

CULTURAL EXPRESSIONS UNDER THREAT
IN THE UNESCO CONVENTION
ON THE DIVERSITY OF CULTURAL EXPRESSIONS

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INTRODUCTION

The provisions relating to cultural expressions under threat have received little attention in the analysis carried out so far on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. This fact is all the more surprising given that these provisions had been the subject of much debate during the negotiations and could create tensions when implementing the Convention if they are not correctly understood and applied.

Before addressing the provisions in detail, it would be useful to briefly examine the corresponding provisions in the Preliminary Draft Convention produced by the group of independent experts set up by the UNESCO director-general in fall 2004. In this preliminary draft—which served as the starting point for actual Convention negotiations—four provisions directly concern cultural expressions under threat: articles 6, 8, 21, and 22. Although only an overview, an examination of these measures will facilitate a better understanding of the direction taken on this issue in the Convention adopted in 2005.

The first of these provisions, Article 6.1, concerns the right of each State Party at the national level to “adopt measures, especially regulatory and financial measures, aimed at protecting and promoting the diversity of cultural expressions within its territory, particularly in cases where such expressions are threatened or in a situation of vulnerability.” During negotiation, many States requested that the last part of the phrase referring to expressions under threat be removed, since it could be perceived as a limit to the right of the Parties to adopt measures to protect and promote the diversity of cultural

expressions.¹ The request having been accepted, Article 6.1 of the Convention was modified accordingly. It is, with the exception of a few details, the provision found in Article 6.1 of the Convention adopted in 2005. We will later examine the significance of this modification.

The second measure, Article 8, entitled “Obligation to protect vulnerable forms of cultural expression,” reads as follows:

If some cultural expressions are deemed to be vulnerable to or threatened by the possibility of extinction or serious curtailment (hereafter referred to as “situations”), States Parties shall take appropriate measures to protect the diversity of cultural expressions within their territory according to the following provisions:

- (a) each State Party may at any time bring before the Intergovernmental Committee referred to in Article 21 situations which may require action under this Article. Such situations shall be identified in conformity with the criteria established by the Advisory Group referred to in Article 22, exception being made for cases covered by existing international instruments relating to the protection of cultural heritage;
- (b) the Intergovernmental Committee shall consider each case according to criteria established by the Advisory Group. In cases where the Intergovernmental Committee determines that action is necessary, it shall require the relevant State Party or Parties to take appropriate measures within a reasonable period of time;
- (c) a State Party required to take appropriate measures by the Intergovernmental Committee may, through this body, seek international cooperation and assistance in identifying the necessary resources for effective action.

The first item that draws attention on reading Article 8 is its binding character. The expression “shall take appropriate measures” in the heading of the article denotes a strict obligation to act as requested. This categorical tone is found again in paragraph (b) of the same article, which states that when the Intergovernmental Committee considers a case brought to its attention by a State Party, it may, when it deems necessary, require that a

¹ In an information document entitled “Vulnerability and Threat: Insights for the Future Implementation of Article 8,” commissioned by the UNESCO Secretariat, Professor David Throsby, when addressing the consideration of cultural expressions under threat in the Preliminary Draft Convention drawn up by the group of independent experts, writes, “In the end a wording was agreed to split the reference to vulnerability between articles 6 and 8. The former referred to the *right* of States Parties to adopt protective measures under conditions of threat or vulnerability, while Art. 8 spelt out an *obligation* to take such measures if cultural expressions were ‘deemed to be vulnerable to or threatened by the possibility of extinction or serious curtailment.’” See UNESCO, Document CE/08/1 EXT.IGC/INF.3, p. 4, April 14, 2008.

State Party “take appropriate measures within a reasonable period of time.” In the Convention adopted in 2005, it is no longer a question of strict obligation: the commitment of the Parties becomes essentially optional. However, as we will see later on, all intent to force the concerned States to act has not been eliminated.

The second item that stands out upon reading Article 8 is the mention of intervention by a body called the “Advisory Group” that is entrusted with, among other tasks, the establishment of criteria to determine the situations in which cultural expressions are at risk. The Advisory Group consists of 12 members of recognized competence in the field of cultural diversity who act in their personal capacity and come from diverse regions of the world. The Advisory Group is also mandated, in accordance with Article 22, “to alert and advise the UNESCO Director-General and/or the Intergovernmental Committee, on its own initiative, with respect to all questions concerning the implementation of the Convention, in particular in the case of a threat to the diversity of cultural expressions.” The considerable powers devolved to the Advisory Group in the implementation of Article 8 were clearly not to the liking of the States. It is therefore of no surprise that during the governmental experts negotiations the decision was made to remove all reference to this body from the Convention. Indeed, in the domain of culture as in many other domains, States are unwilling to transfer powers to bodies they have no control over.

