



**First Meeting of Experts (category VI)  
on the First Draft of an International Convention on the Protection of  
the Diversity of Cultural Contents and Artistic Expressions**

*UNESCO Headquarters, 17-20 December 2003*

**Report**

**1. BACKGROUND**

At its 32nd session (29 September-17 October 2003), the General Conference, having examined document 32 C/52 containing the Preliminary Study on the Technical and Legal Aspects Relating to the Desirability of a Standard-Setting Instrument on Cultural Diversity and observations made in that regard by the Executive Board at its 166th session, decided to adopt, by acclamation, a resolution inviting the Director-General to submit to the General Conference at its 33rd session (2005) “a preliminary report setting out the situation to be regulated and the possible scope of such regulating action proposed, accompanied by the preliminary draft of a Convention on the protection of the diversity of cultural contents and artistic expressions”.

For that purpose, the Director-General established a group of 15 experts representing a wide range of disciplinary approaches and serving in a personal capacity.

**2. INTRODUCTION**

The first meeting of experts was held at the Organization’s Headquarters in Paris from 17 to 20 December 2003 in the presence of Mr Mounir Bouchenaki, Assistant Director-General for Culture of UNESCO.

The Director-General opened the meeting commencing by defining its framework and objectives. He pointed out that the preservation of cultural diversity fell within UNESCO’s mandate: preserving and promoting “the fruitful diversity of (...) cultures” (Article 1 of the Constitution). He went on to say that cultural diversity was being

weakened, not to say threatened, in an unprecedented manner by new phenomena posing challenges whose full implications were still largely unrecognized. One such phenomenon of concern to virtually all cultures was globalization, which was affecting local cultures and in some cases marginalizing them or otherwise placing them in jeopardy. That had led the UNESCO Member States to adopt in November 2001, at the 31st session of the General Conference, the UNESCO Universal Declaration on Cultural Diversity and its Action Plan. Noting that in spite of its undeniable moral force the Declaration was regarded by the Member States as an inadequate response to specific threats to cultural diversity, Mr Matsuura stated that it was for that reason that the question of the desirability of drawing up a binding standard-setting instrument had been brought to the attention of the Executive Board (Spring 2003) and the General Conference (Autumn 2003). Lastly, the Director-General spelled out the mandate of the group of experts corresponding to the first phase of the two-stage process of drawing up standard-setting instruments at UNESCO: the second phase would consist of intergovernmental negotiations. The experts were invited to undertake preliminary deliberations in a personal capacity that would contribute to establish the outline of a first draft of a Convention.

The Assistant Director-General for Culture informed the experts that following prior consultations by the Director-General, Mr Carlos Moneta and Mr Mihaly Ficsor had agreed to co-chair the meeting, which two experts who begged to be excused were unable to attend. He also said that Ms Katerina Stenou, Director of the Division of Cultural Policies and Intercultural Dialogue, had been designated Rapporteur.

Mr Mounir Bouchenaki, commenting on the agenda, defined the parameters of the consultation and recalled that five topics would be addressed in succession, each of them being the subject of two presentations by previously designated experts. The topics were:

- “Aims of the Convention”, introduced by Anthony Rudder and Carlos Moneta;
- “Definition and fields of application of the protection of the diversity of cultural contents and artistic expressions”, introduced by Kwasi Wiredu and David Throsby;
- “Relationship of the future Convention to other international instruments, particularly with the WTO General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)”, introduced by Toshiyuki Kono and Tyler Cowen;
- “International cooperation and assistance”, introduced by Ivan Bernier and Issiaka-Prosper Laleye;
- “Mechanisms of follow-up (implementation) of the Convention”, introduced by Alexander Sadovnikov and Mihaly Ficsor.

Following this presentation, the experts expressed the hope that the question of the rights and obligations of States would be discussed separately as a supplementary item.

