

Sabine von Schorlemer
Peter-Tobias Stoll *Editors*

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

Explanatory Notes

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 Springer

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Foreword

Adopted in 2005 by UNESCO's 33rd General Conference, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions affirms the political will and commitment of governments to protect and promote the widest possible range of cultural expressions as well as to promote fundamental freedoms of expression, information and communication. The fact that the Convention entered into force only 18 months after its adoption and was ratified over the subsequent 3 years by more than 110 states from all regions of the world attests to its importance and timeliness. No other UNESCO culture convention has been adopted and entered into force with such urgency and widespread interest.

The Convention has been heralded as ushering in a new international framework for the governance and management of culture for the twenty-first century. It stresses the dual cultural and economic nature of cultural goods, services and activities, while addressing the right of Parties to introduce specific policies and measures to ensure that artists, cultural professionals, practitioners and citizens worldwide can create, produce, disseminate and enjoy a diversity of such expressions, including their own. In addition, the Convention is considered the first international standard-setting instrument to recognize culture as a mainspring for development by calling on Parties to incorporate culture as a key element of their national and international development policies, cooperation frameworks and programs.

Since the Convention's adoption, numerous academic articles, studies and research papers have contributed to broadening the understanding and application of UNESCO's newest international legal instrument. However, the present *Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, published under the editorial responsibility of Professor Sabine von Schorlemer and Professor Peter-Tobias Stoll, with the support of the German National Commission for UNESCO, is the first academic publication to provide a comprehensive analysis of its articles.

UNESCO welcomes this landmark work and is confident that it will furnish keys to understanding the essence, scope and aims of the Convention. While the *Commentary* is not intended to be an authentic interpretation of the provisions of the Convention, it will undoubtedly enrich the ongoing academic debate on the diversity of cultural expressions in the twenty-first century. It will also enable all stakeholders concerned to better comprehend the ideas and processes that led to the drafting of the Convention text and its adoption. It is my sincere hope that inspiration can also be garnered from this body of knowledge on ways and means for all of us to work together to implement the Convention in the future.

Francesco Bandarin
Assistant Director-General for Culture
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Abbreviations and Acronyms

A & R	Artist and repertoire
ACP	African, Caribbean and Pacific
Add.	Addendum
Art.	Article
Arts	Articles
ASEAN	Association of Southeast Asian Nations/Agreement on the Establishment of the Association of Southeast Asian Nations, 8 August 1967, 1331 UNTS 243
AVMSD	Audiovisual Media Services Directive
Basel Convention	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 1673 UNTS 57
Beirut Convention	Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, 10 December 1948, 197 UNTS 3
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, 828 UNTS 221
BOP	Balance of payments
BRIC	Grouping acronym that refers to the related economies of Brazil, Russia, India and China
CAD	Canadian Dollar
CADTCR	Convention for the Avoidance of Double Taxation of Copyright Royalties, 13 December 1979
CARIBCAN	Caribbean–Canada Trade Agreement
CARIFORUM	Caribbean Forum of African, Caribbean and Pacific States
CBD	Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79
CBERA	US–Caribbean Basin Economic Recovery Act

CC	Creative commons
CCA	Canadian Conference of the Arts
CCD	Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, 2440 UNTS
CCDCESDD	Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, 17 June 1994, 1954 UNTS 3
CCP	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231
CD	Compact disc
CDE	Convention against Discrimination in Education, 14 December 1960, 429 UNTS 93
CDPCSTS	Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, 21 May 1974, 1144 UNTS 3
cf.	Confer
c.i.f.	Cost, insurance and freight
CIOFF	International Council of Organizations for Folklore Festivals and Folk Art
CIP	The Competitiveness and Innovation Framework Programme (EU)
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS
CLO UNESCO	NGO-UNESCO Liaison Committee
CMS	Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS
CoE	Council of Europe
CoP	Conference of Parties
CPC	Central product classification
CPCPEAC	Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240
CPOL	Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 293
CPSID	Convention for the Pacific Settlement of International Disputes, 18 October 1907
CPUH	Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, 2562 UNTS
CRC	Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3
CRNM	Caribbean Regional Negotiating Machinery
CRQHEER	Convention on the Recognition of Qualifications Concerning Higher Education in the European Region, 11 April 1997, CETS No. 165

