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Summary of the exchange session

Preferential treatment, international coordination and
consultation

9 June 2015
UNESCO Headquarters, Paris

EXCHANGE SESSION

Preferential treatment, international coordination and consultation

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The Secretary of the Convention, Danielle Cliche, welcomed the experts to this exchange session on preferential treatment, international coordination and consultation, in other words Articles 16 and 21 of the Convention. She gave the floor to Kimmo Aulake, the session moderator.

The moderator, K. Aulake, asked each expert to present themselves.

Nina Obuljen Korzinek stated that she works at the Institute of International Relations and Cooperation in Zagreb.

Mhlanganisi Masoga comes from South Africa and works in the development of small enterprises and creative industries where he is Director of the Department of Trade and Industry.

Nkiru Bolonu indicated that she is originally from Lagos in Nigeria and is CEO of *Spinlet*, a music platform similar to iTunes, also accessible via a browser and via an application.

Véronique Guèvremont indicated that she is a professor at the Faculty of Law at Laval University in Quebec, Canada, where she teaches international culture law and international trade law; and has been involved with the Convention for around ten years. Notably, in 2003 and 2005 she was an associate expert to the UNESCO Secretariat and had the privilege of seeing this instrument emerge, as well as attending and participating in the negotiation.

The moderator recalled how a highly restrictive provision on preferential treatment appeared in the Convention. He explained that there were two vital stages: one preceding the official negotiations, and the other during the official negotiations. Before the negotiation and conclusion mission was entrusted to UNESCO, a certain number of initiatives and efforts were undertaken at the international level to evaluate the need for this new international instrument. In the late 1990s, various groups reflected on what this new legal instrument. A Canadian *think tank* called Groupe 1999 developed the idea of preferential treatment. Then, another important historical element came from the International Network for Cultural Diversity (INCD), a group emanating from civil society and non-governmental organizations (NGOs). Finally, the International Network on Cultural Policy (INCP) provided political support. He considers this provision concerning preferential treatment to be the most powerful and most restrictive of the Convention. He questioned whether it was a matter of trade, or rather a combination of trade and capacity-building making it possible to offer cultural goods and services which can then benefit from this preferential treatment.

N. Balonwu explained that developing countries and developed countries help one another to the benefit of developing countries. She explained that while we can speak of preferential treatment, if there are no capacities, what can preferential treatment achieve?

M. Masoga indicated that in South Africa, they have made significant progress in implementing the Convention and in promoting bilateral treaties. He said that agreements were in place, particularly with the European Union (EU). Specific reference was made to the Convention in a development cooperation agreement signed in 2004 and updated in 2008, including both issues relating to capacity-building as well as numerous other activities. He also underlined that eight co-production agreements had been concluded. In co-production agreements for films, it was agreed to treat films co-produced between South Africa and another country as national products. These films thus benefit from national treatment.

The moderator indicated that apart from cinematographic co-productions, it is clear that often access to markets in the global North for people from the global South is facilitated by agreements between governments. When it comes to artists participating in festivals or organizers of concerts in the global North, things become infinitely more complicated. A visa is required. An artist must not be forced to go through agreements between governments and should not have to fight to get a visa.

V. Guèvremont indicated that the Convention pursues this ideal of a rebalancing of exchanges of cultural goods and services. The aim is to facilitate their entry into the market, but not only that, as Article 16 also refers to preferential treatment with regard to artists and cultural professionals. Regarding their free movement, things are not easy, for reasons which have more to do with obtaining a visa. Unfortunately, States do not want to make a commitment with regard to this mode of provision due to relative sensitivities in the face of the temporary admission of people to their territory. She clarified that Article 16 poses a tremendous challenge. Few agreements effectively implement this form of preferential treatment with specific regard to cultural goods and services. Nevertheless, the EU has developed a very interesting model in the form of free trade agreements to which a cultural cooperation protocol is annexed. The originality of these protocols is that they place the emphasis on capacity-building at the same time as on preferential access to markets, notably by concluding agreements on co-production, co-distribution, and access to quotas which are established in local markets so that co-produced works are considered as national works and can circulate more easily. To date, some fifty Parties to the Convention are part of trade agreements in which this form of preferential treatment is granted.