### 3. SUMMARY OF THE DEBATES AND PROPOSALS

#### 3.1 Aims of the Convention

The experts continually emphasized that the future Convention should consolidate the achievements of the UNESCO Universal Declaration on Cultural Diversity, in particular the links between respect for fundamental rights, democracy and creative diversity or those between cultural diversity, dialogue and development. They also strongly recommended that the said Convention should place cultural development on an equal footing with economic development. The principle of the free flow of ideas and images too was reaffirmed by all. All such principles could be included in the preamble to the future Convention in the same way as those of balance, transparency, sustainability and equal dignity of all cultures. In this regard, some experts suggested that the full text of the Declaration should be incorporated in the Convention, while others recalled that the aim of the Convention was not to protect cultural diversity in the widest sense of the term, but rather to protect a specific aspect of cultural diversity, namely the diversity of cultural contents and artistic expressions.

Some experts felt that it was important to distinguish between (i) the aims relating to the end purpose of the Convention, and (ii) those relating to its implementation.

With regard to the aims of the first type concerning the purpose of the Convention: a Convention should underscore, along the lines of the Declaration and having appropriate regard to the specific character of cultural contents and artistic expressions, the need for a balance between culture and trade, and thereby the dual nature – cultural and economic – of cultural goods and services.

The precise meaning to be given to that dual nature remained controversial, but there was fairly general agreement that the principles of “exemption” or “exception” did not take it sufficiently into account. In that connection, the term “cultural recognition” was proposed in preference to “cultural exception” in an effort to follow a positive approach.

The aims of the first type also refer to the principles and rules that determine the commitment of the States Parties: a Convention should establish and validate rights and obligations specific to States in the area of cultural policy. While there was broad agreement on the general principle, consistent with the text of the Declaration, that States had a generic right to take measures in support of cultural diversity within the strict limits of respect for basic human rights, divergent views persisted as to the status of those rights in relation to rights and obligations arising from other texts, measures that might be “appropriate” in respect of those rights, and possibly correlative obligations. Those questions were at the heart of subsequent sessions.

With regard to the aims of the second type concerning the implementation of the Convention, there was a broad convergence of views as to the two principles that should be promoted by a Convention: (a) access for all consumers and users to cultural products and artistic expressions that were rich and diversified, including in terms of geographical origin (some experts highlighted the positive contribution that the market made spontaneously in this respect, while other experts underlined the “imperfections of markets” and emphasized the specific problems encountered by small markets; and

(b) the participation of all creators in cultural life and their access to the widest possible means of dissemination. The twin emphasis on *consumers* and *creators* was intended, in the experts' opinion, to underline that it was only through them and their interaction that the "cultural product" existed as such.

Consequently, the principle of promoting and strengthening international cooperation and solidarity, particularly for the benefit of developing countries, minorities and indigenous peoples, was unanimously supported as a contribution to striking a balance among countries in terms of capacity to produce, distribute and have access to the international market in cultural products.

In addition all the experts agreed on the need to view protection in a positive sense, that is to say, not only in terms of preserving cultural expressions but also as creating the conditions in which they might develop and flourish.

Alongside that basic consensus, a number of points of divergence emerged. Thus some experts highlighted the risk of giving too much authority to States, since cultural diversity depended in large measure on the vitality of the private sector, and the State was not always the sole guarantor of such diversity.

Similarly, most experts also stressed that protection should imply "empowerment", particularly of those who had no means of expressing themselves and of becoming known nationally and internationally. While no consensus was reached, a preliminary outline of the objectives was proposed as follows: (i) to recognize the specificity (culture/trade duality) of cultural goods and services and accordingly envisage appropriate measures; (ii) to identify the obligations of the State Parties in respect of the protection and promotion of cultural diversity, (iii) to preserve the rights of the States Parties to maintain or adopt appropriate measures for the promotion of cultural diversity, and (iv) to strengthen international co-operation and solidarity with a view to ensuring a balance between developing and industrialized countries in terms of production and access to the international market.

### **3.2 Definition and fields of application of the "protection of the diversity of cultural contents and artistic expressions"**

In the discussion on this topic, the experts put forward several proposals relating to cultural products; the link between cultural expressions, cultural products, cultural industries and cultural policies; to cultural capital; and culture and to cultural diversity. These were aimed, generally speaking, at ensuring consistency between a broader anthropological conception of culture, the terms of the Declaration and the specific emphasis on artistic expressions and cultural products proposed for the future Convention.

#### Cultural products

The experts began by underscoring that there were no internationally recognized or satisfactory definitions or categories/criteria in this regard. The only possible reference would be the North American Free Trade Agreement (NAFTA) which included a list of "cultural industries" that might possibly be referred to for the purposes of the Agreement.

