson positions were filled by representatives of Tunisia, Saint Lucia, Lithuania, and the Republic of Korea. During the first meeting of government experts, the Bureau met a number of times to address issues essentially related to how the debate was being carried out and to structure the next steps in the negotiations. The most

important decision it made during these meetings was, without a doubt, that of establishing a Drafting Committee.

The Drafting Committee, as its name implies, plays a crucial role in drafting the text of the convention. Its mandate, as defined by the Bureau and transmitted to the Plenary, stipulates that it will be composed of four members per regional electoral group and assisted by the UNESCO Secretariat. More specifically, it will be responsible for translating instructions submitted by the Plenary Chairman into concrete language and legal terms. The Chairman may ask the Drafting Committee for recommendations regarding linguistics, style, or word choice should the Plenary fail to reach a consensus. Its role in such a context could prove delicate; that is why, out of concern for transparency, its mandate specifies that observers will be allowed to attend Committee meetings. The composition of the Committee as such appears relatively balanced in that it provides a fairly accurate representation of the major opinions expressed during the debate concerning the type of convention desired. For the record, it may be useful to mention that the 24 States represented on the Drafting Committee, four from each regional electoral group, are as follows: (group 1) Finland, France, Switzerland and the United States; (group 2) Armenia, Croatia, Hungary, and Russia; (group 3) Barbados, Brazil, Costa Rica, and Ecuador; (group 4) China, India, Japan and Korea; (group 5) Benin, Nigeria, Madagascar and Senegal; (group 6) Algeria, Lebanon, Saudi Arabia and the United Arab Emirates.

The Director-General of UNESCO will call the first meeting of the Drafting Committee in December 2004 (more precisely, December 13-17) after having received the written comments of States Members. The Committee will then elect its Chairperson and determine its work schedule according to the timeframes established by the General Conference. Its first task will be to submit for the following Plenary Session a revised version of the Convention incorporating the written comments and amendments of States Members. All of the Drafting Committee's proposals will be submitted to the Plenary for approval. The Committee may meet at the same time as the Plenary Session and will receive instructions from its Chairman. However, it could also meet between Plenary Sessions, which appears inevitable. It remains to be seen how such a large Drafting Committee will function in practice. Given the timeframes established by the General Conference, it is not unthinkable that it might have to set up unofficial thematic groups to speed up its work. Since three of its members belong to the European Union (France, Finland and Hungary), we will have to wait until it is clear what role the EU plans to play in negotiations to know what to expect of these countries' participation in the Drafting Committee's work. Depending on its response, the Committee's work dynamic could be affected.

- *Different perspectives concerning the type of convention to establish*

More often than not, negotiating a convention involves the reconciliation of sometimes quite different view points regarding the content of the convention. The greatest differences in viewpoints generally concern the exact purpose, the scope of commitments and the binding character of the convention. In this case, such differences in viewpoints quickly became apparent during the section-by-section examination of the preliminary draft convention. Three distinct perspectives concerning the type of convention desired can be identified on the basis of the oral and written comments of States Members during the first meeting, and other perspectives cannot be excluded, considering that 49 of the 121 Member States represented at that first meeting did not speak on this occasion. The first two perspectives take for granted that the convention's main concern has to do with the diversity of cultural expressions, but disagree on several important aspects of such a

convention. The third perspective considers the convention's focus on the preservation of the diversity of cultural expressions as too limited and seeks to substantially broaden the scope of the convention. Our goal, in more closely examining these three perspectives, is not to link them to specific States, but rather to show how they differ from each other in their comments on the preliminary draft and in their perception of the convention to be established, as well as to highlight the impact they could have during the Plenary debates and in the work of the Drafting Committee.

The first perspective, which loosely ties together a majority of the States that spoke during the debate, approves of the broad strokes of the draft convention, although it questions certain aspects and suggests some modifications and additions. It supports a legally binding instrument, equal in value to other international agreements, which recognizes the specificity of cultural products and the right of States to implement measures to protect and preserve their cultural expressions while remaining open to other cultural expressions, encourages these States to take the necessary measures to preserve and promote their own cultural expressions, and commits them to concretely reinforcing cooperation for development in the cultural sector. So that the convention does not become a dead letter and can evolve over time, it also supports the incorporation of a monitoring mechanism and a dispute settlement mechanism, as long as any cumbersome bureaucracy is avoided and the mechanisms involved remain inexpensive. Finally, a characteristic element of this first perspective is the fact that the States in favor deem it important that negotiations proceed as quickly as possible.