The third and final item of note in Article 8 is its concrete application. Thus, according to paragraph (c), “a State Party required to take appropriate measures by the Intergovernmental Committee may, through this body, seek international cooperation and assistance in identifying the necessary resources for effective action.” Such a call for international cooperation and assistance is absent from Article 8 of the Convention adopted in 2005. However, as will see later on, the idea has not been abandoned. In fact, it is once again expressed in Article 17 of the Convention, which clearly suggests that there is a correlation between Article 8 and Article 17.

Finally, Article 21 of the Preliminary Draft Convention provides for the establishment of the Intergovernmental Committee and establishes its functions, which include making appropriate recommendations when special situations are brought to its attention in accordance with Article 8. This provision is repeated almost exactly in Article 23 of the Convention adopted in 2005. Article 22 of the preliminary draft, which created the Advisory Group and defined its powers, is completely absent from the Convention adopted in 2005, with the result being the transfer to the Intergovernmental Committee and the Conference of Parties of the responsibility, previously entrusted to the Advisory Group, to develop operational guidelines with respect to articles 8 and 17.

Following this brief examination of the provisions of the Preliminary Draft Convention that served as a starting point for the government experts' negotiation on cultural expressions under threat, we can now examine the Convention provisions that refer explicitly to this issue and look at the draft operational guidelines adopted in June 2008 by the Intergovernmental Committee that will be submitted for the approval of the Conference of Parties in June 2009.

PART 1 – CULTURAL EXPRESSIONS UNDER THREAT IN THE TEXT OF THE CONVENTION

Four articles in the Convention adopted in 2005 refer explicitly to cultural expressions under threat: Article 8, which concerns the problem of cultural expressions under threat; Article 12, which concerns international cooperation in general and, in this context, consideration of the situations mentioned in Article 8; Article 17, which concerns international assistance offered to developing countries in situations where cultural expressions are seriously threatened; and Article 23.6 (d), which includes among the powers of the Intergovernmental Committee the power “to make appropriate recommendations to be taken in situations brought to its attention by Parties to the Convention in accordance with relevant provisions of the Convention, in particular Article 8.” In the following pages we will deal more specifically with Article 8, but without losing sight of the other articles.

1.1 Article 8 of the Convention

Article 8, entitled “Measures to protect cultural expressions,” reads as follows:

1. Without prejudice to the provisions of articles 5 and 6, a Party may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.
2. Parties may take all appropriate measures to protect and preserve cultural expressions in situations referred to in paragraph 1 in a manner consistent with the provisions of this Convention.
3. Parties shall report to the Intergovernmental Committee referred to in Article 23 all measures taken to meet the exigencies of the situation, and the Committee may make appropriate recommendations.

To understand the scope of this provision, we must first establish its context, then examine its structure and, finally, analyze each of its paragraphs in detail.

1.1.1 The Context of Article 8

Article 8 is part of a group of four articles (5, 6, 7, and 8) that were closely linked in the Preliminary Draft Convention drawn up by independent experts and that remain so in the Convention adopted in 2005.

Article 5 of the Convention restates, in clear terms, the sovereign right of Parties to adopt measures to protect and promote the diversity of cultural expressions. This right is dealt with in greater detail in Article 6 in the form of an illustrative list of measures that Parties can take to exercise it. Article 7, entitled “Measures to Promote Cultural Expressions”, subsequently explains what is expected from the Parties regarding the promotion of cultural expressions and Article 8, entitled “Measures to Protect Cultural Expressions” what is expected from them regarding the promotion of cultural expressions.

Judging by the titles of articles 7 and 8, one might think that protection measures are to be applied exclusively in the special situations given in paragraph 1 of Article 8.

However, such an interpretation fails to consider Article 5 of the Convention, which mentions the right of Parties to take measures to protect as well as promote the diversity of cultural expressions, irrespective of their degree of vulnerability. To eliminate any doubt with respect to the right of Parties to protect cultural expressions in situations not identified in Article 8, Convention negotiators took the time to specify at the very beginning of this article that the measure was “without prejudice to the provisions of articles 5 and 6.” It should also be noted that the reference to cultures under threat, which appeared in Article 6 of the Preliminary Draft Convention drawn up by the group of independent experts, had been removed during the governmental expert’s negotiation. It must therefore be concluded that Article 8 of the Convention does not in any way restrict the general right of Parties to intervene in accordance with articles 5 and 6.

1.1.2 The Overall Structure of Article 8

At first glance, the reasoning laid out in Article 8 is clear and consistent. The first paragraph states that the Parties can determine the existence of special situations where cultural expressions are at risk of extinction, under serious threat or otherwise in need of urgent safeguarding. This naturally leads to the second paragraph, which states that the Parties can take all appropriate measures in the situations mentioned in paragraph 1. This paragraph in turn leads to the third paragraph, which declares that Parties must report to the Intergovernmental Committee the measures taken to meet the requirements of a situation, which may then make appropriate recommendations.