CSI	Civil Society Index
CSICH	Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 35
CSIECO	UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457
CSS	Contractual service suppliers
CTVE	Convention on Technical and Vocational Education, 10 November 1989, 1649 UNTS
CWE	CultureWatchEurope
CWII	Convention on Wetlands of International Importance, 2 February 1971, 996 UNTS
DAC	Development Assistance Committee (OECD)
DCI	Development cooperation instrument
DCMS	Department of Culture, Media and Sport (GB)
DESA	Department of Economic and Social Affairs (UN)
DNA	Deoxyribonucleic acid
DSB	Dispute Settlement Body (WTO)
DSU	Dispute Settlement Understanding (WTO), Marrakech Agreement, Annex 2, 15 April 1994, 1869 UNTS 299
DUK	Deutsche UNESCO-Kommission (German Commission for UNESCO)
DVD	Digital versatile disc (formerly: digital videodisc)
e.g.	Exempli gratia (“for example”)
EBU-UER	European Broadcasting Union - Union Européenne de Radio-Television
EC	European Community
ECE	Economic Commission for Europe
ECF	European Cultural Foundation
E-commerce	Electronic commerce
ECOWAS	Economic Community of West African States
ECRML	European Charter for Regional and Minority Languages, 5 November 1992, CETS No. 148
ed.	Edition
EDAP	European Diversity and Autonomy Papers
EDF	European Development Fund
EEA	European Economic Area
EFA	Education for All
EFAH	European Forum for the Arts and Heritage
EMC	European Music Council
ENT	Economic needs test
EPA	Economic Partnership Agreement between the CARIFORUM States and the European Community and its Member States, 15 October 2008
EPC	Electronic product code

ERICarts	European Institute for Comparative Cultural Research
ESF	European Social Fund
ESSnet	A network of several ESS (European Statistical System) organizations aimed at providing results that will be beneficial to the whole ESS
et al.	Et alii (“and others”)
etc.	Et cetera (“and other things” or “and so forth”)
EU	European Union
EUR	Euro
EUROSTAT	Statistical Office of the European Communities
excl.	Excluding
f.o.b.	Free on board
FAO	Food and Agriculture Organization of the United Nations
FCPNM	Framework Convention for the Protection of National Minorities, 1 February 1995, 2151 UNTS
FDI	Foreign direct investment
FGMC	Female genital mutilation / cutting
FIA	International Federation of Actors
FIM	Fédération Internationale des Musiciens
Florence Agreement	Agreement on the Importation of Educational, Scientific and Cultural Materials, 17 June 1950, 131 UNTS 25
fn.	Footnote
FOSS	Free and open-source software
FTA	Free trade area
FTAA	Free Trade Area of the Americas
G-77	Group of 77
GATS	General Agreement on Trade in Services, Marrakech Agreement, Annex 1 B, 15 April 1994, 1869 UNTS 299
GATT	General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 187 (GATT 1947) / Marrakech Agreement, Annex 1 A, 15 April 1994, 1869 UNTS 299 (GATT 1994)
GCSI	Global Civil Society Index
GDP	Gross domestic product
GNP	Gross national product
GSP	Generalized System of Preferences
GSTP	Global System of Trade Preferences
GVA	Gross value added
HDR	Human Development Report
HEREIN	European Heritage Network
HIPCs	Heavily indebted poor countries
i.a.	Inter alia (“among other things”)
i.e.	Id est (“that is”)
ICA	International Council on Archives

ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171
ICDS	International Convention against Doping in Sport, 19 October 2005, 2419 UNTS
ICESC	International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3
ICJ	International Court of Justice
ICOM	International Council of Museums
ICOMOS	International Council on Monuments and Sites
ICPPPPBO	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 October 1961, 496 UNTS 43
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and communication technology
ICTSD	International Centre for Trade and Sustainable Development
ICW	International Council of Women
IFACCA	International Federation of Arts Councils and Culture Agencies
IFCCD	International Federation of Coalitions for Cultural Diversity
IFCD	International Fund for Cultural Diversity
IFEX	International Freedom of Expression Exchange
IFHR	International Federation for Human Rights
IFM	International Federation of Musicians
IFPI	International Federation of the Phonographic Industry
IFUW	International Federation of University Women
IGC	Intergovernmental Committee of the Convention
IGO	Intergovernmental organization
IIPA	International Intellectual Property Alliance
ILC-CCD	International Liaison Committee of Coalitions for Cultural Diversity
ILO	International Labour Organization
IMC	International Music Council (UNESCO)
IMO	Institute for International Relations (Croatia)
INCD	International Network for Cultural Diversity
INCP	International Network on Cultural Policy
IOM	International Organization for Migration
IPA	International Publishers Association
IPR	Intellectual property right
ISSC	International Social Science Council
IT	Information technology