The second perspective is shared by a more restricted number of States, but this apparent disadvantage is largely compensated by the economic importance and ideological cohesion of the States in question. While accepting that the preliminary draft primarily addresses the issue of cultural contents and artistic expressions, and acknowledging the justification and relevance of several of its clauses (particularly the clauses concerning cooperation for development), this perspective has serious reservations regarding several important aspects of the preliminary draft convention. First, these reservations concern the scope of the convention, which is deemed too focused on cultural goods and services and the protection of cultural expressions and not enough on the promotion of cultural diversity and an openness to other cultures. They also concern: the sovereign right of States to adopt measures to protect and promote the diversity of cultural expressions within their territory, considered to be potentially incompatible with WTO commitments of the parties; the commitment of signatory States to promote the objectives and principles of the convention in other international arenas and consult one another to this end, deemed dangerous; monitoring and dispute settlement mechanisms, which should be reduced to their simplest form or eliminated as they are inappropriate for the cultural sector; co-production and preferential treatment agreements for developing countries, considered to be incompatible with WTO commitments of the parties; and finally, *Article 19* on relations with other international instruments, which should clearly establish that the convention is in compliance with other international agreements. Generally speaking, the convention model envisioned is one in which the means of achieving its international objectives would be more focused on dialogue and cooperation than on legally binding regulations. Finally, it should be pointed out that the States that identify more particularly with this perspective on the convention are also those that stress that it's not essential for the convention to be adopted in 2005, that it is preferable to take the time necessary to establish consensus and that unrealistic deadlines should be avoided.

A third perspective on the convention, currently supported by a very limited number of States but likely to gain support when real negotiations begin, questions the relevance of the preliminary draft of the convention on the grounds that it is too focused on the protection and promotion of the

diversity of cultural expressions. Instead, it proposes a legal instrument with a broader scope, which focuses on respecting the right of States to adopt policies that reflect their beliefs, increasing intercultural respect and developing common values. This perspective, which implicitly questions the mandate initially conferred upon the Director-General of UNESCO by the General Conference, opens the door to a broadening of the scope of the convention that is more in keeping with the promotion of cultural diversity in a broad sense than with the promotion and protection of the diversity of cultural expressions. Unfortunately, it should be acknowledged in this regard that the draft convention does not clearly define what is meant by cultural expressions and does not really describe the nature of the link that should be established between the diversity of cultural expressions and cultural diversity.

The existence of these three distinct points of view on the type of convention that UNESCO should adopt, in the context of negotiations aimed at seeking consensus, can hardly fail to have an impact on the result of negotiations. This is not abnormal and it is precisely through negotiations that these different points of view can come closer together and a convention that reflects the concerns of all members can be reached. However, there remains a risk that should not be downplayed. If the negotiations yield a text that is nothing more than the lowest common denominator of the set of requests made by States Member, or if they yield an agreement reflecting a series of political compromises that have no real legal significance and the diversity of cultural expressions ends up weakened rather than strengthened, then they would, unfortunately, be a failure. However, this risk is offset to some extent by the fact that the negotiations have begun on the basis of a text which already has its own structure and logic and which acts as a centripetal force.

- *The preliminary draft of the convention as a basis for negotiations*

As the Rapporteur stressed in his oral report, delegations acknowledged during the first meeting that the draft convention was a valid basis for discussion and a useful instrument for facilitating the debate at the intergovernmental process stage. Indeed, the entire debate was carried out during the first meeting on the basis of the preliminary draft. More importantly, however, the mandate conferred upon the Drafting Committee specifies that the revised text of the convention to be submitted at the next Plenary session will be based on the preliminary draft submitted by the Director-General, and will incorporate the written comments of the States Member.

The immediate result of using the preliminary draft as a basis for the revised text of the convention to be submitted at the next Plenary Session is that it structures the debate around a certain perspective on the convention, which already has its own structure and logic. However, States remain completely free, in theory, to do what they want with the proposed text, including making major transformations or even rejecting it and starting from a completely different foundation. Judging by the comments made by delegations during the debate on the preliminary draft, it is foreseeable that a substantial number of the clauses in that draft will remain in the adopted draft convention either as is, with changes to wording, or supplemented by other clauses. The clauses in the preliminary draft concerning cooperation for development, for example, or those regarding education and civil society will probably stay, although improvements will likely be made to them. Where the text of the preliminary draft raises more serious problems, possible solutions concerning changes have already been proposed. Thus, with regard to the monitoring mechanisms, several delegations have pointed out that they could be substantially reduced. For example, the Cultural Diversity Observatory set forth in *Article 15* could be moved to the UNESCO Institute for Statistics, and the Consulting Group set forth in *Article 22* could be replaced by a list of experts who might be

consulted in an ad hoc fashion. The principle itself of a monitoring mechanism seems to be widely accepted, with many States having suggested maintaining the Assembly of States, with stronger powers, and the Intergovernmental Committee, with more clearly defined powers, as well as a UNESCO Secretariat. As we can see, the preliminary draft is serving as an integrating mechanism, although it will likely undergo a fair amount of transformation over the course of negotiations.

That said, in spite of everything, choices will have to be made in order to achieve a text that meets a clearly identified need and can be concretely applied. Some choices will be relatively easy to make in that their impact is well understood. This is the case, for example, of establishing a mechanism for sharing and exchanging information as set forth in *Article 9* of the draft. Such a mechanism could be seen as placing too heavy of a burden on the signatory States and thus be eliminated. However, it might also be kept because of its importance to the smooth functioning and dynamic of a convention that serves its members. Other choices might prove much more difficult because their underlying issues are unclear in the preliminary draft itself. These are the issues that we now need to examine more closely as they are at the heart of the draft convention.

