

The importance of Affirming the Principles and Objectives of the UNESCO Convention on the Diversity of Cultural Expressions in Other International Forums

How effective will the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions prove to be as an international instrument for upholding the right of countries to apply cultural policies?

After two years of work implementing the Convention, it is still too soon to answer this question. However, in light of the implementation priorities established for the next two years during the Second Conference of the Parties in Paris this past June, there is some cause for concern.

The question of the Convention's relationship to other international instruments is set out in Section V of the Convention, which is comprised of two articles: 20 and 21.

Article 20 affirms that the Convention is equal in weight to other international instruments, and commits States to take its provisions into account when entering into future agreements—as well as when interpreting and applying existing agreements to which they are Party. Article 21 undertakes States to consult together to develop approaches to promote its principles and objectives in other international forums.

Well before the Conference, it was clear that a consensus had developed among States that the language in Article 20 was already sufficiently operational in nature to preclude the need for operational guidelines.

That left Article 21. There is a particularly good case to be made for operational guidelines for this article—which we detail later. At the same time, going into the Conference, there was a major question as to whether States would be prepared to address this question at this stage of the Convention's implementation.

In the end, the most surprising outcome of the Second Conference wasn't the fact that Parties attending the Conference did not charge the Intergovernmental Committee with developing operational guidelines for Article 21.

Rather, what was most striking was the utter silence of the Parties with respect to this key article. The result was a decision by default—one made without any debate on the question.

However, the original pressures on culture that led to the campaign for an international instrument that would affirm the right of countries to apply cultural diversity have not gone away. Trade agreements continue to proliferate—and with them, the pressure on countries to make liberalization commitments that would constrain their capacity to apply policies and other measures in support of their domestic cultures. Moreover, there is the challenge of pushing the vision of the Convention into other forums in order to maximize

the resources that can be brought to bear to realize the international cooperation objectives of the Convention.

As a result, it now becomes essential that at its upcoming meeting in December the Intergovernmental Committee decide on its own to pursue work on how best to promote the principles and objectives of the Convention in other international forums.

The Committee has the power to do so because this matter was considered important enough during the negotiations on the Convention that this mandate was explicitly conferred upon the Committee in Article 23 6 e).

The following reviews the events that led us to the current situation—beginning with the pressures that galvanized cultural organizations the world over to work to secure an international legal instrument that would affirm the right of States to apply cultural policies.

Articles 20 and 21: Why They Matter

To understand the importance of these articles, one needs to recall the context from which the Convention emerged.

In the late 1990s and early 2000s, cultural professional organizations around the world mobilized in support of an international instrument on cultural diversity as a response to a looming threat: if nothing was done, trade agreements would steadily and irrevocably encroach on the capacity of countries to apply and retain cultural policies.

From this emerged the initiative to secure an international instrument that would recognize the distinctive nature of cultural goods and services as essential transmitters of values, identity and meaning—goods and services not reducible solely to their commercial value—and therefore affirm the right of States to apply policies and other measures in support of their domestic cultural sectors.

During the negotiations on the Convention in 2004 and 2005, the debates on the specific question of the Convention's relationship to other international instruments were difficult, and at times tense. However it was crucial that the Convention clearly assert its non-subordination to other international instruments and that it commit each signatory States to take its provisions into account not only when entering into other subsequent international agreements, but also when interpreting and applying other agreements to which they are already a party (Article 20).

States also agreed on the value of consultation among signatory States in order to promote the objectives and principles of the Convention in other international forums (Article 21). Since the rights, duties and obligations set out in the Convention will necessarily have an impact in other areas if the Convention is to be truly effective, in particular trade agreements, consultation among the Parties is essential in order to assert

and uphold the consensus on the international stage that States should retain the right to support their domestic cultural sectors through policies and other measures.

The consensus ultimately forged on these issues during the negotiations is reflected in the wording adopted for Articles 20 and 21.

With the entry into force of the Convention in March of 2007, Articles 20 and 21 effectively became operational. The importance of operational guidelines for Article 21 lies in the fact that they would serve to flesh out the article by, for example, identifying other appropriate international forums, setting out specific channels for consultations, and spelling out specific actions that States might take to promote and uphold the principles and objectives of the Convention. Moreover, the actual work to develop such guidelines would set in motion a process of discussion and exchange among States that would reinforce their shared commitment to advancing the Convention in other international forums.