N. Obuljen Korzinek mentioned that we have established very clear links between Article 16 and other Articles of the Convention, particularly Articles 6, 7, 12 and 15 stating the entire range of measures to implement in order to reinforce Article 16. Just as importantly would be to establish frameworks and mechanisms at the developing country level that would enable them to benefit from or seek preferential treatment. Work needs to be done on policies, but new systems to promote artists and cultural expressions also need to be put in place. These new systems must function at the national level, in order to obtain preferential treatment for international circulation.

The moderator confirmed that in order for preferential treatment to have meaning, it must be interpreted in light of a certain number of other provisions, particularly that of national policies, that of development cooperation and, of course, the objectives and principles of the Convention. It is only possible to truly benefit from preferential treatment if you possess cultural goods, services, or activities likely to interest other people. He mentioned the co-production agreements concluded by South Africa with other countries, adding that national treatment is granted to promising co-productions in terms of support and distribution. In his opinion, this is a very concrete example of interconnections at Convention level. He noted that V. Guèvremont had explained that preferential treatment is a term derived from international trade policy. In fact, the term preferential treatment is not frequently used. The World Trade Organization (WTO) talks about special and differential treatment. Therefore, do we know exactly what we mean by preferential treatment? What is the traditional interpretation of this term?

V. Guèvremont confirmed what the moderator had said and indicated that we now talk about special and differential treatment and not preferential treatment. These rules are one of the pillars of the free trade system and ensure that when a preference, privilege, or favour of any sort is granted to one of our trade partners, it is systematically extended to all other partners. We prohibit discrimination, but we prevent ourselves from granting favours to those who need them in order to participate in this system. Hence this idea of creating exceptions to this principle of non-discrimination in trade law. Nevertheless, the difficulty with the implementation of Article 16 is this prerequisite for granting a preference, and ensuring that this respects trade agreements. Thus, the relatively innovative idea by the EU was born to conclude a free trade agreement which opens up most sectors. We remain within the framework of the conditions set by trade law, but benefit from this trade framework in order to annex on a cultural cooperation protocol. Within the framework of this protocol, at that time, it is possible to grant privileges that specifically concern cultural goods and services and the movement of people, artists and cultural professionals. This method of granting specific preferences to culture, while remaining compatible with trade commitments, is certainly interesting and could represent a source of inspiration to reproduce other agreements of this type.

N. Obuljen Korzinek stated that in view of the reports sent by the countries and the quadrennial periodic reports, it appeared that a large number of countries, when speaking about preferential treatment, do not simply speak about agreements, but refer to cultural policy instruments, and previously existing bilateral and multilateral agreements. She said that we had talked about co-production agreements, but there are a substantial number of cultural agreements and bilateral cultural protocols that contain provisions related to exchanges of artists, and special mechanisms to ensure the mobility of artists. Regarding the implementation of the Convention, not everything has been revolutionary. The implementation of Article 16 not only involves trade agreements, but all existing measures, mechanisms and agreements.

M. Masoga wanted to quickly come back to the question of the product quality mentioned, as this is very important for developing countries if they wish to benefit from preferential treatment. Before requesting preferential treatment, you have to have a quality product, but what does that mean? He added that his country is different from others and that there are many things that may surprise. Between 2002 and the present day, exports of cultural goods and services have not increased to the United States of America and Europe. Nevertheless, imports from these countries and these regions have significantly increased. In terms of the implementation of the Convention, they have further liberalized their sectors and in the long-term, have noted a stagnation of their exports accompanied by a significant increase in their imports, he said.

N. Balonwu felt that artists are slightly embarrassed by this notion of preferential treatment. In her opinion as an artist, she certainly does not want preferential treatment. She does not want to be privileged over others as if she was being done a favour. She added that she does not think that it is possible to talk about the quality of a work, but it is possible to talk about production quality. She believes that preferential treatment means equal access to the cultural products of different countries.