2 *Issues to be clarified before a true debate can take place*

The issues in question concern three subjects that, judging by the States' comments, still remain ambiguous in the Draft: (1) the purpose of the convention; (2) the relationship of the convention to other international agreements; (3) the legally binding nature of the convention.

- *The purpose of the convention.*

According to the terms of the mandate conferred upon the Secretary-General of UNESCO by the General Conference, the Convention must address “the protection of the diversity of cultural contents and artistic expressions.” The preliminary draft of the Convention presented by the Director-General is, in fact, entitled, “Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions.” Thus, the purpose of the Convention, as envisaged in the Preliminary Draft is not the protection of cultural diversity in the broad sense of the term (encompassing aspects as diverse as the distinctive features that characterize a society or group, or culture in the sociological sense, cultural rights, cultural heritage in all of its forms, cultural development, copyright, cultural expression, multiculturalism, linguistic rights), but rather the protection of a specific aspect of cultural diversity: the diversity of cultural contents and artistic expressions.

However, despite the title given to the Preliminary Draft, its text contains numerous references to cultural diversity, implying that the exact purpose of the convention could be broader. Such references can be found in the Preamble, where four considerations exclusively address cultural diversity; in *Article 2* (principles), where *paragraphs 2, 3, and 7* make references to cultural diversity; in *Article 4* (definitions), which gives an elaborate definition of cultural diversity; in *Article 15*, which proposes the establishment of a Cultural Diversity Observatory; in *Article 16 (f)*, which envisages the establishment of an International Fund for Cultural Diversity and, finally, in *Annex II*, which provides a non-exhaustive list of cultural policies focused on the promotion of cultural diversity in the broad sense. Such references to cultural diversity in the broad sense may have a place in a convention on the protection of cultural contents and artistic expressions, but on

the condition that the link between the two is well understood. Unfortunately, this is not the case according to the comments on the Preliminary Draft made by the States during the first meeting.

A cursory examination of these comments quickly reveals the extent of confusion surrounding this issue. Indeed, several States describe the purpose of the Convention as the preservation of cultural diversity. In the general comments from the first day of the meeting, the convention is described as a “useful instrument for promoting cultural diversity.” There is hope that the convention will be “one of the legal pillars of cultural diversity” and it is suggested that the convention “stress the promotion of cultural diversity.” A list of conditions is given so that a “convention on cultural diversity” does not become another convention without any concrete effect. Other States stress that the purpose of the convention is the diversity of cultural contents and artistic expressions and ask that cultural content becomes “the central theme and main thread” of the convention. There appears to be just as much confusion when more specifically discussing the title, objectives and scope of the convention. Regarding the title, for example, some States claim to be satisfied with the title and ask that it be kept, while others suggest that in order to eliminate any ambiguity and respond to the aspirations of the members, the current title should be replaced with “Convention on Cultural Diversity.” Concerning the scope, one State goes so far as to complain that the Preliminary Draft only addresses the diversity of cultural contents and artistic expressions. Confusion regarding the purpose of the convention reaches the point where the Chairman sees fit to request UNESCO for a clarification of the negotiation’s mandate. In his response, the Deputy General-Director of Culture, Mounir Bouchenaki, refers to the debates surrounding the General Conference’s decision in Fall 2003 to proceed with negotiations specifically addressing “the protection of the diversity of cultural contents and artistic expressions” and explains that it is on the basis of this perfectly clear mandate that work towards the establishment of a convention has since been carried out.

Nevertheless, although it is clear in the terms of the mandate that the envisaged convention must address “the protection of the diversity of cultural contents and artistic expressions,” it must be acknowledged that the exact meaning of this expression compared to “cultural diversity” is not immediately obvious. To avoid any confusion, we therefore need to examine the meaning of each expression and clarify the relationship between the two.

To do this, it seems appropriate to start with the notion of culture itself. The most generally accepted definition of the notion of culture is undoubtedly the one adopted during the *MONDIACULT* Conference, held in Mexico City in 1982, and used in the *UNESCO Universal Declaration on Cultural Diversity*, which asserts that, in the broadest sense of the term, culture can be regarded as “the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.” This complex of distinctive features that characterize a society or social group falls under what we commonly call cultural identity. Thus, in its first and literal sense, cultural diversity refers simply to the multiplicity of cultures and cultural identities.

