Implementing the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

Future Actions

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with the collaboration of
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NOTE TO READERS

UNESCO's adoption of the *Convention on the Protection and Promotion of the Diversity of Cultural Expression* in October 2005 was a major step towards the emergence of an international cultural law.

It is vital that the Convention should occupy its rightful place in the international system, and that it should realize its full influential potential. However, although it is important that the minimum threshold of thirty ratifications needed to bring the Convention into force be obtained as quickly as possible, it is equally important for member States to be dynamic in ensuring its implementation.

This study was carried out by Ivan Bernier, an Associate Professor with the Faculty of Law at Laval University in Québec City, in collaboration with Hélène Ruiz Fabri, a Professor with the Université Paris 1 Panthéon-Sorbonne. Its purpose is to fuel reflections on future actions to be taken by UNESCO and its member States.

The study proposes several avenues for future work, and will serve as an inspiration for many others.

INTRODUCTION

The adoption, on October 20, 2005, of the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* by that organization's General Conference marked the end of the collective negotiation phase and signaled acceptance of the definitive version of the text. In follow-up, Article 29 of the Convention stipulates that "This Convention shall enter into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States or regional economic integration organizations that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date."

In order that the Convention can become part of positive law, each of the States must therefore express individually its willingness to be bound by its terms, with concomitant adherence to the following specific points:

1. In this regard, international law has traditionally referred to domestic law in determining the requisite formalities and procedures to be followed in expressing this individual consent. This explains the extremely broad phrasing of Article 29 in the Convention, which covers its ratification, acceptance, approval and even accession. Consequently, each nation's particular canon of constitutional law will serve to determine who will be responsible for the Convention's ratification, the existence or absence of control, providing information to Parliament, etc. Although the executive branch is usually responsible for proposing ratification, since it has traditionally held responsibility for international negotiations, a number of factors can present dramatic variance between countries. These include the State's control of the ratification procedure, the opportunity for parliamentary and democratic control that could thereby be necessary, the amount of information that could be available in this regard, as well as timelines required for completing the ratification process.

2. Following adoption of the Convention, the issue of ratification is the next imperative. This step is comprised of two legal elements: the "critical date", which is more technical in nature, and the "critical mass", which is more political.

As indicated in Article 29 of the Convention, the "critical date" threshold for its implementation is 30 ratifications. Traditionally, multilateral conventions have included a requirement for a minimum number of ratifications before they can come into effect. This pragmatic provision is intended to prevent the international justice system from being encumbered by conventions that claim to have universal acceptance but whose ratification by only a few parties in fact demonstrates the contrary. This threshold generally varies between 30 and 60 ratifications. In the case of this Convention, the number is moderately high, representing a deliberate decision on the part of the negotiators, in order to ensure that implementation is not unduly delayed. It should be noted in this regard that the implementation date (which in this case has been set at three months after the 30th instrument of ratification is filed) represents the critical date after which the text will be granted full legal effect and become both enforceable and opposable. Consequently, the effective and opposability date of a text can be important for determining in what manner it will be linked to other legal instruments (as such, the Convention's effective date will influence the enforcement of Article 20), since it has been specified that once the document takes effect, any State that subsequently ratifies it will be bound by the effective date that defined in terms of its ratification or accession.

In addressing the issue of "critical mass", it is clear that if 30 ratifications are legally stipulated to be sufficient for the Convention's implementation - this number does not include any regional economic integration organizations' ratification over and above those of its member States (Article 29 § 2) – the Convention's level of opposability, and therefore the importance it must be granted in the international arena, will be proportionate to the actual number of ratifications that it will garner. In other words, the higher the number of ratifications obtained, the more legitimate the Convention's objectives and the measures taken to achieve them. From this standpoint, although the number of voices in concurrence during the Convention's adoption is undisputedly a positive aspect, it does not determine the importance that could – or could not – be attached to the Convention in the area of international legal relations. Only two things count in this regard: the ratifications and their number. The United States, which has not concealed its hostility to the document, is not mistaken – as demonstrated

by certain statements made by key figures in the State Department, to the effect that the U.S. could try to prevent the various signatory States from ratifying the Convention[1].

3. Subject to the restrictions imposed by each nation's constitutional law, the speed with which the signatory States will embark on ratification procedures is obviously an indication of the importance they actually attach to the Convention and of their determination to implement it quickly. The timeframe for subsequent implementation could vary, all the more so because it can and must involve several levels of participation, both nationally and internationally.