ITC	International Trade Centre
ITI	International Theatre Institute
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture, 3 November 2001, 2400 UNTS
ITU	International Telecommunication Union
IUCN	International Union for Conservation of Nature
LDC	Least developed country
lit.	Litera (“letter”)
lits	Literae (“letters”)
LSE CCS	London School of Economics Centre for Civil Society
MDG	Millennium Development Goals
MEA	Multilateral environmental agreements
MEDIA	EU Support Programme for the European Audiovisual Industry
MERCOSUR	Common Market of the South, Treaty of Asunción, 26 March 1991, 2140 UNTS 319
MFN	Most-favoured nation
Montreal Convention	Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, 2242 UNTS 350
MOU	Memorandum of understanding
MPAA	Motion Picture Association of America
N.	Marginal number
n.e.s.	Not elsewhere specified
n.i.e.	Not included elsewhere
NAFTA	North American Free Trade Agreement, 8 December 1993, 32 ILM 289, 605
NATO-Treaty	North Atlantic Treaty, 4 April 1949, 34 UNTS 241
NB	Nota bene (“take notice”)
NCCR	National Centre of Competence in Research
NGO	Non-governmental organization
No.	Number
NT	National treatment
NWICO	New World Information and Communication Order
ODA	Official development assistance
OECD	Organisation for Economic Co-Operation and Development
OG	Operational Guidelines
ONG	Organisation non gouvernementale (non-governmental organization)
p.	Page
pp.	Pages
para.	Paragraph
PCIJ	Permanent Court of International Justice
PR	Public relations

PRSP	Poverty Reduction Strategy Paper
R & D	Research and development
REIO	Regional economic integration organization
resp.	Respective
RFID	Radio frequency identification
Rotterdam Convention	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10 September 1998, 2244 UNTS 337
rpr.	Reprint
RTA	Regional trade agreement
s.	Sentence
SAGIT	Sectoral Advisory Group on International Trade (Canada)
SCM	Subsidies and countervailing measures
SEE	South Eastern Europe
SIDS	Small Island Developing States
SMEs	Small and medium-sized enterprises
SNA	System of National Accounts
subpara.	Subparagraph
tbp.	To be published
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
TNC	Transnational corporation
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech Agreement, Annex 1 C, 15 April 1994, 1869 UNTS 299
TV	Television
UCC	User-created content
UCRC	Universal Copyright Convention, 6 September 1952, 216 UNTS 133 and 24 July 1971, 943 UNTS 178
UDCD	Universal Declaration on Cultural Diversity
UDHR	Universal Declaration of Human Rights
UIS	UNESCO Institute for Statistics
UK	United Kingdom
UN	United Nations
UNC	Charter of the United Nations, 26 June 1945, 1 UNTS XVI
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization

UNESCO Constitution	Constitution of the United Nations Educational, Scientific and Cultural Organization, 16 November 1945, 4 UNTS 275
UNFCCC	United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNI-MEI	Union Network International-Media Entertainment
UNRISD	United Nations Research Institute for Social Development
UNSD	United Nations Statistics Division
UNWTO	United Nations World Tourism Organization
US	United States
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organizations, 21 March 1986
VCR	Video cassette recorder
Warsaw Convention	Convention for the Unification of Certain Rules Relating to International Carriage by Air, 12 October 1929, 137 LNTS 11
WASP	White-anglo-saxon-protestant
WCCD	World Commission on Culture and Development
WHC	Convention Concerning the Protection of the World Cultural and Natural Heritage, 23 November 1972, 1037 UNTS 151
WHO	World Health Organization
WHO FCTC	WHO Framework Convention on Tobacco Control, 21 May 2003, 2302 UNTS 166
WIPO	World Intellectual Property Organization
WMOC	World Meteorological Organization Convention, 11 October 1947, 77 UNTS 143
w.p.	Without publisher
WSIS	World Summit on the Information Society
WTO	World Trade Organization

Introduction

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1 Introduction

During its 33rd General Conference on 20 October 2005, UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions¹ with a vast majority,² after a relatively short period of roughly 2 years of negotiating and political bargaining. The Convention aims at developing and supporting conditions which contribute to the protection of cultural diversity **on the basis of international law**. The core issue is the protection of cultural diversity **in the context of globalization and free trade**. As expressed by UNESCO Director-General Koichiro Matsuura, the new regulations are also to be seen as UNESCO's contribution to redefining the rules of globalization.