However, when we more closely examine the definition of culture proposed by UNESCO in 1982, we can see that it refers to two rather distinct realities. First, there is a more limited perspective focused on art and literature, which refers to the cultural expression of a community or a group and encompasses cultural creation in all its forms, including that of individuals as well as that of cultural enterprises. It is to this first perspective that the expression “cultural contents and artistic expressions” in the Preliminary Draft more specifically refers to. Next, there are lifestyles, ways of

living together, value systems, traditions and beliefs, which refer to a more sociological and anthropological perspective of culture, or cultural diversity in a broad sense. This then raises the question as to whether the planned convention aims to protect cultures in the more limited sense of the cultural expression of a community (the creation, production, distribution, and dissemination of cultural content through any medium and in any form), or cultures in the broader sense, referring to the sociological and anthropological characteristics of a society, including linguistic and religious aspects, those related to cultural heritage, etc., or both. We know which choice the UNESCO General Conference made.

Cultural expression meets an essential need for every community. If we state, as does the *UNESCO Universal Declaration on Cultural Diversity*, that cultural goods and services “as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods,”¹ we are merely recognizing the capital importance of cultural expression in the life of a community. In fact, it is so important that any community that is deprived of it will see its long-term survival threatened. This is also true of openness to the cultural expressions of other communities. A culture that folds in on itself and closes itself to the contributions of other cultures is condemned to fade away over time, incapable of adapting to the changes in its environment.

However, as we can easily imagine, 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. We need to understand that 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 we should reject any political initiative that might affect in one way or another 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. This is where cultural expression plays a particularly important role.

Cultural expression is a key element in the adaptation of different cultures to the transformations imposed by globalization and the liberalization of trade. In this regard, creators and cultural players play a primary role 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 assert that the preservation of cultural diversity can only occur through the preservation of cultural expression. The latter is not the only way to ensure the preservation of cultural diversity - preserving cultural heritage and copyright protection, for example, also play an important role in this regard - but its particular significance lies in the fact that it is both a concrete adaptation of the fundamental right for anyone to freely participate in the cultural life of a community, and since this, in itself, is the translation, in terms of values, of the participation of everyone in public life, a fundamental means of democratic expression. Far from inciting separatist withdrawal or intensified nationalism, as some States perceived it during the first meeting, the preservation and promotion of the diversity of cultural expressions constitute a bastion against such drifts. It’s not by chance that the establishment and maintenance of dictatorial regimes are accompanied by close monitoring of cultural expression. This understood, 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.

¹ See UNESCO: <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>

The fact that the draft convention currently being negotiated specifically addresses this aspect of cultural diversity does not lessen the importance of other aspects of cultural diversity. Many of the other aspects of cultural diversity, we should remember, have already been covered by other conventions (this is particularly the case for aspects related to the preservation of cultural heritage, basic human rights, and intellectual property rights), and if changes or additions need to be made to these, it is not the responsibility of a future convention on the protection of the diversity of cultural expressions to do so. This does not prevent links from being established with these other aspects, which is precisely what the preliminary draft convention does in its article on principles, which states, “no one may invoke the provisions of this Convention in order to infringe human rights guaranteed by international law or to limit the scope thereof” or when it grants priority to agreements on intellectual property as we will see below.

- ***The convention’s relationship to other international agreements***

Even before the UNESCO General Conference unanimously decided in October 2003 (32C/52), based on the decision of the Executive Council (166EX/28), to confer upon the Director-General the mandate (Res.32C/34) to submit at the next General Conference in October 2005 a preliminary report and Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, the issue of the convention’s relationship to other international agreements had already acquired symbolic value. On April 11, 2003, during the examination of a proposition aimed at adding the issue of a “preliminary study on the technical and legal aspects relating to the desirability of a standard - setting instrument on cultural diversity” to the agenda of the 32nd session of the General Conference, the UNESCO Executive Council engaged in a lively debate on a draft amendment concerning “the links between the new instrument and other instruments already existing or in preparation.” The draft amendment in question, which sought to specify that the new instrument “would be without prejudice to other existing instruments or those being prepared by the WTO,” won the support of ten member States on the Board. 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 requiring the Director General’s report to include references to the relevant international instruments a decision was unanimously adopted in favour of the original proposal, but without the basic conflict having been resolved.

Eighteen months later, at the opening of the first session of the meeting of government experts on the preliminary draft of a convention on the protection of the diversity of cultural contents and artistic expressions, the conflict remained just as topical. It should be said that the preliminary draft of the convention doesn’t really help resolve it, providing two options on the subject (*Article 19*). *Option A* reads as follows:

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

Option B of the preliminary draft of the Convention reads :

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

This last option, as we can see, is more or less a reproduction of the basic principle in *Paragraph 2 of Option A*. If we compare these two options, we see that the first is more constraining than the second in that it makes the Convention subject to existing international instruments concerning intellectual property, but less constraining in that it authorizes the States Parties to depart from the basic principle whenever compliance with existing international instruments might give rise to serious damage to the diversity of cultural expressions or might threaten such diversity.