4. The three-month timeframe that must pass after the 30th instrument of ratification is filed will therefore mark the debut of the Convention implementation phase. The first step in this process will be the creation of the Convention organs – the Conference of Parties and the Intergovernmental Committee – with UNESCO assuming secretariat duties. Three issues are likely to have an impact on Convention implementation: the convocation of the first meeting of the Conference of Parties, the makeup of the Intergovernmental Committee, and the organization of the work program for the organs in question. We will take a closer look at these issues in the first part of this paper. Once the organs of the Convention are in place, the issue of the Parties monitoring Convention implementation will have to be addressed. A distinction will be made between political and legal monitoring. Monitoring will be dealt with in the second half of this paper. As we shall see, we must begin to take action right away if we are to achieve tangible results.

1 Declaration by Kristin Silverberg, cited in *Le Monde,* October 24, 2005.

I- ESTABLISHMENT OF CONVENTION ORGANS AND DEVELOPMENT OF THEIR WORK PROGRAM

If the Parties can avail themselves of the Convention and make use of it immediately following its implementation, in particular as it relates to their own national measures and policies, the reliability and consistency of their intentions with regard to the Convention will be confirmed by the extent to which they make the necessary arrangements for complete implementation. This includes primarily the actual implementation of the institutional basis for the Convention, to the extent that it guarantees its multilateral execution.

Given that the instruments of ratification, acceptance, approval or accession are filed with the Director-General of UNESCO and that the UNESCO Secretariat is responsible for assisting the Convention organs under Article 24 of the Convention, the Secretariat will presumably be responsible for publicizing the date on which the Convention comes into force and calling the first meeting of the Conference of Parties as well as, very shortly thereafter, a first meeting of the Intergovernmental Committee.

1. The Conference of Parties

Article 22.2 of the Convention provides that the Conference of Parties shall meet in ordinary session every two years, in conjunction with the General Conference of UNESCO to the extent possible. Unless the effective date of entry into force of the Convention closely precedes a regular session of the General Conference (the 34th General Conference is expected to be held in the autumn of 2007), a separate meeting of the Conference of Parties should be envisaged as soon as the Convention comes into effect, both to avoid undue delays in implementation and to comply with Article 23, which stipulates that the members of the Intergovernmental Committee must be elected by the Conference of Parties "upon entry into force of this Convention." The first meeting of the Conference of Parties will inevitably raise the issue of travel expenses for members who are unable to assume the cost thereof. Given the importance of this first

meeting for Convention implementation, a special effort should be made to facilitate attendance by all members who have filed their respective instruments of ratification, acceptance, approval and accession.

The first task of the Conference of Parties is to elect the 18 members of the Intergovernmental Committee (Article 22.4 (a) and 23.1.) The election is based on the principles of equitable geographical distribution and rotation (Article 23.5). However, the possibility of equitable distribution not being achieved at the first meeting of the Conference of Parties should not be ruled out, given that the first 30 members to ratify the Convention may not be representative of all the world's regions. In such a case, should the election of the members of the Committee be delayed until a sufficiently diverse array of states has ratified the Convention? In my view, this would run counter to the requirement in Article 23 that members of the Intergovernmental Committee be elected by the Conference of Parties "upon entry into force of this Convention." Furthermore, inasmuch as the number of Intergovernmental Committee members will be increased to 24 once 50 ratifications are obtained (Article 23.4) – assuming that this number is reached before the Committee's first four-year term has elapsed – the representation can be readjusted as necessary.

Another important task incumbent on the Conference of Parties is the approval of operational guidelines prepared at its request by the Intergovernmental Committee. Given that the Conference of Parties meets every two years, a minimum two-year period must be anticipated between the time of request and the time of approval. Should such operational guidelines be essential to Convention implementation, it would be advisable for the Conference of Parties to immediately request at the first Conference meeting that the Intergovernmental Committee prepare a draft of those operational guidelines considered necessary, failing which adoption would be delayed until four years later. Such guidelines may be requested for instance to properly carry out such tasks as those entrusted to the Intergovernmental Committee under Article 23.6 (d) – "to make appropriate recommendations to be taken in situations brought to its attention by parties of the Convention in accordance with relevant provisions of the Convention, in particular Article 8" (measures designed to protect cultural expressions) – or to fulfill responsibilities conferred in paragraphs 4 and 5 of Article 18 regarding

decisions on the use of International Fund for Cultural Diversity resources "on the basis of guidelines conferred by the Conference of Parties" as well as the acceptance of "contributions and other forms of assistance for general and specific purposes relating to specific projects, provided that these projects have been approved by the Intergovernmental Committee." It should be recalled that the deployment of the various resources thus called on is particularly important for the developing countries and as a means of facilitating implementation of the international cooperation component of the Convention. It is therefore important that this process begin as soon as possible.