The moderator noted that by exploring this question in depth; we had discovered several limitations, particularly with regard to Article 16. Market mechanisms have certain requirements, which entail certain obligations. He added that he did not know that exports to Europe and the United States of America from Africa had not increased at all. On the contrary; exports have multiplied thanks to certain trade commitments. As such, it is possible to say that the implementation of provisions concerning preferential treatment in this particular case had not proved effective. He also wished to talk about the proliferation of agreements and mentioned the fact that numerous bilateral trade agreements had been concluded since. And that numerous agreements and other arrangements had been signed or were currently being signed. He asked whether, as UNESCO Member States, as well as UNESCO itself, we are sufficiently aware of what happens during these trade negotiations. Is there sufficient transparency? Do we have the opportunity to influence the positions adopted by respective governments?

M. Masoga indicated that he thought that better coordination was seriously needed within governments. In South Africa, the Department of Trade and Industry generally conducts trade negotiations and the Ministry of Foreign Affairs handles the rest. Coordination needs to be improved. In fact, the Convention seems to be a key instrument, but unfortunately it has not been institutionalized and placed within a framework or structure. In his opinion, it is this coordination and this technical application that need to be mastered.

N. Balonwu considered that these bilateral trade agreements were interesting. And that we will see which are the contracting parties. The trade agreement between Europe and the United States of America will not be an agreement like any other - it will impact everyone. This agreement between these two entities is interesting as it incorporates and concerns everyone, while being bilateral. These are very important and interesting subjects which relate to culture and economy in bilateral agreements.

N. Obuljen Korzinek confirmed that since the adoption of the Convention, we have seen bilateral agreements multiply while very little has emerged at the multilateral level. She specified that this is a significant problem as these negotiations have become much less transparent and when important actors are in play, their impact is much greater than that of the countries and regions

represented in the negotiation. The situation, in reality, is infinitely more complex than ten years ago. It is also important to know what happens with case law once all of these agreements have been put in place. A certain number of court decisions will make it possible to confirm or reinforce certain developments. In this regard, if we take this further and look at Article 21, it becomes vital in countries where there is awareness of these questions, that the debate remains open. In her opinion, what the Secretariat of the Convention has done is very useful, and she believes that UNESCO is a place where countries can come to talk about the latest developments in order to then put pressure on their governments and talk about this lack of transparency.

V. Guèvremont noted that today there is of course the Convention, but at the same time, trade agreements are multiplying. One of the objectives of the Convention is to recognize States' right to adopt cultural policies, and to protect and promote the diversity of cultural expressions, but this right remains vulnerable. Indeed, even though they may be Parties to the Convention, if States negotiate trade agreements under which they renounce this right, this effectively cancels out the efforts made to obtain this instrument. This instrument must be used wisely. What we can expect is for States to draw on this Convention to justify their positions and claims. She explained that she recently encountered this, in a different context, with representatives of developing countries who were unaware of Article 16. There was a desire to learn more about how to draw on Article 16 in order to claim the granting of preferential treatment with specific regard to the cultural sector within the framework of trade negotiations. Therein lies the true utility of the Convention, having a text to refer to. There are now 140 Parties. Shared values emerge from this text, which are worth advocating beyond the forum of UNESCO. That is the purpose of Article 21, to promote the objectives and principles of the Convention in other negotiation forums, particularly but not limited to trade negotiations.

The moderator emphasized that there is a remarkable difference in the way in which we pursue economic objectives through free trade agreements and cultural policies. If we debate cultural diversity, we adopt positive, proactive policy measures. Governments do not act directly, but establish frameworks and forms of assistance, particularly financial ones, for actors and operators. It is therefore a very active political field which relies heavily on public intervention. Anyone can say that there is conflict, opposition, or contradiction between those that seek to achieve economic objectives and those that seek the well-being of our peoples. There are no fundamental contradictions in the approach, but there are in the implementation. He then indicated that we must now examine the impact of Article 21 on international cooperation and consultation. But what is the current situation regarding this Article?

N. Obuljen Korzinek felt that it was important to firstly look at how countries have implemented it. Countries have taken a very broad view on how they could apply Article 21. This has been demonstrated in numerous forums, and goes beyond trade agreements. This can be seen in the declarations made by several governments, intergovernmental meetings on culture and development. The question now is what are the effects and what are the consequences? There are several relatively positive examples, but there are still a certain number of failures, and this is particularly the case with bilateral agreements on trade. She added that even when the actors involved are also prominent advocates of the Convention, it has not been possible to incorporate the topic of culture in a way which is fully in line with the commitments of the Convention. Much remains to be done.