That being so, it was suggested that the first task was to clarify the term “cultural product” and the terms “goods” and “services” with the future Convention in mind. The definition of those terms could facilitate that of “key notions” such as “cultural contents and expressions”, “cultural industries” and “cultural policies”. Three possible working methods were noted: (i) drawing up a set of criteria that would distinguish cultural products from other products; (ii) compiling an exhaustive list of cultural products; and/or (iii) compiling a non-exhaustive list of cultural products, with references to some examples of contents, support, sectors or activities. While there was a slight preference for the non-exhaustive list solution, it was observed that it would be desirable to combine the approaches, especially – as several experts stressed – in view of the rapid development of technologies and the need for the future Convention to adapt to the changes that would shortly affect the production and distribution of cultural products. In that connection, it was suggested that telecommunication policy should be regarded as an integral part of cultural policies, taking into account the role that new information technologies may play in stimulating cultural diversity and exchanges.

So as to distinguish the specific character of cultural products, a triple criterion was proposed and broadly endorsed: (i) the cultural product is a creation deriving from the conjunction of creativity and human labour (industrial, artisanal or other); (ii) the cultural product has a symbolic value apart from any economic value, the former being neither a result nor an aspect of the latter; and (iii) the cultural product generates or may generate intellectual property, in particular copyright and neighbouring rights (which involves more than its current status in positive law – folklore, for example, not being protected under the current international intellectual property regime).

As to the list of cultural products (whether illustrative of general criteria or exhaustive in respect of products deemed to have priority), it was proposed that a survey be conducted among Member States and within civil society to identify differences in the definitions of cultural products as between countries.

#### Link between forms of cultural expression, cultural products, cultural industries and cultural policies<sup>\*</sup>

While no satisfactory consensus was actually reached, some ideas were put forward concerning the link between the above-mentioned elements. Generally speaking it could be said that certain forms of “cultural expression”, as symbolic vehicles of social communication, may take the form of cultural products (in particular products generating intellectual property under existing positive law) distributed through cultural industries. Cultural goods and services accordingly are a means inter alia by which cultural expressions can be conveyed to the general public; while cultural industries, for their part, are a means of production and distribution of cultural products. Other cultural products, on the other hand, might not at all be “industrial” in nature; and, lastly, certain cultural expressions might not take material form as cultural products (folklore, religious ceremonies, cookery, libraries, archives or public museums). Furthermore, when cultural expressions take the form of cultural goods and services; they do not necessarily follow the economic logic of cultural industries (e.g. libraries and archives).

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<sup>\*</sup> In place of “artistic expression”, considered too restrictive, several experts took the view that it was more appropriate to employ the more inclusive term, “cultural expression”.

### Cultural capital

To take account of the relationship between cultural products – whether or not marketable and consumable – and their background in creativity, it was proposed that the existence of a cultural capital belonging to a community, a nation or humanity as a whole should be recognized. That capital was rooted in expressions, products, know-how, languages and schemes of thought, the heritage and landscapes, and, conversely, was eroded in so far as the mainsprings of its creativity were destroyed, neglected, or simply inadequately maintained. The term has the advantage of presenting an analogy with “natural capital” (natural resources) and therefore of suggesting that States would be under an obligation to protect cultural capital in the same way as natural capital with a view to sustainable development.

### Culture and cultural diversity

Concerning the basic terms “culture” and “cultural diversity” as they related to the principles of the Convention, it was generally felt that reference should be made to UNESCO’s work and documents, in particular the UNESCO Universal Declaration on Cultural Diversity, especially as the future Convention would follow the same lines. Furthermore, to guard against undesirable practices and cultural expressions, it was considered essential to reaffirm the reference in the Declaration to the primacy of the principles of the protection of human rights proclaimed in international instruments.

In conclusion, the experts pointed out that no clear conception of the field of application of the Convention had emerged from the discussions. This matter should be placed on the agenda of the next meeting.