The debate over this issue during the first meeting was far from conclusive. Among the States that voiced their opinion on the issue, a majority claimed to favour *Option A*, but this choice was often accompanied by remarks hinting at some hesitation over how to deal with the problem. A substantial minority favoured *Option B*, but with comments implying that additional clarifications may be necessary. Opposition was fairly strong between supporters of *Option A* and *Option B*, and it seems that for both sides, this was seen as a major issue. Several States refused to support either option, claiming it was too early to make a choice and there was not enough information to do so. Finally, over one-third of the States in attendance during the first session abstained from discussing the issue, an obvious sign of difficulty in grasping the exact implications of the choices presented. Thus, at the end of the first meeting, we find ourselves with a debate that is gaining political importance, but whose issues, paradoxically, remain misunderstood. In such a context, we obviously need to take a deeper look at what is really involved in this debate.

One of the first questions to arise is what is concretely covered by the expression “other international instruments,” since, obviously, not all international agreements have the potential to conflict with the convention. A fairly clear indication of the agreements that are more particularly covered by this expression can be found in the UNESCO General Conference Resolution of October 2003, which conferred upon the Director-General the mandate (*Res.32C/34*) to submit at the next General Conference in October 2005 a preliminary report and a Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions. The resolution specifies that it is important to bear in mind that when elaborating a new international standard-setting instrument, it is essential to take into account existing international legal instruments, and that it is appropriate to this end that the Director-General undertake consultations with the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD) and the World Intellectual Property Organization (WIPO). We can therefore assume that potential conflict is likely to occur in the sectors of activity covered by these organizations. To the agreements in question, we could also add agreements respecting human rights, which were mentioned by several States during the debate on the Preliminary Draft.

Although there is a reference in *Paragraph 1 of Article 19* of the Preliminary Draft to existing international instruments concerning intellectual property rights, these agreements do not seem to have played an important role in the debate regarding *Article 19*. This measure caused very few comments during the first meeting, despite the supremacy it grants existing international instruments on intellectual property rights over the Convention. The World Intellectual Property Organization (WIPO) itself, in its participation as observer during the first meeting, did not reveal any points of incompatibility between the content of the Preliminary Draft and WIPO agreements, quite the opposite. The same conclusion should apply to UNCTAD, since, although it is a forum for

intergovernmental debates regarding trade and development and performs research projects and analyses on the topic, it is not directly involved in the management of multilateral agreements. Thus, there cannot be any conflicts between UNCTAD and the Convention. Concerning agreements concerning human rights, the possibility for conflict appears rather slim insofar as one of the basic principles of the convention, as we have seen, is precisely that it “no one may invoke the provisions of this Convention in order to infringe human rights guaranteed by international law or to limit the scope thereof.”

All that remains, therefore, is the WTO. Indeed, when the possibility was brought up that the Convention could go against existing international agreements during the debates on the Preliminary Draft, as it was by the United States, it was essentially related to issues covered in one way or another by international trade agreements, and more particularly, by the WTO. Thus, behind the general language of *Article 19* addressing the Convention’s relationship to other instruments, what seems first and foremost at stake is the relationship between the Convention and international trade agreements, and more particularly, WTO agreements.

Two distinct visions of the trade/culture interface are involved - one commercial, the other cultural - which are, themselves, the reflection of the dual nature of cultural goods as both products that are commercially traded and means of social communication.

The commercial vision of the trade/culture interface, such as expressed within the WTO, focuses on the reduction of custom duties and other obstacles to trade and the elimination of discrimination in international trade relations as a means for fostering higher standards of living, creating full employment and increasing the production and trade of goods and services. However, the WTO is not particularly interested in culture or cultural diversity, which are beyond its field of expertise. The situation is different in the case of measures adopted by States aimed at promoting cultural expression at the national level and cultural diversity at the international level. As soon as such measures impede trade in any way and violate a WTO obligation, they, in theory, are subject to a complaint being lodged with the Dispute Settlement Body. To avoid such a result, cultural works, or to use WTO jargon, cultural goods and services, which represent the dynamic expression of a culture, must benefit from total exemption or special treatment. Yet, except for a few rare exceptions [screen quotas for films (*Article IV* of the GATT) and measures put in place to protect national treasures having artistic, historical, or archaeological value (*Article XX f* of the GATT)], such exemptions do not exist. In other words, in the context of the WTO, cultural goods and services are considered a priori like any other good or service, with no regard to their role as a means of social communication in a democratic society. The basic rule that prevails in trade between producers from different countries is that of competition, in which the best, most competitive and most efficient one wins. From this strictly commercial perspective, nothing will prevent producers from one country, who already occupy a substantial part of the film or television market in another country, from seeking to secure the balance of this market.

The cultural vision of the trade/culture interface is altogether different. The preservation and promotion of the diversity of cultural expressions, and more generally, the preservation and promotion of cultural diversity in the broadest sense, are considered “an ethical imperative, inseparable from respect for human dignity” (*UNESCO Universal Declaration on Cultural Diversity, Article 4*). Exchange between cultures is not envisaged from a perspective of competition, but rather from one of dialogue implying that each culture has the right to preserve and promote its own cultural expression while remaining open to the cultural expression of other

cultures. What is ultimately desired and sought is a situation in which diverse cultural expressions interact and complement each other for the shared enrichment of all, like different instruments in an orchestra, each contributing in their own way to the performance of a shared piece.