When we seek to transfer this reasoning into practical application, however, a preliminary question regarding the function of Article 8 arises. Even though paragraph 1 clearly establishes that a Party may determine special situations where cultural expressions are endangered—the Party in other words is not obliged to make such a determination—and though paragraph 2 also clearly states that the concerned Party may take measures to deal with this type of situation, paragraph 3 rather curiously suggests that the Party is not as free to act as we thought. Indeed, as soon as a Party takes such measures, it must report them to the Intergovernmental Committee, which “may make appropriate

recommendations.” Without prejudice to the nature of the recommendations made, it cannot be ruled out that they call into question, explicitly or implicitly, the soundness of the measures taken. This could be the case, for example, if the Intergovernmental Committee judged that the determination of a special situation did not conform to the criteria established in the operational guidelines or if a Party requested the support of the Intergovernmental Committee without having first made the determination of a special situation. It is not unthinkable that, in such a case, the Party concerned would be invited to “redo its homework.” The question then arises of knowing whether Article 8 is a provision that aims at supporting Parties’ interventions to support their cultural expressions under threat or a provision that aims at controlling such interventions. To best understand the scope of Article 8, it is necessary to address each of its paragraph separately.

1.1.3 Paragraph 1 of Article 8

This provision raises three questions.

*a) What is meant by *determine*?*

The most common interpretation of the term *determine* refers to a finding with respect to a problematic situation that is based on analysis of the facts. In the French version of the Convention, the phrase “may determine the existence of special situations” is thus rendered: “peut diagnostiquer l’existence de situations spéciales”. Does the term *determine*, or its French equivalent *diagnostiquer*, presuppose the existence of a text that is suitable for communication, evaluation, and critique? In the event that both terms imply some kind of formal judgment, we can reasonably infer that this is the case. However, it is impossible to specify which form this finding must take and what it must contain. As we will see later on, members of the Intergovernmental Committee recognized the problem when they developed the draft operational guidelines relating to Article 8. They felt the need to specify that the Parties ought to provide the Committee with concrete information regarding the nature of the special situations when reporting

the measures taken. Parties that fail to forward the requested information run the risk of the Intergovernmental Committee concluding that a true determination has not been made.

b) What is meant by cultural expressions?

The term *cultural expressions*, as defined in Article 4 (3) of the Convention, refers to expressions that “result from the creativity of individuals, groups, and societies, and that have cultural content.” Cultural expressions take form and are conveyed by the “creation, production, dissemination, distribution of, and access to cultural activities, goods, and services.” The term appears for the first time in the Preliminary Draft Convention drawn up by the group of independent experts. In a summary of the independent expert meetings, the UNESCO Director-General notes that the experts “agreed that the terms culture and cultural diversity should not be tackled in their full range of accepted meanings or manifestations, but only in relation to the term cultural expressions, which are transmitted by means of cultural goods and services.”²

The fact that the Convention is limited to a specific aspect of cultural diversity, that of cultural expressions, does not in the least diminish the importance of other aspects such as cultural heritage, the preservation of languages, and cultural rights. It must be noted that certain aspects are already the subject of other conventions, including those linked to the protection of heritage and the protection of human and intellectual property rights. In addition, the Convention itself explicitly refers to a number of these aspects in the preamble and in certain articles in order to situate the Convention with respect to these aspects without treating them as specific elements. Finally, the Convention does not provide for the protection of cultures in a sociological or anthropological sense (ways of life, value systems, traditions, and beliefs).

² See UNESCO, General Conference, Preliminary Report by the Director-General with regard to the problem to be regulated and the possible scope of the regulating action proposed, accompanied by the Preliminary Draft Convention on Protection of the Diversity of Cultural Contents and Artistic Expressions. Doc. 33C/23, paragraph 10, August 4, 2005.

To illustrate the nature of the difficulties raised by the interpretation of the term *cultural expressions* in the context of Article 8, we need only consider, for example, a Party that submits that national languages are at risk of extinction in its territory. This threat is far from theoretical given that at least ten or so of the world's languages become extinct virtually each year.³ In the preamble to the Convention, the difficult problem of the extinction of various languages is not avoided, as it affirms that “linguistic diversity is a fundamental element of cultural diversity.” However, in the Convention, the only mention of languages with respect to the diversity of cultural expressions as such is made in Article 6.2 (b), which refers to measures that

(...) in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution, and enjoyment of such domestic cultural activities, goods, and services, including provisions relating to the language used for such activities, goods and services.

From this we can infer that it is exclusively by reference to the creation, production, dissemination, distribution, and enjoyment of cultural activities, goods and services that the preservation of languages at risk can be considered under the terms of Article 8 and not by reference to areas of activities covered by other international conventions, such as cultural heritage. A concrete example of measures that could be taken in that regard is the linguistic quotas in effect in a certain number of countries with respect to radio and television.⁴ A similar approach was adopted in the 2003 Convention for the Safeguarding of Intangible Cultural Heritage. Although this Convention does not prescribe the safeguarding of languages as such, the list of intangible cultural heritage domains provided in Article 2 includes oral traditions and expressions, including language as a vehicle of intangible cultural heritage. The result is that the preservation of languages at risk has now become an important aspect of the implementation of that Convention..⁵

³ In this study, Professor David Throsby gives as an example of a cultural threat the “possible crowding-out of minority languages by a dominant national or international language,” *supra*, Note 1.