### **3.3 Relationship of the future Convention to other international instruments, particularly the WTO General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)**

In the general discussion, a number of important points were raised in addition to that of the compatibility of the future Convention with other international instruments which depended largely on its aims and scope of application that had yet to be defined. It would be premature to discuss the subject as long as these aspects were not clarified. It was pointed out that if the future Convention were based on the principles of assistance and capacity-building (for example, subventions to developing countries and marginalized cultures), such a positive approach would in no way conflict with existing instruments. In this regard, it was emphasized that the legal answer to the question regarding the relationship between the future Convention and other international instruments should be sought in the basic rules of the international law of treaties, as well as in a particular type of clause entitled “Relations with other international agreements” stating that the parties to a treaty confirm their rights and obligations under the terms of other accords to which they are party.

Furthermore, the question of the relationship to existing instruments was not exhausted by textual analysis. Indeed, the text of the Convention should specifically state how it related to other texts on the basis of three possible theoretical models: (i) the future

Convention might override the provisions of other instruments (for example, NAFTA overrode WTO provisions); (ii) the other agreements might take precedence over the future Convention (as environmental agreements take precedence over NAFTA provisions); and (iii) the Convention might not specify anything in that regard, opting for a “neutral” provision or parity relationship whereby States would undertake to respect their agreements without discrimination. The latter case presupposed, at least implicitly, the existence of a mechanism for the settlement of disputes. The majority of the experts, however, rejected option (ii).

These reservations of principle having been noted, it was pointed out that if the future Convention were to authorize certain forms of protection for cultural products or cultural industries, it would risk running counter to the basic principles of WTO agreements (GATT and GATS), in particular the gradual liberalization of commercial exchanges, the restriction of preferential national treatment and the “most favoured nation” clause. It was noted, in particular, that Article XIX of GATS, subparagraph 1 aims at “achieving a progressively higher degree of liberalization”, is complemented by subparagraph 2, which specifies that “*the process of liberalization shall take place with due respect for national policy objectives and the level of development of individual members*”.

In addition, some experts mentioned the unequal treatment of the developing countries in those legal frameworks. It was pointed out that a certain number of countries, many of which are developing countries, to which the proposed Convention should give priority, had taken up engagements in their accession to the WTO without requesting neither exemptions to the most favoured nation treatment nor reservations concerning national treatment. This situation places them at a disadvantage in current and future trade negotiations. More generally, it was suggested that it should be specifically stated that the proposed Convention would not come into conflict with other agreements to which States were parties.

To that end, it would be constructive to specify which sectors and measures were appropriate for maintaining and promoting cultural diversity and to take them into account as *sine qua non* conditions that would be the subject of specific commitments in the future Convention. As to the TRIPS Agreement and other treaties on intellectual property, fewer difficulties were foreseeable, except, eventually in the area that might touch upon the Internet treaties.

The experts also stressed the need for consistency among the various UNESCO standard-setting instruments, particularly with reference to the Convention for the Safeguarding of the Intangible Cultural Heritage.

It remained the general opinion that the great challenge was the question of how UNESCO would manage, in the future Convention, to develop an innovative cultural approach in the current international legal context in which commercial considerations tended to take precedence. That challenge had legal and technical implications, even if its scope was not confined to these. The experts accordingly specified that the future Convention should have a purely cultural objective, being of an essentially cultural nature, and should not seek to modify rights and obligations of the States elaborated under other international agreements.

### **3.4 International cooperation and assistance**

During the general debate, international cooperation and assistance were unanimously considered the linchpins of the future Convention. In the view of the experts, the issue of international cooperation and assistance should focus on the possibility of access by all countries to the diversity of each others' cultural contents and artistic expressions and on support for developing countries to enable them to set up cultural industries capable of meeting the domestic and international demand for cultural goods.

Some experts argued that international cooperation should be built on strengthening the production and distribution capacities of developing countries that face strong competition of goods and services imported from the industrialized countries (a situation that some experts qualified as commercial, cultural and social dumping). This emphasis on capacity building should be coupled with the promotion of products originating in developing countries. In addition, experts highlighted the need to develop cultural marketing skills, so as to be able to meet market demands at the local, regional and international level.