2. The Intergovernmental Committee

Immediately following the first Conference of Parties meeting, a first meeting of the Intergovernmental Committee will also need to be planned in order to develop a blueprint for action for the first few years. Organization of the meeting will be facilitated by the fact that representatives of the Parties elected to the Committee will already be present. The Intergovernmental Committee will operate under the authority and guidance of, and be accountable to, the Conference of Parties (Article 23.3). Its general role is to promote the objectives of the Convention and encourage and promote its implementation. Among its more specific functions is the establishment of procedures and other mechanisms for consultation aimed at promoting Convention objectives and principals in other international forums (Article 23.6 (e)). In light of current trade negotiations, this is a matter that deserves urgent attention, if only for the purpose of identifying foreseeable prescriptive developments and initiating the distribution of information that can only serve to facilitate effective coordination, in keeping with the spirit of the Convention.

We will come back to Convention implementation monitoring by the Conference of Parties and the Intergovernmental Committee in the next section. Before doing so, however, we want to emphasize the importance of considering well in advance the priorities these two organs should address at their first meeting. Another matter that should be considered in advance is that of the chairmanship of the Intergovernmental Committee, not so much in terms of who should be selected, but rather in terms of the requirements of the position.

II – IMPLEMENTATION MONITORING BY THE PARTIES

As indicated in the introduction, we will distinguish between political and legal monitoring.

1. Political Monitoring

Even though the State Parties to the Convention, acting individually, have primary responsibility for its implementation, the negotiators have also established Convention organs whose mission is to promote Convention objectives and encourage and monitor its implementation (Articles 22.4 (d) and 23.6 (a)). In this sense, they have equally agreed to collective supervision of Convention implementation, thus guaranteeing its status as a multilateral instrument. Furthermore, they have acknowledged, in Article 11, the fundamental role that the civil society plays in protecting and promoting the diversity of cultural expressions and agreed to encourage their civil society's active participation in their efforts to achieve the objectives of the Convention. This, in turn, implies a certain degree of oversight on the part of the civil society with respect to Convention implementation. Thus, one can distinguish three distinct levels of Convention monitoring: national (through governments), supranational (through collective supervision by signatory States), and, finally, domestic and international (both through the civil society). It remains to be seen how these three levels will operate in practice with respect to Convention undertakings. To do so, we must first review the commitments assumed by the Parties under the Convention.

- *Commitments by the Parties*

In consideration for the sovereign right granted under the Convention to Parties "to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention" (Article 5), the Parties

> i) shall endeavour to create in their territory an environment that encourages individuals and social groups (a) to create, produce, disseminate, distribute, and have access to their own cultural expressions

and (b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world (Article 7);

ii) provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level; designate a point of contact responsible for information sharing in relation to this Convention; and share and exchange information relating to the protection and promotion of the diversity of cultural expressions (Article 9);

iii) encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions, inter alia, through educational and greater public awareness programs, and cooperate with other Parties and international and regional organizations in achieving the purpose of this article (Article 10);

iv) encourage the active participation of the civil society in their efforts to achieve the objectives of this Convention (Article 11);

v) shall endeavour to strengthen their bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions (Article 12);

vi) shall endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector by, inter alia, the strengthening of cultural industries in developing countries; capacity-building through the exchange of information, experience and expertise as well as the training of human resources in developing countries; transfer of technology and know-how through the introduction of appropriate incentive measures; and financial support through the establishment of an International Fund for Cultural Diversity (Article 14);

vii) encourage the development of partnerships, between and within the public and private sectors and non-profit organizations, in order to cooperate with developing countries in the enhancement of their

capacities in the protection and promotion of the diversity of cultural expressions (Article 15);

viii) that are developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries (Article 16);