These two visions, with their own logic, are equally legitimate. UNESCO is as justified, from a cultural point of view, in worrying about the repercussions of economic globalization and the liberalization of trade on the preservation and development of cultural expressions as the WTO is justified, from a commercial point of view, in worrying about the repercussions of measures set forth in a convention on the preservation and promotion of the diversity of cultural expressions. So unless UNESCO Member States accept that cultural concerns are less important than commercial concerns, the solution to this problem of international governance can only lie in purely and simply recognizing the supremacy of the commercial perspective over the cultural perspective. We must, therefore, find a solution that respects both points of view.

To accomplish this, we first need to clearly and explicitly acknowledge in Article 19 that the Convention, barring explicit wording to the contrary (presumption of compliance with agreements on human rights, for example), is not subject to other international agreements. Otherwise, it is difficult to see how signatory States of the Convention could succeed in developing among themselves a strictly cultural vision of the trade/culture interface. Different wording can be envisaged to express this status of non-subordination, provided that the equal status of the Convention with other international agreements is clearly acknowledged.

Once this is accomplished, we must then work towards establishing communication between the two perspectives in an effort to find mutually acceptable and complementary solutions. In the case of the Convention, the mechanism envisaged to accomplish this is *Article 13*, which asks States Parties to promote the objectives and principles of the Convention in other international forum. Such a procedure could lead to concrete results more quickly than one would think. For example, if we consider that the vast majority of States, including the United States, financially support the production of cultural goods and services to varying degrees, and that financial aid is not currently covered by the GATS and is even excluded from provisions relating to services in practically every free trade agreement signed in the last ten years, it is not unthinkable that a consensus could be reached among States Parties to the Convention and WTO Members to explicitly acknowledge the right of States to financially support the development of cultural expression within their territory.

Thirdly, we must accept that certain situations, covered from one point of view by WTO regulations, can also be covered from another point of view by the Convention, provided it does not lead to a situation of incompatibility². This approach, similar to the one adopted by the WTO Dispute Settlement Body to resolve cases of apparent conflict between various WTO multilateral trade agreements, could very well be applied to the Preliminary Draft Convention. Thus, some clauses in the Preliminary Draft, at first glance, could be seen as entering into conflict with WTO regulations. This is the case for *Article 17*, which deals with granting preferential treatment to developing countries, something that is a priori incompatible with the principle of the most favoured nation. However, if we consider that Article 17 is aimed at transposing, in the cultural sector, the concept of

² For a closer look at potential conflicts between the Convention and the WTO, see : Ivan Bernier, "*Preliminary Draft of the Convention on the Protection of the Diversity of Cultural Content and Forms of Artistic Expression - Analysis and Commentary*", October 2004: http://www.mcc.gouv.qc.ca/international/diversite-culturelle/eng/pdf/draft_analysis-commentary_2004.pdf

“special and differential treatment to developing countries,” developed within the framework of the GATT and the WTO, and which, in Doha, was the subject of an official declaration acknowledging “that provisions for special and differential treatment are an integral part of the WTO Agreements,” the conflict is no longer obvious. This “special and differentiated treatment,” as we know, translates into the establishment of technical assistance measures for developing countries as well as the adoption of concrete measures by developed countries for developing countries, such as preference systems. The recognition of such preferential treatment, granted with the specific aim of promoting the cultural expression of developing countries does not, a priori, lead to a situation of incompatibility, despite the fact that the WTO has measures of its own in this regard.

Finally, it must be recognized that a State is in no way legally obliged to contest the policies and measures of another State that would, hypothetically, go against the latter’s WTO commitments if, on cultural grounds, it deems such action inappropriate. Thus, by mutually acknowledging in *Article 5 (1)* of the Draft Convention their sovereign right to adopt policies and measures to protect and promote the diversity of cultural expressions within their territory, the States Parties to the Convention implicitly accept not to contest the policies and measures adopted by other States to this end, so long as they comply with the objectives and principles of the Convention. If this was not the case, the statement of *Article 5(1)* would add little to what is otherwise a traditional rule of customary international law. This relinquishment of the right to contest the cultural policies and measures of other States is not something new. Thus, when the United States, which had lodged a complaint to the GATT in 1988 against the European Community concerning the quotas of the directive “*Television Without Frontiers*“, accept in their recent free trade agreements to allow the maintenance of existing quotas of their partners in the audiovisual sector, they do implicitly renounce to challenge such measures in the context of those agreements.