Other experts referred to Article 11 of the UNESCO Universal Declaration on Cultural Diversity, stressing the need for States Parties to have recourse to partnerships involving the public sector, the private sector and civil society. Such partnerships could encompass such diverse fields as development funds, the transfer of technologies and know-how, support for cultural institutions, the exchange and dissemination of statistics and good practices, preferential treatment of cultural products from developing countries, subventions and positive quotas in support of creators, co-production agreements with the audiovisual sector, the establishment of observatories to facilitate the exchange of national experiences, and incentive measures for regional cooperation. It should not be forgotten however, that cooperation also meets the needs of the developed countries which frequently have major difficulties in extending their own cultural expression.

One expert also suggested drawing on Chapter 5 of the Convention for the Safeguarding of the Intangible Cultural Heritage (International cooperation and assistance), adapting the approach to the specific problem of preserving and promoting cultural expressions. Nevertheless, with regard to the establishment of a development fund, one expert referred to the reluctance expressed by many countries in that regard during negotiations on the Convention for the Safeguarding of the Intangible Cultural Heritage. That point of view was qualified by other experts, who considered that the establishment of a development fund could be of symbolic value in evaluating States' level of commitment to cultural diversity, even if – they stressed – the development fund was not the sole parameter of international cooperation and assistance.

### **3.5 Mechanisms of follow-up (implementation) of the Convention**

During the general debate, it was pointed out that the success of the future Convention would depend largely on the follow-up mechanism. In the experts' view, such a mechanism was not an end in itself. Its feasibility depended on the aims assigned to the future Convention and on the definition of the rights and obligations accepted by the States Parties. One might nonetheless draw on models devised for other international instruments, such as that of WTO (which provided for good offices coupled with recourse

to a panel); and of UNESCO which provided for an assembly, an interministerial committee and working subgroups on cooperation, to which might be added, if necessary, observatories responsible for supplying information and statistical data on the effective implementation of the Convention, on mediation, on the review of services and systems, and other measures. It was also stressed that any mechanism that entailed more weighty procedures, administrative tasks and costs should be avoided.

### Sanctions

The question of the desirability of a sanction mechanism was discussed. It was recognized that the effectiveness and credibility of the future Convention would depend on the nature of the commitment by States Parties and the degree of constraint placed upon them. Does the term “constraint” imply a sanction? The experts were divided on that question: some believed that the word “sanction” should be included in the future Convention; others took the view that it should not because of its negative connotation. Several experts argued that a certain degree of severity would be necessary to ensure the effectiveness of the future Convention, while others considered that it was likely to weaken the Convention and that it was not UNESCO’s task to apply such a measure to States. One speaker said that he was against the principle of a binding legal application of the principles of the Convention, considering that the primary effectiveness of such an instrument should rest, not on constraint or the violation of the rights of States, but rather on persuasion, on national cultural exchange policies, and on the positive use of education and the new technologies. In view of the divergent opinions expressed, it was suggested that a consensual approach be taken, based on positive exhortation, supportive measures and a system to monitor the implementation of the Convention in order to ensure its application should be adopted.

Following this open debate, a more limited common denominator emerged centred on the idea that States Parties to the future Convention could be assisted in holding to their commitments, that is to say in exercising their rights and duties, by combining the mechanisms of dialogue (such as good offices, negotiations, monitoring, evaluation of results), with a judicial mechanism (as a last resort, where the mechanisms of dialogue had failed).

### **3.6 Rights and obligations of States**

In discussing this cross-cutting theme, the experts wished to underline the extent to which the definition of rights and obligations of States is a central task to the future international instrument, insofar as it will determine the scope of the competences and constrains freely accepted by the parties and will condition the respect for the objectives that are assigned to it.

Generally speaking, the importance of an active commitment on the part of States to the promotion of cultural diversity was underlined. The experts placed emphasis on the rights and obligations of States at both international and national levels, although the latter led to major differences of opinion<sup>2</sup>. The future Convention should also take account of

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<sup>2</sup> In this regard it was suggested that discussions on this subject would be facilitated if proper distinction was made between the commitments of the States parties at national, international levels and in terms of co-operation and assistance.

differences of situation, jurisdiction and social context within each State, in particular by including preferential treatment for developing countries and by recognizing the rights of States to maintain or adopt appropriate measures to promote cultural diversity with due respect to human rights. In this connexion, considerable transparency should accompany the follow-up mechanism to permit widely accepted criteria to come to the fore. It was made clear that such transparency could only be achieved through proper linking with other international agreements.