ix) shall cooperate in providing assistance to each other, and in particular to developing countries, in situations referred to under Article 8 (measures to protect cultural expressions threatened with extinction, at high risk, or requiring urgent protection.) (Article 17);

x) agree to exchange information and share expertise concerning data collection and statistics on the diversity of cultural expressions as well as on best practices for its protection and promotion (Article 19.1);

xi) shall endeavour to provide contributions on a regular basis towards the implementation of this Convention and shall cooperate to develop suitable funding mechanisms. (articles 14.4 and 18.7);

xii) shall undertake to promote the objectives and principles of this Convention in other international forums, and for this purpose, shall consult each other, as appropriate, bearing in mind these objectives and principles (Article 21).

As we can see, most of these undertakings are good faith commitments that have no specific targets, but represent behaviour-based obligations that require a genuine effort to meet the objectives of the Convention. Hard to enforce from a legal perspective – proof must made of a deliberate lack of diligence, which is not easy - they demand political follow-up, especially since the Parties themselves are responsible for setting a course of action at the domestic and international level on the basis of their own situation. A distinction can be made between commitments requiring action at the domestic level and those requiring international efforts, since the latter are more likely to be questioned by the other Parties. But in reality, as we shall see, many of these commitments involve action in both the national and international spheres.

• *Convention implementation monitoring by governments*

Convention implementation in each of the signatory States is the responsibility of the executive branch. To the extent that monitoring implies a critical perspective on implementation, the executive arm may, understandably, find it difficult to judge its own actions, especially if it enjoys considerable discretion in interpreting the scope of its undertakings, as is the case with so-called "best effort" commitments. Nonetheless, genuine monitoring within the structure of the state is still possible so long as there are mechanisms for political control of government action (particularly those within the purview of the legislative branch, such as questions in the legislature, parliamentary committees, etc.). This type of monitoring should not be neglected, for it can prove very useful when there is extensive support for the Convention among legislators. Such support also provides positive reinforcement for government initiatives and helps ensure a certain continuity in implementation in the event of a change of government. Conversely, the lack – or an insufficient level – of political or democratic control, leading to inadequate dissemination of information, could plant the seed of a later dispute of the policies developed, even while they are thought to be accepted. It is well known that the ratification of the Marrakesh Agreements, which resulted from the Uruguay Round negotiations, was only discussed on a limited basis in the various Parliaments around the globe, to an extent that was disproportionate to the importance of the issues, and without any reference to public opinion – a situation that only served to fuel protest.

Another reason this Parliamentary support deserves attention is the existence of several international parliamentary associations and federations like the Parliamentary Assembly of the Francophonie, the Commonwealth Parliamentary Association, the Parliamentary Confederation of the Americas, and the Parliamentary Assembly of the Council of Europe, not to mention the European Parliament, whose members are directly elected to represent their European Union constituents. Through their members, these bodies can also lobby for close monitoring of Convention implementation by the governments concerned (and by the European Community, in that particular instance). It may be useful to give some serious thought to ways in which parliamentarians could be encouraged to get involved in implementation follow-up and monitoring. For example, an international parliamentary

conference could specifically look into the role of parliamentarians in implementation and examine possible courses of action, such as the formation of national or parliamentary implementation monitoring committees, or the possibility of drafting a guide explaining the scope of the Convention and the role parliamentarians play with respect to it. This type of approach would not only promote political support for the Convention, but it would also ensure democratic control over its implementation, and as such can only strengthen its legitimacy.

However, government monitoring of Convention implementation may fluctuate over time in relation to the level of interest shown by heads of government and political parties. It is worth remembering that Brazilian and Spanish support for the draft Convention on the Protection and Promotion of the Diversity of Cultural Expressions was far from assured prior to latest changes of government in the two countries. Nothing guarantees that the opposite will not happen. In other words, we cannot solely rely on the States Parties to ensure implementation of the Convention.

Fortunately, as noted earlier, signatory States have demonstrated their openness to some form of outside oversight in the Convention by acknowledging the fundamental role of civil society in protecting and promoting the diversity of the cultural expressions and by agreeing to encourage the active participation of civil society in their efforts to achieve Convention objectives.