Dedication to cultural diversity is part of the global battle against the homogenization and commercialization of culture.³ At the same time, it is a battle for **creating a better balance between culture and trade interests**. This has to be seen against the background of a **conflict of objectives**.⁴ On the one hand, there is

¹UNESCO Doc. 33 C/23 of 4 August 2005, Annex V.

²148 yes-votes, two no-votes (United States of America and Israel), 4 abstentions (Australia, Honduras, Liberia and Nicaragua).

³For more information on this matter, see Neil, G. (2006). The Convention as a response to the cultural challenges of economic globalisation. In N. Obuljen, & J. Smiers (Eds), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: making it work* (pp. 39–70). Zagreb: Institute for International Relations. http://www.culturelink.org/publics/joint/diversity01/Obuljen_Unesco_Diversity.pdf.

⁴See Obuljen, N. (2006). From *Our Creative Diversity* to the Convention on Cultural Diversity: introduction to the debate. In N. Obuljen, & J. Smiers (Eds), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: making it work* (pp. 17–35). Zagreb: Institute for International Relations. http://www.culturelink.org/publics/joint/diversity01/Obuljen_Unesco_Diversity.pdf.

the market-oriented view, which understands cultural goods and services as ordinary products, going along with the ambition to lift trade barriers. On the other hand, there is the understanding that cultural goods and services are of a dual nature; they are economic products but at the same time public cultural products which carry identities, values and meaning. The latter approach focuses on instruments of cultural funding and support.

UNESCO aims at making a contribution to settling this conflict of objectives, as UNESCO's Constitution highlights that a "**wide diffusion of culture**" is essential for human dignity.⁵ Additionally, in a time of globalization, the new international Convention follows the objective of counteracting the dramatic levelling of cultural variety by financially powerful cultural industries, such as those of the United States of America. Cultural diversity offers people the chance of getting to know products of cultural work and art forms of various countries and cultures. It also offers the potential of import and use. The cultural industry has become a sector with an enormous rate of economic growth. Customs-based data show that trade in cultural goods almost doubled between 1994 and 2002, from 38 billion US\$ to 60 billion US\$ with the tendency to rise even further.⁶

In the context of this development, the **specific characteristics of culture** have to be adequately considered during negotiations of the WTO on the General Agreement on Trade in Services (GATS)—especially in light of the fact that these negotiations are based on the principle of progressive trade liberalization.⁷

However, UNESCO also feels responsible for the rich cultural heritage of numerous developing countries. The desire to preserve the socio-cultural dimension is especially distinct in many non-European countries which are chronically poverty-stricken. For them, their rich **cultural heritage is inseparably linked to social and cultural development**, as well as to the cultural identity of the society as a whole.⁸ Quite often concerns are expressed that in times of rapid economic transformation the ability to adapt to social and cultural change might be overstretched. This is another reason why cultural characteristics and traditions are in need of special protection.

At the **heart of the UNESCO Convention** is the relationship between "market" and "state" as well as between "cultural industry" and "cultural policy". The new

⁵Preamble recital 4 of the UNESCO Constitution of 16 November 1945.

⁶UNESCO Institute for Statistics/UNESCO Sector for Culture (2005). International flows of selected cultural goods and services 1994–2003. Defining and capturing the flows of global cultural trade. <http://unesdoc.unesco.org/images/0014/001428/142812e.pdf>, p. 19; see also, Metzke-Mangold, V. (2005). Die Rolle der Deutschen UNESCO-Kommission im Spannungsfeld zwischenstaatlicher Verhandlungen und zivilgesellschaftlicher Verhandlungen. *UNESCO heute*, 52(1), 29–34, p. 31.