M. Masosa replied that within the framework of their negotiations and discussions with the EU they discuss the Convention, and one of the interesting points of the African Charter is that it not only refers to the Convention but also refers to other Conventions on culture, such as that on the protection of culture during conflict. South Africa acceded to this Charter under the auspices of the two former Ministers of Culture, who greatly insisted on accession to the Charter of African Cultural Renaissance. Nevertheless, in the event of policy changes, civil society needs to know that we have a very robust and powerful instrument that needs to be promoted.

N. Balonwu believes that international coordination and consultation does not prevent local coordination and consultation. In a certain number of countries, there are people who are not even aware of this Convention. There is a great deal of awareness-raising to be done. Before organizing international consultation and coordination, there is much to be done at the local level. She referred to Nigeria, where the impact of culture is not truly known. Nevertheless, culture is also linked to trade. Nigeria has become the most powerful economy in Africa, an achievement that is notably linked to the cinema industry. The governments of developing countries must recognize the impact that culture can have on their economic situation. In doing so, they will view culture differently.

V. Guèvremont stated that Article 21 is entitled “International Consultation and Coordination”. When negotiating something within this forum and this framework, we respect principles, we pursue a certain number of objectives, and in order to fully achieve these, this may require that resources be deployed beyond this Convention. We have spoken at length about trade, but all forums are also concerned. She added that the Convention is an instrument for sustainable development. Sustainable development requires the reconciliation of several dimensions and several values. To start with, we have this idea that cultural goods and services have both an economic and cultural value. This concept of sustainable development has gained recognition. We now talk about it in almost all international organizations. In the Convention, culture is a fundamental dimension of sustainable development. Great progress has been made regarding the role of culture in all debates concerning development, particularly sustainable development, as well as at the national level.

The moderator asked if there were any questions from the floor.

Christine Merkel, German point of contact for the Convention, pointed out that what had been said about the flows between South Africa and the EU proved that the UNESCO Institute for Statistics should support us, because having good data is essential to understanding what is happening. Second observation: given the complexity of this domain, we should ask experts to support the work of the governing bodies of the Convention. It is true that preferential treatment was relatively unknown to public administrations. The other lesson learnt is that this notion is not easy to communicate. How can we motivate stakeholders to work on these questions in a sustainable manner? Regarding the questions, she questioned the current revision of the EU Schengen Code. She then wondered whether innovations had emerged from the EU regarding (pertaining to) cultural protocols. She also asked the experts what, in their opinion was the best strategy to promote these instruments beyond Europe?

N. Obuljen Korzinek wished to refer the question to the audience so that it could expand on the subject. It is a particularly sensitive question. During the negotiation of the Convention, one of the reasons that the EU had to sign up to the Convention at the same time as the Member States was that the EU sometimes has shared competencies with the Member States. or has exclusive competencies, which was the case for trade negotiations, but also questions of development and free movement of persons.

A participant clarified that Schengen does not simply address artists and cultural activities. It concerns everyone travelling within the Schengen Area and the world. When the Code was revised two years ago, he had the impression that it was a proactive effort. He explained that the aim was to expand the area. This naturally concerns researchers and entrepreneurs, not simply artists or the cultural sector. In his opinion, there is a desire to understand the main obstacles to overcome in order to facilitate things as far as possible. He felt that this situation is one of the consequences of the Convention. He believes that we will see the results of this entire revision process when things have moved further along.

The moderator returned to the subject of the cultural protocol model within the framework of free trade or an association agreement. He confirmed that as far as he knows, the EU is the only organization to have adopted this approach, which he feels is one of the most interesting in existence and which is one of the results of the Convention. It represents a best practice to explore and to recommend to all those involved in bilateral agreements.

The representative from Saint Lucia said that she finds Article 16 particularly interesting as when the Operational Guidelines relating to this Article were adopted in 2009, she was Chairperson of the Committee. She questioned to what extent the Operational Guidelines were still relevant, and whether there was a need to update them in light of the experience gained through its implementation.