- *The legally binding nature of the convention*

Affirming the binding nature of a convention is, at first glance, stating an obvious fact, since in international law, a convention by definition binds the signatory parties who must fulfill it in good faith. Nonetheless, it is easy to understand that not all conventions are equally binding in practice, the degree of constraint varying according to the normative content of the rules, the mechanisms put in place to ensure their implementation and the approach adopted regarding dispute settlement. As far as concerns the rules, for example, they can have an essentially declaratory nature, impose obligations “best effort” obligations or impose obligations of results. Concerning the implementation of the convention, it can be left to the good faith of the parties or encouraged through the incorporation a monitoring mechanism that may be more or less elaborate. Finally, regarding disputes concerning the interpretation or application of the convention, dispute settlement mechanisms, ranging from mediation or conciliation to mandatory arbitration with or without sanctions can be established. Thus, the legally binding nature of a convention does not refer to an unequivocal reality. A convention can be more or less binding according to the choices made by the parties in this regard, which are related to the importance they grant the convention in question and their willingness to ensure its effectiveness.

In the commentaries on the Preliminary Draft Convention at the first meeting, the necessity of reaching an effective convention that would be legally binding was mentioned several times. Many States expressed concern over the cumbersome nature and cost of the implementation and dispute settlement mechanisms proposed, but most would nevertheless like to keep such mechanisms in one form or another. Certain States, however, seriously questioned the need to include implementation

and dispute settlement mechanisms in the convention on the grounds that they were not appropriate in the cultural sector. Overall, a general belief seemed to emerge that it was too early to take a position on the subject since the position of the parties regarding the actual content of the convention was not settled.

But if this issue of the legally binding nature of the convention does not seem to overly concern UNESCO members at the end of the first meeting, this is not the case for some non-governmental organizations, which see it as an absolutely fundamental element of the convention. This is the case for the International Federation for Human Rights, who explains in its written comments on the Preliminary Draft that the only way to ensure the convention's effectiveness is to include a dispute settlement mechanism equivalent to that of the WTO, in other words a mandatory dispute settlement mechanism with sanctions, and that if it does not do this, the convention runs the risk of falling into verbalism. This is also true for the International Theatre Institute, which, in its notes, comments, and observations concerning the Preliminary Draft Convention, points out that the lack of a system of sanctions is likely to cause an imbalance in relation to other treaties, particularly trade treaties, which establish such a system. From there to conclude that, in the absence of a compulsory dispute settlement mechanism with sanctions, the convention will be deprived of any effectiveness and quickly become a dead letter, there is only one step that these NGOs seem ready to take.

Yet, can we really reduce the entire issue of the convention's legally binding nature to this need for a mandatory dispute settlement mechanism with sanctions? If this were the case, the future of the Convention would already be seriously compromised as it is difficult to see what type of sanctions could be applied by UNESCO in the cultural sector (with the exception of authorizing the plaintiff State to suspend the protection it grants to the intellectual property rights of the State found guilty, as suggested by one author, but this would be immediately criticized by cultural creators themselves). Furthermore it is far from clear that a majority of the States would be inclined to accept mandatory arbitration with sanctions. In this regard, it is worth mentioning that it wasn't until 1995, sixty-seven years after the entry into force of the GATT, that a truly mandatory dispute settlement mechanism was finally introduced within multilateral trade proceedings. This did not prevent the GATT from functioning and gradually taking its place. In other words, in any international negotiation, it is difficult to proceed more quickly than the States themselves are ready to do. Thus, before drawing a conclusion regarding the binding nature of this convention, it is important to understand what the Convention itself is seeking to achieve.

First and foremost, it is meant to be 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 provide them with a common approach in international negotiations. As a tool for cooperation, 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

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

It is easy to see that the effectiveness of such a convention is not solely related to the issue of dispute settlement. In fact, two other factors will play an even bigger role in this regard. The first concerns the normative content of the convention, which must allow for firm commitments on the part of the signatory States, particularly with regards to recognizing their sovereign right to take any measures they deem appropriate to preserve and promote the cultural expression within their territory and their concomitant commitment to remain open to the cultural expressions of other States. In other words, the convention will not be truly binding if it is merely a wish list. The other factor concerns the implementation of the convention. If we don't want to merely leave this to the good faith of the States Parties, a monitoring mechanism must be put into place, a mechanism whose composition remains to be determined, but which could, judging by the States' comments during the first meeting, incorporate a general assembly of States Members, a board, and a secretariat. In fact, such a mechanism is essential in enabling the convention to fulfill the roles which it is assigned regarding the supervision of commitments, consultation and assistance to countries seeking aid.

This leaves us with the issue of dispute settlement. This is important not because implementing the convention might prove difficult and raise numerous conflicts, but because the possibility of conflict in the interpretation and application of the convention is unavoidable and the parties involved in litigation must be offered the possibility of recourse to a dispute settlement mechanism in which the decision is based on cultural, rather than commercial, considerations. Failing that, the parties in question will be tempted to resort to the WTO Dispute Settlement Body, which, as we know, makes decisions exclusively based on the commercial mindset underlying all agreements governed by this organization.