First Implementation Phase: Prioritizing International Cooperation

When the time came to start the process of bringing the Convention to life through implementation, the 56 States attending the First Conference of the Parties in June 2007 chose to defer discussion of the issue of the Convention's relationship to other international instruments. Instead, they chose to focus first on the crucial theme of international cooperation.

Specifically, priority was given to operational guidelines on the provisions dealing with the manner in which developed countries could support developing countries in order to encourage the emergence of their own cultural industries.

Underlying this was the recognition that developing countries often have no cultural policies in place, or rudimentary ones, and that they require support in developing and strengthening their cultural sectors.

International cooperation constitutes a crucial feature of the Convention, one that invests the Convention with a dynamic, forward-looking orientation rather than being simply a static, defensive instrument. It is therefore important to recognize the important progress made in this field during the first two years of implementation—resulting in the package of operational guidelines unanimously approved at the Second Conference of Parties this past June.

Reasons Advanced for not Addressing Article 21

Civil society organizations that have raised the question of addressing Article 21 through operational guidelines have heard a number of arguments against doing so.

Initially, as indicated above, there was the emphasis placed on addressing the Convention's international cooperation dimension on a priority basis.

While very sensitive to the need for prompt action on this count, and supportive of the priority attached to developing guidelines for the articles of the Convention that address cooperation, cultural professional organizations remain concerned that the ability to pursue meaningful support to developing countries in the application of cultural policies and other measures will be sharply limited if in the meantime countries waive their right to apply such policies in trade negotiations.

In other words, establishing consultation channels to promote the Convention's principles and objectives in other forums would serve to reinforce the international cooperation objectives of the Convention—and potentially expand the range of international avenues and resources in support of these objectives.

Another reason frequently heard for not initiating discussions on Article 21 was the risk that it would lead to a re-opening of the debate regarding the wording of its neighbouring article, Article 20.

Fundamentally, developing operational guidelines for Article 21 in no way results in a requirement to undertake discussions on Article 20.

It is also worth noting that no signatory has expressed a desire to reopen debates on Article 20, whose wording was the result of lengthy debate during the original discussions—nor would the forum of a Conference of Parties or Intergovernmental Committee session constitute appropriate settings for a new negotiation on this wording.

Another argument advanced is that the wording of Article 21 is already sufficiently clear and therefore does not require operational guidelines.

However, as pointed out in a recent paper by international law expert Ivan Bernier, several operational aspects of the article warrant clarification. For example: what exactly is meant by “international forums”? What form should consultations take? What issues will require consultations?

Another argument advanced is that more countries need to be persuaded to ratify the Convention in order to ensure a broader and more balanced representation of all the regions of the world.

On this point, when civil society organizations raised the question of asserting the Convention's provisions in other international forums, they were advised to be patient. They were warned that forcing a premature discussion of the Convention's relationship to other international agreements could have a negative effect on ratification and scare away countries uneasy about this potentially controversial dimension of the Convention.

Two years have passed since the first Conference. Forty-two new countries have ratified the Convention—98 had ratified at the time of the Second Conference this past June. Nonetheless, the Conference was again characterized by a general silence on the question of how to push out the provisions of the Convention into other international forums.

One is left to wonder how many ratifications will be required before the objectives of the Convention are systematically affirmed in other international forums. Certainly, ongoing work to promote broader ratification is essential, but already the Convention's ratification base includes the vast majority of European Union member states, the majority of Francophone member states, Brazil, Canada, India, South Africa, and many others.

Finally, one of the arguments relied on for not dealing with Article 21 during the Second Conference of the Parties is that this isn't necessary, since Article 23 6(e) already directly charges the Intergovernmental Committee with establishing consultation procedures for the promotion of the objectives and principles of the Convention in other international forums.

This argument is perhaps the most persuasive, still, for it to be truly so the Intergovernmental Committee must exercise the mandate it has been accorded in Article 23, and begin work on developing avenues for promoting the Convention in other international forums. The countries that have been elected to the Committee are all leader countries that have strongly championed the cause of the Convention—their continued leadership is more important than ever in order to ensure that this critical dimension of the Convention is addressed.