- *Convention implementation monitoring by civil society*

The Convention does not define the concept of civil society, but it is generally agreed that it includes individuals, associations, volunteer organizations, or anything deemed an intermediary body – as in intermediary between the State and the individual – so long as its does not originate with the State[2]. As part of the UNESCO negotiations on the protection and promotion of the diversity of cultural expressions, various interested organizations were able to participate in meetings as observers. Unfortunately, the organizational capabilities of civil society vary significantly from country to

2 See-: http://agora.qc.ca/mot.nsf/Dossiers/Societe_civile

country, and since the developed countries are much more advanced in this regard than the developing countries, they tend to be overrepresented in international forums. In the area of protection and promotion of cultural expressions, however, it was not until 1997–1998 that the first NGOs dedicated to this issue appeared in France and Canada. It was not long before others sprang up in some thirty-odd nations across Europe, Africa, Latin America, and Asia, half of them in the developing world. These organizations are made up of individuals and representatives of various groups and associations of cultural professionals, including authors, producers, directors, artists, etc. from various sectors of the cultural community. The sometimes divergent interests they represent rallied around the draft Convention for the protection of the diversity of cultural expressions. But these divergent voices may seek to express themselves separately during the Convention implementation stage. Furthermore, the individuals represented or mobilized are culture professionals rather than "consumers", which could help give their actions a corporate “look”. This requires special attention in order to avoid opening up the process to the critique of a protectionist approach. Once again, education with regard to public opinion is no doubt needed, in order to elicit support beyond the ranks of professionals, by building awareness of the issues at stake. That said, Convention monitoring by civil society, which is perceived *a priori* as essentially national in scope, can also be handed over to the transnational level, especially through the NGO networks.

At the domestic level

The effectiveness of Convention monitoring by civil society will depend first and foremost on its ability to obtain relevant information from governments about the measures planned or already implemented to protect and promote the diversity of cultural expressions, both domestically and internationally. To secure information, civil society can refer not only to Article 11 on participation by civil society, but also to Article 9 on information sharing and transparency, and Article 10 on education and public awareness. Governments are not always receptive to the idea of transmitting information that they may, for various reasons, consider confidential. In such cases, a reminder of their commitments could prove useful. But this presumes a degree of familiarity with the function of the Convention and Party

commitments that civil society organizations have not necessarily acquired yet. Just as governments undertake in Article 10 to encourage and promote understanding of the importance of protecting and promoting the diversity of cultural expressions through education and public awareness programs, non-government organizations active in this area should undertake an awareness campaign as quickly as possible to familiarize their members with the Convention and how to use it. Lastly, in anticipation of the moment when the Convention organs become operational, civil society should undertake exploratory work on the priority issues it would like to see them deal with. It should be remembered that under its rules of procedure, the Intergovernmental Committee can invite at any time public or private organizations or individuals to participate in its meetings for consultation on specific questions (Article 23.7).

At the international level

Although civil society involvement in Convention monitoring is mostly at the national level, this in no way excludes international initiatives. For a number of years now, there has been a growing need for collaboration and consultation between various national organizations involved in protecting the diversity of cultural expressions. Efforts are currently underway to establish a federation of such organizations. There are two key reasons for this: the first is to tackle the unequal organizational capabilities of civil society organizations worldwide and the need for assistance in many countries; the second is the need to develop common approaches in the aim of encouraging the Parties to actively promote Convention objectives and principles in other international forums. In this regard, civil society can rely on Article 12 (c), which calls upon the Parties to strengthen their bilateral, regional, and international cooperation so as to create conditions in order to "reinforce partnerships with and among civil society, non-governmental organizations, and the private sector in fostering and promoting the diversity of cultural expressions."

- *Implementation monitoring by the Convention organs*

But the type of Convention monitoring that should prove most crucial over time will be that performed by the Convention organs, for it reflects the collective will of the Parties. Article 9 of the Convention on information