In the same spirit, experts underlined that the future Convention should determine the conditions for the freedom to create (reinforcing the status of creators and setting up incentive measures), the conditions to create (cultural products require adequate structures of production), and the possibility to exchange (guarantee free circulation of cultural products). At the same time some experts expressed the hope that the future international instrument would encourage the States Parties to promote and to defend cultural diversity in all international bodies including the WTO underlining the dual cultural/economic nature of cultural products. Others experts felt strongly that such promotion should be given obligatory status.

With a view to improving conditions for the free circulation of cultural goods, some experts expressed the hope that the development of new audiences and the education to the consumption of the cultural goods of other countries would be made an obligation for the States party to the future Convention.

#### **4. CLOSURE OF THE MEETING**

##### **4.1 Conclusion**

Mr Mounir Bouchenaki expressed UNESCO's gratitude to the experts for their prompt response to the Director-General's invitation and the quality of the work they had done in a short span of time and in a particularly courteous and productive atmosphere.

He outlined, by way of conclusion, the salient points and achievements that had emerged from the discussions over the four working days:

- There had been general agreement on the relevance for the preservation of the cultural diversity of cultural contents and artistic expressions of drawing up an international instrument, along practical lines that were yet to be determined. The experts had repeatedly made it clear that they wished the Convention, which was a binding instrument, not to take the form of a catalogue of penalties but rather of a document characterized by a generous approach to ensuring an environment conducive to cultural diversity, dialogue and renewed international cooperation. In this respect, the task was one of deciding how, in the absence of sanctions, the protection of cultural goods and services of developing can best be achieved
- The majority of the speakers had stressed that one of the main aims of the proposed Convention should be to address observable imbalances in the fields concerned, which were generally inimical to the expression of cultural diversity worldwide and, in particular, that of the developing countries and minorities. It should be emphasized that the idea that cultural development underlies the various aspects of

economic development is essential to understanding the need for effective mechanisms to protect cultural and artistic expression, and in particular the end-products of such unique expression. The Convention should therefore serve to enhance the diversity of cultural expression in an enlightened global environment that respects the role that the Convention has to play in maintaining balanced cultural and economic growth and development. The role of the proposed Convention would therefore be to modulate the existing regime of rights and obligations in favour of the development of cultural diversity in the States signatories and to foster the development of cultural diversity in the world.

- The question of “protection” had given rise to an extensive and substantive debate centred on existing intervention mechanisms and on the obstacles that some of these presented; it had been stressed that the “protection” envisaged by the proposed Convention should not in any way lead to identity-based isolationism in the form of “cultural nationalism”, to limitation of the supply of cultural products and consequently of the public’s freedom of choice, or to the restriction of the freedom of creation; emphasis had been laid on the importance of ensuring that the links between cultural diversity, democracy and human rights were not weakened as the result of the introduction of a given protective mechanism.
- Several experts had stressed the need for data on cultural policies, in particular in the developing countries, where there was a dire lack of statistics. One expert had regretted in that regard the discontinuation of the UNESCO World Culture Report. It had been stressed that such information had already enabled verifiable links to be established between cultural diversity and development, and were making possible the establishment of exchanges and the dissemination of information, statistics and good practices.
- Several speakers had expressed the view that, to be fully effective, the Convention should embody a sufficient degree of detail concerning cultural goods and artistic forms of expressions. There had, however, been broad agreement on the need to ensure that the text remained general in character given the impossibility of compiling an exhaustive list of the goods and forms of expression covered by the Convention. The real challenge is therefore one of creating a document to enable developing countries to match their artistic and creative output to a type of industrial infrastructure that provides them with greater control of the means of production and distribution of their products, and in a manner that is directly beneficial to their economies.

#### **4.2. Follow-up of the work of the group of experts**

Ms Katerina Stenou announced that the report of the meeting would be sent to the experts in the course of January 2004. She took the opportunity to underline that the two co-Chairpersons and all the experts, whether or not they had introduced the debates, would be completely free to correct the report and to submit to the Secretariat contributions that could provide a basis for drawing up an initial outline of the preliminary draft Convention. It would be desirable that those contributions be brief and written in a concise and clear language so as to make them readily usable in a legal document.