⁷For more information on the relationship between culture and trade in services, see Schorlemer, S. von (2008). Cultural diversity. In R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law (online edition)*. Oxford: Oxford University Press. www.mpepil.com, N. 3.

⁸See Schorlemer, S. von (2005). Kunst und Freihandel. Der UNESCO-Streit um kulturelle Vielfalt. *Blätter für deutsche und internationale Politik*, 50(5), 619–626, pp. 624 et seq.

Convention reflects the determination to legitimate national cultural policies and measures in order to shield them against the potential accusation of being an objectionable discrimination in trade policy. This applies to tax measures, allocation of quotas for film, TV and radio, the ownership of cultural institutions, subsidies for theatre, film funding, maintenance of orchestras, etc. At the same time, it is the declared aim to advance international cultural cooperation so that the requirements of the protection and promotion of cultural expressions can be accommodated.

The Convention was—compared to others which often were adopted only after years of negotiation—drafted within record time. After a few months the negotiating parties succeeded in developing a substantial text which enters new territory concerning international law. Equally, the document is groundbreaking for the twenty-first century, in that it protects a wide cultural environment provided and nurtured by local, regional and national actors.

Establishing the reasons that made such a rapid adoption of the Convention possible is the focus of this introduction. The historical background, the role of various actors—experts, civil society, international organizations and the European Union—as well as the content of the Convention will be highlighted. Also, future prospects are at the centre of interest.

As will become apparent there are altogether **five aspects responsible for the rapid adoption** of the Convention: first, the draft, written by independent experts, set out to reach consensus; second, the excellent management under the auspices of UNESCO, rigorously following a tight schedule; third, the firm conduct of negotiations by the chair of the drafting conference; fourth, the flexibility and constructive cooperation of developing countries; and fifth, the successful EU-coordination.

2 History

2.1 Preliminary Events

Subsequent to the World Decade for Cultural Development (1988–1997), the **1998-Action Plan on Cultural Policies for Development**, drafted during the UNESCO Conference in Stockholm, expressed the following recommendation: “Promote the idea that cultural goods and services should be fully recognized and treated as being not like other forms of merchandise.”⁹ The understanding that cultural goods and services are no arbitrary commercial items such as coffee, shoes or tapes,¹⁰ but “vehicles of identity, values and meaning”—as concisely expressed within Article 1 lit. g of the Convention—grew. Following the Stockholm Conference, initiated by

⁹UNESCO (1998). The Stockholm Conference. 30 March–2 April 1998. Action Plan on Cultural Policies for Development. http://portal.unesco.org/culture/en/files/35220/12290888881stockholm_actionplan_rec_en.pdf/stockholm_actionplan_rec_en.pdf, Objective 3, para. 12.

¹⁰Bernecker, R. (2005). Zur Genese eines Völkerrechtsvertrags. *UNESCO heute*, 52(1), 5–11, p. 8.

the Canadian Minister of Culture in 1998, the informal network of cultural ministers INCP was founded.¹¹ Presently the network consists of 72 member countries. Although it is organized rather informally, it became the mainspring for the adoption of the Convention.

On 7 December 2000, the **Council of Europe** adopted a legally non-binding declaration on cultural diversity, underlining the importance of a cultural and media policy as a necessary addition to trade policy. At the same time, it highlighted the vital function of public radio broadcasting in the context of cultural diversity.¹² One year after the adoption of this declaration, UNESCO Member States were in a position to adopt the Declaration on Cultural Diversity.¹³ Simultaneously, the then 188 Member States agreed upon an action plan on the implementation of the basic principles of the Declaration. It confirmed the intention of the Member States to further address the desirability of a standard-setting instrument on cultural diversity.

In April 2003, at its 166th meeting, the **UNESCO Executive Council** finally decided to put the question on legal and technical aspects of the desirability of a standard-setting instrument on cultural diversity on the provisional agenda of the 32nd General Conference.¹⁴ As a result, on 17 October 2003 a resolution by acclamation materialized. It prompted the Director-General to prepare a report and to develop a first draft of a convention on the protection “of cultural contents and artistic expressions”.¹⁵ This was the all-clear for the elaboration of a legally binding Convention which was given after proposals for a stronger reference to human rights by the USA had been taken into consideration.