⁴ This is true in Canada, France, and Poland, among other places.

⁵ See the following address: UNESCO.org – Culture – Diversity of Cultural Expressions – Languages and Multilingualism: http://portal.unesco.org/culture/en/ev.php-URL_ID=35097&URL_DO=DO_TOPIC&URL_SECTION=201.html.

c) What is meant by risk of extinction, serious threat, and urgent safeguarding?

A precision must be made at the outset. The use of these terms to describe the special situations in which cultural expressions are found implies that these situations already exist. An extinct or nonexistent cinematographic or musical expression cannot be subject to a risk of extinction or a serious threat or require urgent safeguarding. This does not mean that nothing can be done in such situations. Even if Article 8 does not apply to cultural expressions at risk of extinction, under serious threat or in need of urgent safeguarding, the Parties remain free to adopt measures to promote non-existent cultural expressions as envisaged in Article 7 of the Convention. Parties then would not have to notify the Intergovernmental Committee about the measures taken, as is provided for in Article 8.3 of the Convention, but neither could they request assistance from the Committee. Nor would this prevent Parties from adopting measures generally qualified as “measures of protection,” such as quotas. Their right to adopt such measures is restated in Article 5 and is explicit in Article 6, as was seen previously. But even there, Parties could not request the intervention of the Intergovernmental Committee as provided for in Article 8. It remains to be seen if the anticipated situations could be considered as part of Article 8 by adopting, for example, an *a fortiori* interpretation of the terms *risk of extinction*, *serious threat*, and *urgent safeguarding*, which is to say by submitting that the application of Article 8 is even more justified in cases where a cultural expression has gone extinct or no longer exists. Considering the very broad scope of Article 8 that would result from such an interpretation, the likelihood of this argument succeeding seems rather slim.

What is then to be understood by risk of extinction, serious threat, and urgent safeguarding? These expressions have one thing in common: they refer to situations of vulnerability that call for the application of safeguarding measures. In his report on Article 8 drawn up at the request of the UNESCO Secretariat, Professor David Throsby examines the meaning of these different expressions. He first suggests classifying serious threats according to whether they are “external or internal to a State, and as arising from

economic, cultural and/or physical sources.” But the table he subsequently presents to illustrate the possible threats to the diversity of cultural expressions is, unfortunately, not free of ambiguity. He introduces considerations that seem, from a legal standpoint, to fall outside the scope of the Convention. His examples of serious threats, e.g., “weather damage to heritage buildings and sites” and “neglect or failure to maintain fabric of tangible cultural capital,” refer to matters that have more to do with the 1972 Convention for the Protection of the World Cultural and Natural Heritage rather than with the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. As regards urgent safeguarding, he notes that “some degree of exposure to threat and even some curtailment of the extent or diversity of output of cultural expressions may be both expected and tolerated as part of the normal economic and cultural dynamics of national and international affairs.” He continues by stating that “such effects would be regarded as serious, and remedial actions seen to be urgently required, if the injury being caused was likely to be long-lasting or permanent, and/or if the harm was going to be difficult to repair.” On the subject of risk of extinction, Professor Throsby notes that of the three situations identified in Article 8, this one is the most serious, since it leads to a cultural expression’s complete disappearance. The word *extinction*, he adds, “implies that, as with species in the biological sphere, the disappearance would be permanent and irrevocable.” But the examples he gives, such as the destruction of a heritage building or the disappearance of a traditional language, are also given as examples of serious threat. Thus, despite Professor Throsby’s efforts to specify the scope of the expressions *risk of extinction*, *serious threat*, and *urgent safeguarding*, the distinction between them remains unclear.

In practice, it will be the task of the Intergovernmental Committee to clarify, in the context of its examination of the reports transmitted by the parties,, the meaning to assign to these expressions. As was seen previously, the June 2008 draft operational guidelines concerning articles 8 and 17 provides rather clear indications of criteria that the Intergovernmental Committee will take into account to determine if the situations provided for in Article 8 exist.⁶ It remains to be seen if this draft will be ratified as is by

⁶ See below, Section 2.3, p. 20.

the Conference of Parties in June 2009 and, if so, whether the criteria laid out by the Committee will be sufficient to clarify the meaning of the expressions *risk of extinction*, *serious threat*, and *urgent safeguarding*.