sharing and transparency sets out the basic mechanism: "The Parties shall provide appropriate information in their reports to UNESCO every four years on measures taken to protect and promote the diversity of cultural expressions within their territory and at the international level." This requirement must not be perceived as a form of outside interference in the internal affairs of the Parties, but rather as a way to stimulate critical reflection on their own attainment of the Convention objectives and engage in a dialog with other Parties on the topic. It would also represent an opportunity to take the measure of what already exists and to identify a specific number of useful levers that could be used, especially for developing international cooperation. In this regard, Article 9 of the Convention must be interpreted in light of Article 19.1, which further specifies that, "The Parties agree to exchange information and share expertise concerning data collection and statistics on the diversity of cultural expressions as well as on best practices for its protection and promotion." It is also worth noting that the international cooperation contemplated in Articles 12, 14, and 15 can only occur if information is transmitted and needs are expressed by the Parties, building upon already-existing cooperation, even if this cooperation is scattered and remains inadequate. Article 14.2 specifically calls for "capacity-building through the exchange of information, experience, and expertise as well as the training of human resources in developing countries…" The availability of information also plays a central role in the implementation of Articles 8.1 and 17, when a Party notes "special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding." In such cases, the Parties may take whatever measures are appropriate to protect and preserve the cultural expressions in question, but they must report to the Intergovernmental Committee on these measures, and the Committee may formulate appropriate recommendations, including international cooperation.

As can be seen, the collection, exchange, analysis, and dissemination of information will play a key role in Convention implementation. But for the Parties' commitments in this regard to lead to concrete results, reflection must begin now on the concrete implications of Articles 9 and 19, all the more so given that paragraphs 2, 3, and 4 of Article 19 commit UNESCO to facilitating, through the use of existing mechanisms within the Secretariat,

the collection, analysis, and dissemination of all relevant information, statistics, and best practices; to establishing and updating a databank on different sectors and governmental, private, and non-profit organizations involved in the area of cultural expressions; and to paying particular attention to capacity-building and the strengthening of expertise for Parties that request such assistance. An example of a useful initiative in this regard would be the creation of a database on the production, consumption and international circulation of cultural activities, goods and services of signatory States. Efforts to this effect were made earlier, between 1998 and 2002, in UNESCO's *World Report on Culture* for 2000 and 2002, but unfortunately had to be interrupted. They merit a second attempt, perhaps immediately on the initiative of one or several States acting in conjunction with the UNESCO Statistics Institute, organizations like the European Audiovisual Observatory and the statistics departments of interested States. The mobilization of various means that already exist could serve to facilitate the Convention's implementation, since it would prevent significant new costs that could engender the Parties' reluctance.

But the role of information as understood in the Convention is to underpin action. And in this respect, it is easy to conceive that the information collected and transmitted will highlight the major gap that exists between developed and developing countries in terms of ability to meet any cultural needs identified. States which have few cultural policies in place to protect and promote their cultural expressions are mostly States that simply do not have the technical and financial resources to administer such policies. It is therefore important to develop as quickly as possible a strategy to help these States. Two possibilities exist in this regard. The first is direct aid. Many developed countries already have cultural policies that address very diversified needs and that have shown their worth. This know-how and experience can benefit developing countries, provided it is adapted to their specific needs. The partnership formula set out in Article 15 of the Convention is worth careful consideration in this regard. Such partnerships between and within the public and private sectors and non-profit organizations emphasize, "according to the practical needs of developing countries, the further development of infrastructure, human resources and policies, as well as the exchange of cultural activities, goods

and services." Nothing prevents us from considering now how to implement such partnerships. The second possibility is multilateral aid as contemplated in Article 18, which sets up the International Fund for Cultural Diversity. Multilateral aid is a vital companion to direct aid in that it offers greater leeway for determining aid conditions while also providing a guarantee that aid will be available to all Member States. To be credible, however, it requires that the Fund in question rapidly have the resources it needs to function. A strategy must be developed now to accelerate the inflow of funds. It would be extremely useful, for instance, if States ratifying the Convention were to use the opportunity to announce their contribution to the Fund. Civil society should also participate in this effort. Culture professionals, who have often helped out on humanitarian causes in the past, could no doubt find a way to contribute to the Fund. The same is true for big international organizations active in the field of culture and development. For developing countries, seeing that concrete action is being taken now to ensure that the Fund rapidly becomes functional would be a clear signal that the Convention will not just be collecting dust on a shelf.

2. Legal monitoring

By legal monitoring, we mean the monitoring of Parties' commitments in the event of disputes over the interpretation or enforcement of such commitments. The Convention has no provisions on judicial or arbitral settlement of disputes, i.e., provisions that institute mechanisms that lead to binding, legal decisions. But the Convention's silence on the matter does not preclude recourse to either of these methods of dispute settlement if the Parties so agree.