2.2 Preliminary Draft of Independent Experts

Following the decision of Director-General Matsuura, 15 independent experts were called to Paris in December 2003.¹⁶ This group was entrusted with the elaboration

¹¹See website of the International Network on Cultural Policy. http://www.incp-ripc.org/index_e.shtml.

¹²Council of Europe (2000). Declaration of the Committee of Ministers on cultural diversity (Adopted by the Committee of Ministers on 7 December 2000 at the 733rd meeting of the Ministers’ Deputies). CoE Doc. CDMM (2000) 44 of 2000. http://www.ebu.ch/CMSImages/en/leg_t_gats_coe_decl_cultural_diversity_071200_tcm6-4311.pdf.

¹³UNESCO Doc. CLT-2002/WS/9 of 2002.

¹⁴UNESCO Doc. 166 EX/Decisions of 14 May 2003, Decision 3.4.3.

¹⁵UNESCO Doc. CLT/CPD/2004/CONF.201/5 of July 2004.

¹⁶On the regular procedures for elaborating a convention within the realm of UNESCO, see Yusuf, A. A. (2007). UNESCO practices and procedures for the elaboration of standard-setting instruments. In A. A. Yusuf (Ed.), *Standard-setting in UNESCO. Vol. I. Normative action in education, science and culture* (pp. 31–49). Leiden: Martinus Nijhoff Publishers.

of a preliminary draft of the Convention¹⁷; among the independent experts were several authors of this commentary (Ivan Bernier, Toshiyuki Kono; Sabine von Schorlemer; David Throsby).

After a broad exchange of views during the first meeting (17–20 December 2003), the negotiations gained momentum. Already at the second independent expert meeting, which took place between 30 March and 3 April 2004, the outline of the later Convention¹⁸ became apparent. In June 2004, the Director-General was given a document which he approved mainly without any changes. Only one month later, in July 2004, the so-called **Expert Draft**¹⁹ was presented to the public.

The Draft was structured into six chapters, containing one text with preamble, 34 articles and 4 annexes. The Draft developed by the group of independent experts was already very close to the final version, not only in its composition but also in its content. Nevertheless, during the following intergovernmental negotiations²⁰ some clauses were modified or discarded.

The following aspects were accentuated as **cornerstones** for the future Convention:

- The acceptance of regulations on the protection of human rights, including the right of the individual to chose cultural-artistic expressions, to have free access to culture, as well as being able to participate in cultural life;
- The acknowledgement of the dual nature of cultural goods and services which are—on the one hand—commercial goods but also—on the other hand—vehicles of identity, values and meaning;
- The right of all States to have and follow their own cultural policy, so that governments are in the position to actively take on responsibility for the protection and promotion of cultural diversity;
- The commitment to international cooperation, in line with obligatory standards for the exchange of cultural products and in pursuit of establishing a broad and balanced cultural exchange system between countries, as well as the commitment to develop sustainable markets;
- Preferential treatment of artists and persons engaged in the cultural sector of developing countries as well as their cultural goods and services;
- The establishment of innovative public-private-partnerships in the cultural sector;

¹⁷This represents normal practice for the elaboration of an initial draft. See Yusuf, A. A. (2007). UNESCO practices and procedures for the elaboration of standard-setting instruments. In A. A. Yusuf (Ed.), *Standard-setting in UNESCO. Vol. I. Normative action in education, science and culture* (pp. 31–49). Leiden: Martinus Nijhoff Publishers, p. 34.

¹⁸See UNESCO Doc. CLT/CPD/2004/602/6 of 14 May 2004.

¹⁹UNESCO Doc. CLT/CPD/2004/CONF-201/2 of July 2004.

²⁰The proposed international mechanisms for the protection of cultural forms of expressions in danger were deleted, for instance, as well as the consulting expert group and the prospective activities of ICJ and Courts of Arbitration within the framework of dispute settlement.

- A mechanism for the monitoring of the world-wide situation of cultural diversity;
- Enhancement of the role of civil society;
- A mandatory dispute settlement mechanism.

The group of experts also suggested including the term “**promotion**” in the title of the Convention which was originally called Convention on the Protection of Cultural Contents and Artistic Expressions. This had the particular purpose of aiding the interests of developing countries. At the same time, an emphasis was placed on those cultural products which are in conflict with General Agreement on Tariffs and Trade (GATT) and GATS-law, i.e. cultural expressions. Hence the proposal of experts, which was finally approved by the governments, reads “Protection and Promotion of Cultural Expressions”.