1.1.4 Paragraph 2 of Article 8

Under paragraph 2 of Article 8, “Parties may take all appropriate measures to protect and preserve cultural expressions in situations referred to in paragraph 1 in a manner consistent with the provisions of this Convention.” At first glance, it is hard to see what this measure adds to Article 5, which already states in more general terms that Parties have a sovereign right to draft and implement their cultural policies and adopt measures to protect and promote the diversity of cultural expressions. The only notable difference is that paragraph 2 of Article 8 specifies that Parties can take “all” appropriate measures to protect and preserve cultural expressions under threat. Questions can be raised as to the meaning of this specification. Does it mean that, in situations of urgency such as those provided for in Article 8, the Convention will prevail over other international agreements, as was provided for in Article 19 (option A) of the Preliminary Draft Convention drawn up by the group of independent experts which deals with the relationship between the Convention and other international agreements?⁷ This cannot be the case, since this option was explicitly withdrawn at the intergovernmental negotiation stage. The question of a link between the Convention and other international agreements is now answered in Article 20 of the Convention, which calls for the following:

1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,
 - (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and
 - (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

⁷ See UNESCO, Document CLT/CPD/2004/CONF.607/6, *Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, text revised by the Drafting Committee on December 14, 2004, Article 19, December 23, 2004.

2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

The text borrows language from the Cartagena Protocol on Biosafety relating to the Convention on Biological Diversity,⁸ whose basic approach with respect to the relation to other treaties consists of three successive statements in the preamble, i.e., “that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,” that the Protocol “shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,” and that the Preamble “is not intended to subordinate this Protocol to other international agreements.” If we make an exception for clause (b) of Article 20.1, these are the main elements of Article 20 of the Convention on Protection and Promotion of the Diversity of Cultural Expressions. In addition, it is worth noting that in this respect the Cartagena Protocol itself follows the approach adopted by the negotiators of the Rotterdam Convention of 1998⁹ and that it was followed, one year after it was adopted, in another treaty, the International Treaty on Plant Genetic Resources for Food and Agriculture of 2001, which uses an identical approach for the same issue of the relation to other international agreements.¹⁰ Article 20 of the Convention thus seems to be part of a new trend in international governance, a trend that affirms the equal legitimacy of noncommercial concerns in relation to the commercial concerns of international regulations.¹¹ However, Article 20 of the Convention goes a bit further in proposing, in clause 2 of paragraph 1, a concrete way to assure greater complementarity between the issues at stake. In this regard, it directs Parties to take into account the relevant measures of the Convention “when interpreting and applying the other treaties to which they are parties or when entering into other international obligations.”

⁸ The Cartagena Protocol was adopted in 2000 and came into effect in 2003.

⁹ The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, negotiated under the auspices of the United Nations Environment Program (UNEP) and the Food and Agriculture Organization of the United States, was adopted in 1998 and came into effect in 2004.

¹⁰ The treaty in question was negotiated under the auspices of FAO; it was adopted in 2001 and came into effect in 2004.

¹¹ These four conventions have in common the fact that they bring up the problem of balancing commercial and noncommercial concerns, a problem previously discussed in 1998 by Jeffrey L. Dunoff in an excellent article entitled “The Death of the Trade Regime,” *European Journal of International Law*, Vol. 10, No. 733.

To now illustrate how these principals could be applied in the context of Article 8 of the Convention, it would be worth considering the concrete example of New Zealand, which during the Uruguay Round negotiations undertook not to resort to quantitative restrictions in the audiovisual sector. However, a study completed a few years later (1999) showed that the proportion of local content in all New Zealand television programming had decreased to the point that, compared to the programming in nine other countries (United States, United Kingdom, Canada, Australia, Finland, South Africa, Ireland, the Netherlands, and Singapore), New Zealand ranked last, with 24% local content.¹² After a new study in 2001 found that the situation had not improved,¹³ the New Zealand government announced a plan to introduce quotas for local television programming.¹⁴ But the United States trade representative immediately made clear that such a measure would violate New Zealand's commitments.¹⁵ The project was therefore abandoned and replaced by a good faith agreement between the New Zealand government and television station owners in which owners committed to doing everything in their power to improve the level of local television content. It is noteworthy that during the same period Australia, New Zealand's neighbor, was able to maintain 55% local content thanks to its quota system. Subsequently, this system was recognized as a legitimate exception under the Australia-U.S. Free Trade Agreement signed in 2004.

If this matter had come up subsequent to the Convention coming into force and subsequent to New Zealand's ratification of the Convention, would the result have been different? New Zealand certainly would have argued, based on the 1999 and 2001 studies, that the described situation constituted a "serious threat" as defined in Article 8.1 of the Convention. However, in dealing with the United States, which is not a signatory to the Convention, the outcome would likely have been the same. Even if faced with a serious threat, New Zealand could not ignore the commitments made in the WTO in view

¹² New Zealand on Air, "Broadcasting and Cultural Issues at the Start of the New Millennium": <http://www.nzonair.govt.nz/media/policyandresearch/otherpublications/issues.pdf>.

¹³ New Zealand on Air, Local Content 2001, p. 4: <http://www.nzonair.govt.nz/research.php>.