A participant confirmed that the Guidelines clearly demonstrate the link between Article 16 and the other Articles. Nevertheless, she felt that it would be possible to go further. She confirmed that the question of access had been brought up, of our access to standards and Article 14, regarding the measures used to promote local markets and to strengthen existing local markets. In fact, not all artists and professionals travel to Europe. They would live perfectly happily in their country, if there were an existing local market.

A participant clarified that the Convention provides a list of obligations and the Operational Guidelines are not merely an instrument enabling countries to see how to implement the Convention. There are other equally important points. For example, continuing the analysis of reports on implementation by the Secretariat. He said that the Operational Guidelines are sufficient to allow a country to actively work on the implementation of the Convention.

V. Guèvremont wished to clarify the Operational Guidelines in light of practice, with the aim of remedying certain shortcomings. She recalled that Article 9 concerns the production of periodic reports. She felt that the practical information available demonstrates that quantitatively, in terms of the number of agreements, there were few agreements that implemented Article 16. Beyond this potential revision, the aim is to disseminate this information, making it as widely accessible as possible.

The moderator said that the revision of the Operating Guidelines is perhaps not the only solution, but that it would be better to firstly obtain more relevant information on the part of the Parties and continue research on the subject.

A participant confirmed that we are lacking methodological instruments and means to collect statistics on culture. How can we calculate the percentage of inputs? And, when it comes to finding solutions under preferential treatment, how can we use them? Because the dialogue, as you know, is not always easy to initiate.

The representative of the French National Centre for Cinematography (CNC) insisted on the question of the right of Parties, recognized by the Convention, to develop cultural policies. This right would only hold weight if the Parties seized it and enforced it particularly in trade negotiations. She then indicated that the digital environment preserves this right for digital cultural goods and services since they do not change according to methods of production and dissemination. They essentially remain goods and services with this dual nature. She then brought up the example of her organization, the CNC, which has concluded 55 co-production agreements with 55 countries worldwide, with others still being negotiated. Through these co-production agreements, preferential treatment is granted to works because the aim is to develop co-production agreements with countries with similar values and a similar attachment to cultural diversity. We will be able to continue to provide this support to world cinema, not through production assistance, but now within the framework of a distribution assistance component in order for the works produced to be better disseminated.

A participant confirmed, with regard to the music industry, that we have been discussing the issue of inadequate data for the last 10 to 15 years. Much remains to be done to collect statistics, and this is a relatively important question as the lack of data affects the entire industry. It is important to know where we stand with regards to economic growth, culture, etc.

M. Masosa confirmed that they have aligned themselves with UNESCO procedures concerning culture. Their work focused on the entry and exit of cultural goods and on the actors who could obtain statistics. As for the export of cultural services, the UNESCO framework states that even if there is not a satisfactorily up-to-date level on the part of the various sectors, it is necessary to

obtain what is set out in the balance of payments system for services. He added that nothing had been done until 2012, when they committed to this process. Things are now different, as a certain level has been achieved. He confirmed that they can make comparisons in terms of the balance of payments to several European services for cultural goods and services. He pointed out that they had participated in the UNESCO survey on employment in the cultural sector and that this had provided a third source of information. He said that it is important in his country to learn from the mistakes made, adding that this makes it possible to put forward convincing arguments to economists. It had taken two to three years to reach this level. The main thing is that progress has been made.

A participant confirmed that this is indeed very important at both the national and international level. Indeed, much depends on the commitment of Member States. He believes that the majority of countries would be delighted to have the information that already exists at the UNESCO Institute for Statistics and other organizations in the domain. He then mentioned one of the management tools of the Convention, the Monitoring Report which is being finalized by a Swedish Development Agency. We are succeeding in developing indicators which could provide a more accurate overview of the implementation. It is a very long process which requires a great deal of knowledge. For example, we are realizing how difficult it is to have statistics on institutions and bodies when digital technology is controlled by the key actors who do not like to provide this information. He added that they collect statistics in the analogue environment, but that they are already behind on the establishment of mechanisms and impositions in the face of actors involved at international level. In a digital world, it is difficult to obtain this information.