The Convention does, however, include a dispute settlement method that is similar in some regards to judicial or arbitral settlement, but that is more political than legal and that leads to a dispute settlement proposal that the Parties examine in good faith rather than to a legally binding decision. The mechanism consists of a conciliation procedure which is compulsory for all Parties except those that declare at the time of ratification that they do not wish to be bound by such a mechanism. This mechanism's appeal lies in the fact that, although not binding, it will encourage States

to submit their cultural disputes to a special dispute settlement body, the Conciliation Committee, composed of specialists from the cultural sector, which is the only way that non-trade solutions to the questions raised can be found and jurisprudence founded on cultural considerations can be developed over time.

Unfortunately, although the Convention has an appendix that explains the conciliation procedure, it does not address a certain number of points that require clarification, such as the UNESCO Secretariat's role in administering the mechanism, whether the committee's proceedings will be made public or not, and who will pay for what. It would therefore be appropriate, as we wait for the Convention to come into force, to reflect on what can be done to ensure that the mechanism operates properly.

This would not be sufficient, however. If the mechanism is to truly play its role, it should be used by the signatory Parties to the Convention – a requirement that assumes people know about it and understand its mission. Unfortunately, this is currently not the case. As a dispute resolution mechanism, conciliation is a relatively new approach that only appeared on the international scene in the aftermath of World War I, during negotiation of the Locarno Treaties of 1925 and in the 1928 General Act for the Pacific Settlement of International Disputes[3]. Despite its similarities at first glance to good offices and to mediation (the objective of this process is to reconcile the various parties' viewpoints and to propose a non-restrictive solution), this approach can only be understood – as in fact has been pointed out – by juxtaposing it against the two previous mechanisms: "It was in fact commonly perceived as a reaction against good offices and mediation, which were considered in the 19th century (following the European Concert's practices) as permitting easy concealment of pressure tactics applied to the small and medium-sized States by the major powers."[4] This explains why the process is perceived as being more markedly formal and legal in nature, and more reflective of contradictory viewpoints, since the objective is to ensure that the organ is as unbiased as possible.

3 Jean-Pierre Cot, La conciliation internationale, Pédone, Paris, 1928.
4 http://www2.univ-lille2.fr/droit/dipa/dipa15.html

The 1960s saw a resurgence of interest in this form of dispute resolution mechanism. One example is the 1962 Protocol establishing the Conciliation and Good Offices Commission responsible for Seeking the Settlement of Any Disputes which may arise between States Parties to the UNESCO Convention against Discrimination in Education. During the UNESCO General Conference, which is held once every two years, the Executive Council submits a list of individuals who have been selected by the Parties to this Protocol as candidates for election or re-election to serve with the Commission[5]. To date, however, it appears that no disputes have been resolved under the terms of this particular Protocol. Conciliation is also referred to in Articles 12 and 13 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (which came into effect in 1969). In this case also, the procedure does not so far appear to have been used. The 1969 Vienna Convention on the Law of Treaties between States defines conciliation as the basic procedure for resolving disputes relating to invalidity, termination, withdrawal from or suspension of the operation of a treaty (Article 65). A more recent example would be the 1982 United Nations Convention on the Law of the Sea, which stipulates that the limits of territorial waters must be established by agreement and, in the absence thereof, by international conciliation or jurisdictional resolution. Given the minimal use of jurisdictional resolution, a suggestion was made by Richard Meese, in an article published in 1998, whereby States would benefit from more frequent recourse to international conciliation for some of the territorial boundaries that remained unidentified[6]. In support of his conclusion, the author cited an interesting precedent: the 1980 conciliation agreement signed by Norway and Finland in order to submit recommendations regarding the continental shelf limits in the Jan Mayen sector. The commission that was established at the time delivered a report, the recommendations of which were unanimously adopted and accepted by both signatories as a basis for their supplementary negotiations that ultimately produced an agreement in October 1981.

5 UNESCO' doc. 33/C/NOM/7

6 Richard Meese, « Délimitations maritimes : règlement juridictionnel et conciliation internationale », Indemer – Annuaire du droit de la mer, 1998, Vol. III

Starting in the 1990s, conciliation was adopted as a dispute resolution mechanism in several international instruments. Key among these were the Convention on Conciliation and Arbitration within the Organization for Security and Cooperation in Europe (Stockholm 1992), the United Nations Convention on Biological Diversity (1992), the United Nations Model Rule for the Conciliation of Disputes between States (1996), the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998), the PCA (Permanent Court of Arbitration) Optional Rules for Arbitration of Disputes Relating to Natural Resources and Environment (2002) and the UNCITRAL Model Law on International Commercial Conciliation (2002). Notwithstanding this obvious interest in the conciliation procedure demonstrated by the parties to recent international agreements, specific instances of application of this procedure remain somewhat rare, subject to the understanding that some older instances of its use exist.