¹⁴ New Zealand, Ministry for Culture and Heritage, Department Forecast Report 2001, p. 9: <http://www.mch.govt.nz/publications/dfr2001/MCH 2001 DFR.pdf>.

¹⁵ Office of the United States Trade Representative, *National Trade Estimate Report on Foreign Trade Barriers 2001*, under New Zealand.

of Article 20.2 of the Convention. On the other hand, New Zealand should have interpreted and applied its commitments in accordance with the relevant provisions of the Convention, as Article 20.1(b) requires. In doing so, there is every reason to believe it would have acted as it did in 2001 by requiring that owners of private stations do their best to increase the level of local content, because as a matter of law it could not go much further. ¹⁶ However, if opposition to the quotas had come from another Party to the Convention, New Zealand could have pointed to articles 5, 8, and 20 of the Convention to demand an of the WTO that took into consideration the provisions in question, even going so as far as withdrawing opposition to the quotas themselves.

1.1.5 Paragraph 3 of Article 8

Although the first two paragraphs of Article 8 have a permissive character, paragraph 3 is different in that it clearly imposes an obligation. According to paragraph 3, “Parties shall report to the Intergovernmental Committee referred to in Article 23 all measures taken to meet the exigencies of the situation, and the Committee may make appropriate recommendations.” The scope of this obligation is likely to present quickly problem of interpretation in the future. It is not clear at first glance if this obligation to report “all measures taken to meet the exigencies of the situation” is applicable to measures adopted prior to the effective date of the Convention but still in force. In practice, a significant number of Parties could find themselves in such a situation. According to Article 28 of the *Vienna Convention on the Law of Treaties*, which sets out that “the provisions of a treaty do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”, the answer to this question is clear: the measures taken prior to the coming into force of the Convention to remedy a situation would not be exempted from the

¹⁶ Such a measure is the limit of what New Zealand could do without explicitly going against its commitments. The argument against such a measure is that by its very nature, it ends up excluding foreign suppliers from television broadcasting time, which means that local suppliers have an unfair trade advantage. Even if the signed agreement is not formally restrictive, the problem it presents from WTO’s perspective is whether the degree of pressure exercised by the government was such that businesses really had no choice. See *Japan –Semiconductor Trade*, special group report adopted May 4, 1988, L6309 - 35S/126, paragraph 117.

obligation to report if they continue to apply to that situation after the Convention comes into force¹⁷. t.

We cannot prejudge the content of the Committee’s “appropriate recommendations.” However, as was previously mentioned, it is possible that these recommendations will call into question, explicitly or implicitly, the soundness of the measures taken by the Parties to protect their cultural expressions under threat. If these recommendations are not accompanied by a call for international cooperation and assistance, they may be perceived as a form of intervention in the concerned Party’s internal affairs and nothing else. It is interesting to point out in that respect that Article 7 of the Convention on the Protection of the World Cultural and Natural Heritage states that “international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international cooperation and assistance to support States Parties to the Convention in their efforts to conserve and identify that heritage”. Although Article 8 as such is silent on the question of international cooperation and assistance, there are fortunately two other articles, Article 12 and Article 17 that deal with the question of international cooperation and assistance in the situations referred to in Article 8

1.2 Articles 12 and 17 of the Convention

Although separate from Article 8, these two provisions must be read in conjunction with it and seen as the natural outcome of the process put forward by the Convention as concerns cultural expressions under threat. The introductory paragraph of Article 12 prescribes the following: “Parties shall endeavor to strengthen their bilateral, regional, and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions, taking particular account of the situations referred to in articles 8 and 17 [...]” Article 17 states that “Parties shall cooperate in providing assistance to each other, and, in particular to developing countries, in situations referred to under Article 8.” Whether it rests on Article 12 or on Article 17, international

¹⁷ See for a similar problem in the context of the WT): European Communities – Measures concerning Meat and Meat Products (Hormones), Appellate Body Report, WT/DS48/AB/R par. 128 (1998)

cooperation, as we will now see by examining the draft operational guidelines relating to Article 8, will be called to play an important role in the implementation of that provision.

PART 2 – DRAFT OPERATIONAL GUIDELINES ON CULTURAL EXPRESSIONS UNDER THREAT

During its first ordinary session, in June 2007, the Conference of the Parties had tasked the Intergovernmental Committee with prioritizing development of operational guidelines relating to articles 7, 8, and 11 through 17 as well as Article 18 of the Convention for review and adoption during the second ordinary session in June 2009. At its first special session in June 2008, the Intergovernmental Committee adopted various draft operational guidelines including some dealing specifically with the protection of cultural expressions under threat (articles 8 and 17 of the Convention). The draft operational guidelines address the following points suggested by the text of articles 8 and 17: 1) special situations, 2) measures to protect and preserve cultural expressions, 3) reports to the Intergovernmental Committee, 4) the role of the Intergovernmental Committee, (5) periodic reporting by the Parties, and (6) international cooperation. In the following pages, the content of these themes will be briefly commented on.