D. Cliche added that the first report on the implementation of the Convention will appear next December and will contain up-to-date statistics on cultural goods and services. These statistics have been published and produced by the UNESCO Institute for Statistics. She added that the statistics do not indicate an increase in the circulation of cultural goods and services, but rather that things have improved in the global South with certain sectors opening up and an increase

The moderator added that statistics exist on all of the questions, particularly on the economic impact. The main problem is comparing figures from different countries. This is often due to the fact that the information is extremely sparse and that it is difficult to concentrate it in a civil servant's office.

A representative of the Spanish Ministry of Culture said that the Organization of Ibero-American States (OIS) had created a Latino-American Observatory of Culture based on existing sources. This Observatory helps Ibero-American countries incorporate statistical criteria for culture.

D. Cliche indicated that Spain had also supported the UNESCO indicators for culture and development. This is a very good thing for countries where it is not easy to collect these. There are many independent initiatives and Spain has certainly supported all initiatives in this domain. She believes that we can be optimistic with regard to the results.

The moderator also mentioned that the Council of Europe had already launched and analysed an intellectual framework for the indicators concerning culture and democracy. It is a historic event to have indicators that demonstrate correlations between certain cultural activities and democratic life. He concluded by indicating that this exchange session had made it possible to scratch the surface of preferential treatment and international cooperation and consultation. It had shown that Articles 16 and 21 are extremely versatile and have multiple facets. Now we must try to understand them in light of other Articles of the Convention, in particular in their relations to real life, and to real questions regarding the production, distribution, and consumption of cultural goods and services, on domestic, national, and foreign markets.

CONCLUSION

N. Obuljen Korzinek recalled that when it comes to sensitive subjects related to the Convention, it is important to look back at the background of the debates. That is why we have tried to remind ourselves of the *raison d'être* of this preferential treatment. She added that the question of digital technology and electronic commerce is also raised with regard to preferential treatment. What we have tried to do is to look at the complexity of the policies and approaches to consider during the implementation of Articles 16 and 21 of the Convention. Some experts underlined the importance of a *bottom-up* approach because although governments may be signatories to the Convention, they cannot envisage acting alone in this domain. We wanted to interpret this notion of preferential treatment within the context of the Convention and we have seen that we were all in agreement that it is not a question of restricting ourselves to international trade, but rather of discussing international cultural cooperation and in particular, development cooperation.

If we want to evaluate the implementation of Article 16 on preferential treatment, we can look at three domains: international cultural cooperation, international trade, and the link between culture and development. What we can also take away from this session is the complexity of the implementation of preferential treatment. There is still much to do in terms of capacity building for developing countries in order to establish appropriate mechanisms, policies and strategies that will allow these countries to benefit from preferential treatment.

Furthermore, it is important to mention that there are debates in other forums on the preferential treatment granted between developing countries or within regions. For example, a pan-African network that promotes African music. This is the framework for a mechanism that uses this concept of preferential treatment to strengthen trade between countries. Regarding trade agreements, there were several examples of best practices. Then, there were examples of countries that have negotiated bilateral agreements to see that culture had not been treated in the most appropriate manner in these agreements. There was a call for vigilance, monitoring and proactivity. When agreements are negotiated for the cultural sector, it is important to ensure greater transparency in all negotiations regarding preferential treatment.

When it comes to the implementation of Article 21, this is the fruit of training arising from periodic reports. It appeared that countries have a very broad interpretation of Article 21. As such, the work carried out by the Secretariat, through a questionnaire and exchanges of information on the interpretation and implementation of the Article, is something that could be very useful to countries that have perhaps not been as active in promoting Article 21. We can also recall the efforts made by the Secretariat over the last few years within the framework of programmes funded by the EU, which have enabled capacity-building in a certain number of countries, helping them implement Articles 16 and 21. What is important and what relates to these new emerging challenges, when discussing preferential treatment, is to discuss trade, but we are viewing them from a very traditional point of view. Nevertheless, distribution has dramatically changed in the digital sector. It is therefore vital that countries understand that what happens in the digital sector is nonetheless regulated. New regulations will ensure that the principles of the Convention are respected.