In September 2004, during the first meeting of intergovernmental experts in Paris, the Expert Draft received a positive reaction. The delegations assessed the results of the preliminary work as a good, even excellent basis—which was regarded as a “miracle” in professional circles.²¹ As experience shows, numerous texts drafted by experts gather dust after being praised, mainly because governments tend to favour own drafts. Other texts often do not meet the requirements of governments, resulting in yet another drafting process. However, in this case, the intergovernmental negotiations were based on a viable legal document established by independent experts.

2.3 Consultations with International Organizations

Consultation processes with international organizations, in particular those of non-governmental character (NGOs), are considered as one of the most significant factors for the success of international codification projects. In drafting the Convention, an **additional coordination with other organizations** was of vital importance. The reason lies within the **programmatic conflict** between the provisions of the new UNESCO Convention and those treaties aiming at trade liberalization.

In Autumn 2003, the 32nd General Conference requested Director-General Matsuura to seek **close cooperation with the WTO, the UNCTAD and the WIPO** during the drafting process. After the Expert Draft had been presented in July 2004 and approved of by the First Meeting of Intergovernmental Experts in September 2004, it was forwarded to the WTO, UNCTAD and WIPO with a request for comments.²²

The WTO statement was not given until 17 January 2005, later than initially expected. It basically repeated the position expressed during an informal meeting of heads of delegations on 11 November 2004 in the presence of UNESCO

²¹See Bernecker, R. (2005). Zur Genese eines Völkerrechtsvertrags. *UNESCO heute*, 52(1), 5–11, p. 10.

²²UNESCO Doc. CLT/CPD/2004/CONF.201/5 of July 2004.

representative Katérina Stenou.²³ The non-European States, in particular, expressed the wish not to establish an additional, formal control mechanism. The reason for this request has to be seen in the concern of those States that they would no longer be able to manage the heavy workload of the continuing world trade round (Doha Round). The participating delegates made it clear that they considered UNESCO to be responsible for the elaboration of the Convention. In principle, it was the task of the Member States to coordinate their position within the negotiations on a national level in order to ensure that the proposed Convention would not contradict WTO law. Some delegations also expressed concern related to individual passages of the Expert Draft, namely regarding various definitions, protection measures in case of emergencies (which were later discarded), procedures of international coordination and consultation, the relationship between this Convention and other international instruments, as well as the mechanisms for dispute settlement. For the continuation of the governmental negotiations in Paris it was now obvious that there was a **problematic relationship between WTO law and UNESCO provisions**. At the same time the participants shared a growing optimism that these problems could be solved.

2.4 Meetings of Intergovernmental Experts

The **First Meeting of Intergovernmental Experts** took place from 20 to 24 September 2004 in Paris with 550 intergovernmental experts from 132 negotiating Parties attending. There were also representatives of Palestine, the Holy See, nine international organizations (amongst them UNCTAD, WIPO, the UN Permanent Forum of Indigenous People, the Council of Europe and the European Community), as well as representatives of 20 NGOs. The negotiations were based on the Expert Draft. For the duration of the meeting, a “bureau” was established. It consisted of the Chairman of the Plenary Session, Mr Kader Asmal from South Africa, and representatives from Lithuania, the Republic of Korea, Tunisia and St. Lucia. Mr Artur Wilczynski from Canada acted as rapporteur. Additionally, a committee responsible for the drafting of the text was set up. This committee consisted of 24 members, with the Finn Jukka Liedes being the chairman. With the adoption of the Rules of Procedure,²⁴ the foundation for the two successive sessions of the Intergovernmental Meeting were laid. According to UNESCO’s ambitious timetable, those meetings were only to last two weeks each, in order to pass the Convention during the UNESCO General Conference in autumn 2005.

The **Second Meeting of Intergovernmental Experts** took place from 31 January to 11 February 2005 and revealed more controversies than the first meeting had.

²³Summary of views expressed during the informal discussion (Head of Delegations) on the Preliminary Draft UNESCO Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions of 11 November 2004. Document on file with the author.

²⁴UNESCO Doc. CLT/CPD/2005/CONF.203/3 of December 2004.