Possible Consequences of Deferring Discussion of the Issue

The immediate consequence of the decision made by default at the Conference of the Parties in June is that there now cannot be operational guidelines on Article 21 before 2013.

This is because even if the next Conference of the Parties in 2011 decides to add this Article to its agenda, two more years will be needed before draft guidelines can be proposed for adoption at the following Conference of Parties.

However, in the meantime, even if multilateral negotiations remain at a stalemate at the WTO (and even this is by no means a certain state of affairs), bilateral and regional trade negotiations will continue to proliferate, with culture in play and with no operational framework to guide States in ensuring coherence with the principles and objectives of the Convention.

If one examines a number of trade agreements concluded since the Convention was adopted, the unavoidable conclusion is that several countries, although they ratified, have not necessarily been consistent in abstaining from liberalization commitments affecting culture. For some of these countries, their commitments will impose serious limitations on their latitude for applying cultural policies in the future.

It is true that each country that ratifies the Convention is responsible for upholding it through its own actions. However, this becomes much easier if all States that are signatory to the Convention work together in other forums to affirm and reinforce the consensus that the Convention represents.

If countries continue to liberalize their cultural sector in the course of trade negotiations, the Convention will be emptied of its potential. It could be reduced to the status of an international cooperation treaty more noteworthy for its good intentions than its practical impact.

How can one avoid this scenario?

The Key: Political Will

As already stated, the Intergovernmental Committee has the leeway and the responsibility, according to its terms of reference in Article 23 6(e), to identify mechanisms to promote the principles and objectives of the Convention in other international forums. In his [recently-published study](#) on the relationship of the Convention to other international instruments, Professor Ivan Bernier underscores the importance of this explicit mandate entrusted to the Committee.

It is with great interest, therefore, that civil society organizations will follow the proceedings of the next meeting of the Committee in December. It will be important for Ministers of Culture and for civil society once again to mobilize and be heard.

The work of the Committee may provide the foundation for a decision at the next Conference of the Parties to task the Committee with developing operational guidelines for Article 21 for the 2011-2013 period.

As for Article 20, Professor Bernier explains that its true significance will emerge in the individual actions of States that are parties to the Convention. Each signatory is responsible for complying with this fundamental commitment to ensure that the Convention is not subordinated to other international treaties, and that its provisions are taken into account not only when entering into new agreements—but when interpreting and applying agreements to which they are already party.

It is also worth repeating that in reality both Article 20 and 21 are already in force—operational guidelines, notably for Article 21, could be useful by spelling out specific avenues for States to pursue the task of promoting its principles and objectives in other forums. But by ratifying, States have already committed themselves to maintain coherence and not undermine the Convention by renouncing in other forums what they have so clearly affirmed in the Convention.

Consequently, the ongoing demonstration of clear political will by States that have ratified will be crucial to the effective implementation of the principles and objectives of the Convention.

The Importance of Maintaining Mobilization

Given the challenges that still remain with respect to realizing the Convention's full potential, renewed vigilance is essential by the coalitions and cultural organizations that mobilized around the world to support an international instrument recognizing the distinctive nature of cultural goods and services and asserting the right of countries to apply cultural policies.

Governments need to clearly hear the importance that cultural professional organizations attach to the development of concrete actions to affirm, in a concerted and coordinated fashion, the principles and objectives of the Convention in all appropriate forums.

Given the leadership that the States that now sit on the Intergovernmental Committee have demonstrated throughout the campaign to put in place the Convention, cultural professional organizations are counting once more on these States to show the way in addressing this essential dimension of the Convention.

At the same time, it will remain every bit as important that coalitions and all cultural professional organizations vigilantly monitor any trade agreements that their governments are contemplating. The impact of the Convention depends on States being consistent and not undermining, through undertakings to liberalize culture, what they clearly asserted by voting in favour of the Convention or ratifying it.

The Convention's ultimate effectiveness as an instrument for upholding the right to apply cultural policies is still to be decided. Mobilization and vigilance by the cultural milieu is more important than ever.