Judging by the commentaries of the parties during the first meeting, the choice of mechanism, as such, will likely be close to the solution proposed in the Preliminary Draft Convention. The procedure in question is as follows:

If good offices or mediation are not undertaken or if there is no settlement by negotiation, good offices or mediation, the parties concerned may have recourse to one of the following means of dispute settlement:

- a) *arbitration, at their joint request, in accordance with the procedure laid down in Annex III to the Convention; the arbitral award shall be binding. Parties shall implement the award in good faith;*
- b) *submission, at their joint request, of the dispute to the International Court of Justice.*

If the parties concerned have not accepted either of the procedures provided for in paragraph 3 above, the dispute shall be submitted to conciliation in accordance with the procedure laid down in Annex IV of this Convention. The parties shall consider in good faith the proposal made by the Conciliation Commission for the resolution of the dispute.

The first two options, as we can see, are only applied at the joint request of the parties. For obvious reasons, it is likely that these two options will rarely be used in practice. However, it should be pointed out that the text of the Preliminary Draft differs on this point from the *Convention on Biological Diversity*, which stipulates that when ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a State may declare in writing to the Depositary that for a

dispute not otherwise resolved, it accepts one of the other means of dispute settlement mentioned as compulsory. If such a procedure, which allows a State to accept arbitration or submission to the International Court of Justice in advance, were used by a relatively high number of States, it could help give a more binding nature to the dispute settlement procedure of the Preliminary Draft. We believe that it should be included in the text of Article 24. In other words, if we are going to borrow the dispute settlement procedure from the Convention on Biological Diversity, we should borrow it in its entirety.

The major weakness of this procedure is that it isn't legally binding. It leads, by default, to a conciliation report drafted by a Conciliation Commission composed of five members, a report that the parties examine in good faith. For this report to have a minimum of impact, it should be required that it be made public.

Although the possibility of a mandatory arbitration procedure was dismissed in the draft Convention, there is no doubt that it will come back on the table during negotiations. Various arguments will then be made with the goal of definitively ruling it out, such as the exorbitant cost of a procedure, making it inaccessible for the majority of developing countries. However, the fact is that if it is not retained this will be first and foremost because a majority of UNESCO members, including practically every developed country, do not want it.

CONCLUSION

In May 1998, Renato Ruggiero, then Director-General of the WTO, warned the Members of the organization that they “*should not underestimate the growing pressure on the multilateral trading system to give answers to issues which are very real public concerns, but ones whose solution cannot rely on the trading system alone.*” Among these issues, he specifically mentioned that of cultural diversity.³ Behind this warning is a thinly veiled appeal for the development of a set of rules aimed at responding to these problems outside the WTO. It is precisely the objective of the convention on the preservation and promotion of the diversity of cultural expressions to respond to the public's concerns in this respect.

The issue is so important that observers with a good knowledge of the international economic scene now see it as a major obstacle to pursuing efforts towards the liberalization of international trade. It is in this vein that Fred Bergsten, former Assistant Secretary for International Affairs of the US Treasury, in a speech before the Trilateral Commission in Tokyo in May 2001, referring to the demonstrations in Seattle, Davos, Bangkok and Washington, which he considered a superficial sign of a very real issue, declared, “*The world economy today faces a more fundamental set of challenges because the backlash against globalization is much more than economic. There is also a huge cultural dimension which raises a mass of contentious and difficult issues of their own.*” What we need to understand from these words is that the international trade system may find it increasingly difficult to ignore the negative repercussions that it can sometimes have on the diversity of cultural expressions, and beyond these, on cultural diversity in the sociological and anthropological sense.

³ Opening statement by the Director-General, Mr. Renato Ruggiero, Ministerial Conference, Geneva, May 18, 1998 : http://www.wto.org/english/thewto_e/minist_e/min98_e/anniv_e/dg_e.htm

The negotiations currently taking place at UNESCO on the diversity of cultural expressions are reaching a turning point in the development of an international system of governance. If these negotiations fail, the consequences will be felt not only in UNESCO and the WTO, but in a more general sense, throughout the system. In this regard, the first meeting of government experts on the draft version of the Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions will have contributed to putting into place the essential elements for a true debate on “*the crucial issue of the protection and the promotion of the diversity of cultural expressions in today's world,*” to use the words of the Director-General of UNESCO. At the same time, however, it has brought out rather significant disagreements on this issue and demonstrated the importance of clarifying underlying issues that remain often misunderstood.

The second negotiation meeting will clearly not be easy. Several issues remain highly contentious, including those discussed here, and will be brought up again in the debate. However, we don't believe that any of these issues is likely in itself to compromise negotiations on the Convention if its finality is kept in mind. Possible solutions and even responses to these various issues exist, as we have sought to demonstrate above. What is more disconcerting is the possibility that these negotiations will turn into a debate on the pros and cons of globalization and the liberalization of trade, or will be perceived as an unexpected opportunity to deal with loads of issues that are more or less related to the preservation of the diversity of cultural expressions. If such is the case, we run the risk of seeing the implementation of various strategies aimed at removing any concrete meaning from the Convention, either by diluting its purpose or seeking to render the Convention itself as inoffensive as possible.