2.1 Special Situations

The draft operational guidelines are rather succinct on the subject of special situations. They simply set out, in the first paragraph, that “the nature of threats to cultural expressions can be *inter alia* cultural, physical, or economic.” No attempt is made to specify the meaning of concepts such as risk of extinction, serious threat, and urgent safeguarding. This gap could seriously complicate the Parties’ work when the time comes for them to provide information on the subject of threats to cultural expressions, as required by paragraph 5 of the operational guidelines.

2.2 Measures to Protect and Preserve Cultural Expressions

The details regarding this subject in the draft operational guidelines are not devoid of interest. Paragraph 3 begins by stating that

Measures taken by the Party under Article 8 (2) will depend on the nature of the “special situation” determined by the Party and may include but will not be limited to: short-term or emergency measures designed to have an immediate effect; reinforcement or amendment of existing policies and measures; new policies and measures; long term strategies; and appeals to international cooperation.

The reference to international cooperation among the measures likely to be taken in accordance with Article 8.2 to protect and preserve cultural expressions under threat is noteworthy since it stresses the importance of reading Article 8 and Article 17 in parallel.

In the following paragraph, the Parties’ freedom to take all appropriate measures to remedy a special situation is qualified by asking them to ensure that measures “taken under Article 8 (2) do not hinder the guiding principles of the Convention nor are, in any other way, inconsistent with the letter and the spirit of the Convention.”¹⁸ Among the principles to take into consideration in this context, it is worth noting the principle of respect for human rights and fundamental freedoms (Principle 1), the principle of equal dignity of and respect for all cultures (Principle 3), the principle of international solidarity and cooperation (Principle 4), the principle of equitable access (Principle 7), and the principle of openness and balance (Principle 8).

2.3 Reports to the Committee

This part of the operational guidelines project concerning articles 8 and 17 is central to the provision put in place to ensure implementation of the provisions in question. It draws a link between paragraphs 1, 2, and 3 of Article 8 as well as with Article 17 in such a way as to leave little doubt about the Committee’s desire to have strict control over recourse to these measures. In this regard, paragraph 6 of the draft operational guidelines sets out that, where a party “has identified a special situation under Article 8 (1) and taken

¹⁸ Paragraph 4 draws from the last part of Article 8.2.

measures under Article 8 (2), the concerned Party will report to the Committee regarding the measures taken. The report should contain the information listed in paragraph 5 of this chapter.” This paragraph reads as follows:

5. Whenever a Party reports to the Intergovernmental Committee under Article 8.3, it should be able to:

5.1 Determine that the situation cannot be subject to action under other UNESCO Conventions;

5.2 Identify the risk or threat to the cultural expression or the urgent safeguarding needed, involving experts, civil society, and including grass root communities as appropriate;

5.3 Demonstrate the source of the threat *inter alia* with factual data;

5.4 Determine the vulnerability and importance of the cultural expression at risk;

5.5 Determine the nature of the consequences of the risk or threat to the cultural expression, and demonstrate the nature of the cultural consequences;

5.6 Explain the measures taken or proposed to remedy the special situation, including short-term and emergency measures, or long-term strategies;

5.7 If necessary, appeal for international cooperation and assistance.

The first thing that becomes apparent is that the requirements are less concerned with the measures taken by the Parties to address the situation than with the nature of the threat that necessitates them. While clauses 5.1 to 5.5 concern the nature of the threat, only clause 5.6 concerns the measures taken to remedy a special situation. The desired objective is very clearly to ensure that the threat is real and that its nature justifies the measures taken. This finding is also confirmed in the very wording of the requirements relating to the nature of a threat which imposes a relatively heavy burden on the Parties who wish to have recourse to Article 8, something that could eventually discourage certain of them. Finally, it must be noted that the last paragraph, paragraph 5.7, does not constitute a requirement *per se* but is rather presented as an option offered to the Party that submits the report. We can also read, in this paragraph, the procedure prescribed to submit an appeal for international cooperation and assistance to the Intergovernmental Committee.

Lastly, Paragraph 7 of the draft operational guidelines specifies that the report should be submitted to the Committee at least three months prior to the opening of an ordinary session so as to allow the information to be disseminated. Must this be seen as a warning that noncompliance will automatically lead to postponement of the review of the report to the Committee's next ordinary session? The use of the conditional rather than the future in the wording of this requirement seems to indicate that the Committee would have a certain leeway. This brings us to the Committee's role when a Party submits a report on a special situation.

2.4 Role of the Intergovernmental Committee

The committee's first task, according to paragraph 8 of the draft operational guidelines, is to add the report to the agenda of its ordinary sessions. The Committee must then examine the reports and their attachments. If a Party does not meet the requirements of the guidelines regarding report content, we can assume that the Committee will reiterate its request for information before moving forward.