One could wonder why this situation exists, given that the conciliation process is not as restrictive as jurisdictional resolution and therefore poses less of a threat to States' sovereignty. Could it be the absence of conflicts? There is reason for doubt here. Between Canada and the United States alone, one can easily identify half a dozen conflicts of a cultural nature that could all have undergone a dispute resolution mechanism. Is it because of the general reluctance of the various States to submit their conflicts with other States to this type of mechanism, whatever its nature? Although this is certainly not false, the importance of jurisdictional dispute resolution within the WTO appears to show that States are not as reluctant as was originally believed to submit their conflicts to a dispute resolution mechanism. What appears in reality to be a determining factor is the States' own perception of their interest in undergoing this type of procedure. In cases where the conflicts are trade-based, this interest is quite widely acknowledged. On the other hand, this is not yet readily apparent in the case of culture-based conflicts. Further reflection on the relevance of using the conciliation process to resolve cultural disputes would also appear desirable, as would be the publication of a more detailed document explaining the nature of the mechanism in question and its potential role in implementing the Convention.

It should furthermore be acknowledged that the fact that the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* grants Parties the right, if they so desire, to withdraw from the conciliation procedure when they ratify the Convention is not an incentive to make use of this mechanism. It would therefore appear important that the Convention be ratified by the greatest number of States without exercising this right. For this purpose, the first round of ratifications must clearly set the tone in this respect. If, for example, the first 30 States that ratify the Convention were to do so without seeking to withdraw from the prescribed dispute resolution mechanism, one would hope that the subsequent States would do the same. An immediate effort – involving all players who are interested in seeing the Convention succeed – is required in order to achieve this result. The very first instrument of ratification filed with the Director-General of UNESCO – by Canada, on November 25, 2005 – opens the door to this process by accepting the Convention without making use of the opting-out clause attached to the dispute resolution mechanism.

CONCLUSION

This paper on the implementation of the Convention is in no way an exhaustive review of the question. It simply aims to spur reflection in areas that could speed implementation and build support for the Convention. It would be most regrettable, after the Convention's adoption by the General Conference and ratification by the required number of States, to see it fail through poor implementation. The best way to avoid this is to prepare now for the implementation phase, as if it were about to begin.

With the Convention now a reality and its importance being openly recognized – if the interest it has elicited is to be believed, including in mass communication media – the Parties must take up the challenge of actually using the instrument they sought to have. This note has deliberately avoided entering into the details of the implementation of the Convention from the standpoint of policies to be introduced, since each Party is responsible for defining its own policies and measures. It would perhaps be appropriate, however, to recap certain points that call for particular vigilance:

1. The policies and measures must be designed and implemented with all due consideration for human rights and the basic freedoms, and the transparency that will be demonstrated by the Parties, particularly within the context of the various monitoring mechanisms we have analyzed above, can only contribute to affirming the Convention's success.

2. The Convention cannot be implemented in isolation, without due consideration for the overall context. It would, to this end, no doubt be appropriate to recall that the Convention's purpose is limited to the policies and measures espoused by the Parties, which essentially are the States. Although it is an important dimension, this notion does not exhaust the question of protection and promotion of the diversity of cultural expressions. Other discussions currently underway demonstrate the issues relating to the expert handling of the means of production and, above all, of dissemination, given the progress of technological advancements, as well as the need to take into consideration the economic structuring of the cultural industry sector and to reflect on the problem of regulating behaviour among the players in the sector, both nationally and internationally.

3. Since deliberations began on the feasibility of having a legal instrument to govern cultural diversity, it has become evident that an instrument of this type, even if its use was limited to addressing a cultural problem, and due to the specific characteristics of globalization, would of necessity interact with other areas of endeavour. This Convention represents a foundation stone, on which would be built a cultural pillar for globalization legislation; however, this pillar must be consolidated and the Convention's implementation could also serve as an opportunity to reflect on the underlying conditions of this consolidation and to begin the associated process.