Once it has finished reviewing a report, the Intergovernmental Committee can make recommendations and suggest corrective measures that the Party concerned must implement as necessary, as is indicated in paragraph 9 of the draft operational guidelines and in accordance with Article 8.3 of the Convention. By making recommendations and suggesting corrective measures, the Committee in a way steps in for the Party concerned to determine what must be done to resolve the problem. This task is both delicate and complex, since it not only assumes extensive skills and solid experience, but also requires time. Is the Intergovernmental Committee able to take on such a task? Could it carry out its study of the reports that are transmitted to it within a reasonable timeframe, taking into account the urgency of the situations in question? Could it deal with a possible increase in the number of requests submitted in accordance with Article 8? Would it be necessary to create a subcommittee to efficiently handle these requests? These questions will probably require answers in the relatively near future.

Among the appropriate measures that could be suggested to apply Article 8.3 of the Convention, three are mentioned in paragraph 10 of the draft operational guidelines that are linked to other provisions of the Convention. These are, respectively, promoting the dissemination of information on best practices from other Parties in similar situations (articles 9 and 19), informing Parties of the situation and inviting them to provide mutual assistance (Article 17) and suggesting that the Party concerned request assistance from the International Fund for Cultural Diversity as needed (Article 18), the information and data described in paragraph 5 of the operational guidelines as well as any other information deemed necessary being annexed to the request by the Party concerned. Because they meet the concrete expectations of the Parties concerned, these three types of measures are called to play a key role in the implementation of Convention provisions relating to cultural expressions.

2.5 Periodic Reports

Paragraph 11 of the operational guidelines specifies that when a Party has identified a special situation in accordance with Article 8 (1) and has taken measures in accordance with Article 8 (2), it is obliged to mention the appropriate information about these measures in the periodic report that it will present to UNESCO in accordance with Article 9 (a) of the Convention. Under the terms of this latter provision, the Parties undertake to provide every four years, in their report to UNESCO, appropriate information on the measures taken to protect and promote the diversity of cultural expressions on their territory and internationally. In this context, paragraph 11 of the operational guidelines can be interpreted as a way of increasing control over the use of Article 8 by submitting it for review by the Conference of Parties.

2.6 International Cooperation

The last section of the operational guidelines concerning articles 8 and 17 succinctly addresses international cooperation. Indeed, the first of the three paragraphs essentially repeats Article 7 of the Convention, while the second simply specifies that the

cooperation anticipated in this article can be bilateral, regional, or multilateral and that the anticipated assistance can be financial, technical, or otherwise. Rather oddly, no reference is made to Article 12 of the Convention entitled “Promotion of international cooperation,” which states in its heading that the Parties “shall endeavor to strengthen their bilateral, regional, and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions, taking particular account of the situations referred to in articles 8 and 17 [...]” Considering that Article 17 of the Convention invites Parties to cooperate in providing mutual assistance, “in particular to developing countries, in situations referred to under Article 8,” Article 12 can be regarded as a broader call for international cooperation, benefitting not only developing countries but also developed countries, which are also concerned by Article 8.

CONCLUSION

The significance of Convention provisions concerning cultural expressions under threat must not be underestimated. In the debates surrounding their adoption, it was clear that for many countries, particularly developing ones, this is a problem that must be taken very seriously. Moreover, three distinct articles of the Convention deal with this problem, which shows the priority given to it. These articles, as well as the draft operational guidelines adopted by the Intergovernmental Committee (to be submitted for approval by the Conference of Parties in June 2009) must be understood as being part of an integrated approach to bringing concrete assistance to Parties that have this type of problem. On the face of it, this approach has the merit of prompting the Parties to identify the cultural expressions under threat in their territory and to consider what they can do to protect them. It now remains to be seen how the anticipated intervention framework will take shape.

This analysis of Convention provisions as well as those of the applicable operational guidelines leads one to believe that the success of the mechanism to be put in place will largely depend on the Parties’ perception of it. As is evident upon reading the operational guidelines, the Parties faced with situations of cultural expressions under threat that wish

to call on the Intergovernmental Committee will have no choice but to prepare a detailed report on both the nature and the seriousness of the threat as well as on the measures taken to remedy it. By submitting this report to the Intergovernmental Committee, Parties implicitly open the door to a critical review of their behavior in the situation in question and to suggestions that they will not always welcome. On the flip side, they can hope to benefit from the technical expertise of other Parties as well as financial assistance from the international community. If Parties receive no such concrete benefit, recourse to Article 8 may gradually become rarer.

It is obvious that the Intergovernmental Committee will play a key role in implementing Article 8. Unfortunately, exactly how it will do so has up to now hardly been considered. If the reports submitted to the Committee were to increase, it could quickly be overwhelmed by the amount of work to complete. An annual meeting of a few days is certainly not sufficient to review reports, make recommendations, and suggest remedial measures. Must a permanent subcommittee be tasked with investigating the special situations brought to the Committee's attention and preparing draft recommendations and remedial measures for the Committee's review? It is clearly too early to answer this question. But, at the same time, we must not wait to intervene until the Parties have lost confidence in the mechanism put in place.