



**CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY
OF CULTURAL EXPRESSIONS**

**POSITION OF INCD
AGREED AT RIO DE JANEIRO, NOVEMBER 2006**

1. INCD supports the Convention. It confirms the sovereign right of States to implement and modify the policies and measures they need to support their own artists and cultural producers. It provides a focus and a forum for States to work together to accomplish the objective of carving out cultural goods and services from the trade and investment agreements. It provides a model of what measures and programs can be used by States to support their own artists and cultural producers.
2. INCD urges all member States of UNESCO to ratify the Convention and to engage actively in the ongoing work.
3. INCD urges UNESCO to make the Convention as meaningful as possible by convening a meeting of the Conference of Parties as quickly as it can, and by facilitating the collection, exchange, analysis and dissemination of the necessary information.
4. Since the existing bilateral and multilateral trade and investment agreements and ongoing negotiations for new agreements represent a continuing threat to policies and measures that promote cultural diversity, INCD will reinvigorate its campaign to raise awareness of the cultural implications of the WTO, regional and bilateral agreements and of the ongoing free trade talks. INCD also reinforces its call for governments to refrain from making commitments in the context of trade talks that would negatively affect their ability to promote cultural diversity.
5. While the Convention generally does not obligate countries of the North to support the development of creative industries and cultural capacity, INCD will work to ensure that its strong principles of promoting international cooperation, integrating culture in sustainable development, cooperating for development and providing preferential treatment for developing countries are transformed into practical programs and measures that will make a difference.

BACKGROUND

INCD is a worldwide network of non-governmental organizations working to counter the adverse effects of globalization on arts and culture. INCD has almost 400 members in 71 countries, a number of which are international organizations with a presence in other countries. Our scope is truly global.

The INCD represents individual artists and creators, cultural groups, professional cultural associations, academics and creative industries. We come from all continents and all sectors of the cultural community ranging from digital media to traditional artisans. We are a democratic organization with an active Steering Committee. The Network is guided by this Steering Committee, our Statement of Principles and member decisions.

Since 1998, the INCD has been working with governments, intergovernmental institutions and other civil society groups to ensure that diverse cultures and artistic expressions can thrive in a world of global marketplaces and rapidly changing media technologies. We believe governments should have the ability and obligation to carve out a space for domestic artists and cultural industries and to ensure traditionally marginalized communities can maintain the living expression of their cultural heritage.

Since its first meeting in Santorini, Greece held in 2000, INCD has advocated the adoption of a legally binding treaty on cultural diversity, a treaty that would confirm the sovereign right of states to support their own artists and cultural producers and would remove cultural goods and services from the trade agreements. In 2002, INCD released the initial draft of such a treaty to demonstrate its potential. Since that time, it has been an active participant in all international activities surrounding the proposed treaty.

On 3 June 2005, delegates to UNESCO's intergovernmental meeting considering the terms of a treaty on cultural diversity reached agreement on all outstanding issues. The proposed Convention was approved at UNESCO's General Conference in October 2005.

CONTENT OF THE CONVENTION

The Convention adopted by the Intergovernmental Conference has a standard form and, in its final provisions, language that is similar to other UNESCO instruments.

Introductory Clauses

The Preamble introduces the reasons for drafting a legally-binding instrument and outlines key developments affecting the exchange of cultural goods and services and international cultural cooperation. The Preamble evokes concerns about how globalization is affecting the future of the diversity of cultural expressions; reaffirms the fundamental importance of the respect for human rights; acknowledges the need for greater cultural interaction; and the need to preserve cultural diversity as the common heritage of humanity.

The Objectives outline the main goals and primary focus of the Convention. The most important include the protection and promotion of the diversity of cultural expressions; recognition of the link between culture and development; recognition of the distinctive nature of cultural activities, goods and services; and strengthening international cooperation.

The Guiding Principles are significant since they provide a legal framework for the substantive rights and obligations found in the Convention. The strongest of these have been made operational elsewhere in the text, certain others may act as a limitation on the rights. The principles are:

- respect for human rights and fundamental freedoms
- sovereignty of States to adopt measures and policies
- equal dignity and respect for all cultures
- international solidarity and cooperation
- recognition that the cultural aspects of development are as important as the economic aspects
- acknowledgment that protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable cultural development
- equitable access
- openness and balance.

The need to respect human rights and fundamental freedoms provides a strong and necessary limit on the sovereign right of States to implement policies and measures. It has been confirmed in Article 5.1, the general provision respecting the scope of governmental authority.

The principle of openness and balance may also act as a limitation, although it appears no-where else in the text. It provides that States should “seek to promote, in an appropriate manner, openness to other cultures,” and “to ensure that (measures they adopt) are geared to the objectives,” of the Convention.

The principle of access could also have been an important limit on the sovereign rights, except that it was confused in the push to achieve a consensus by the adoption of a seemingly random sub-clause:

“Equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding.”

Elements of the principle are found elsewhere in the text, particularly in Article 7.1 which provides that States “shall endeavour” to create “an environment that encourages individuals and social groups ... to have access to diverse cultural expressions from within their territory as well as from other countries.”

Scope and Definitions

The Scope of the Convention is broad, it “shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions.” It is importantly not focused exclusively on “cultural” policies.

The most important Definition is certainly the definition of cultural activities, goods and services as it is the first time that the dual nature of cultural goods and services is recognized in an international legal instrument. The definitions of cultural policies and of the term protection are also very useful for the interpretation of the Convention provisions if the legitimacy of cultural policies is questioned.

Rights and Obligations of Parties

The heart of the Convention is the 15 Articles which provide the rights and obligations of the Parties. The accent is on rights, rather than obligations, and the overriding focus is on the sovereign rights of states to adopt policies and measures they deem appropriate to protect and promote cultural diversity. This operational part of the Convention includes Articles about the extent of rights that Parties have at national level, information sharing and education and public awareness. Except for Article 10, the rights are expressed in the discretionary form, "Parties may" take certain actions favouring cultural diversity. Article 10 provides that Parties "shall" implement educational and other programs to promote understanding. Article 11 provides that Parties acknowledge the role and "shall encourage" the active participation of civil society in the protection and promotion of cultural diversity.

Articles 12 to 18 concern the promotion of international cooperation. Parties agreed on the need to integrate culture in sustainable development; to cooperate for development, including through technology transfers, capacity building and financial support; to encourage collaborative arrangements; and to assist each other where there is a "serious threat to cultural expressions." Innovative wording is found in Article 16 which provides that developed countries "shall facilitate cultural exchanges with developing countries by granting through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing country." Article 18 establishes an International Fund for Cultural Diversity. Despite the strong push of developing countries, contributions to the Fund are voluntary and not obligatory.

In the key Articles on international cooperation, the language provides that parties "shall endeavor to" achieve the goals of the Article. However, Article 15 provides that Parties "shall encourage" collaborative arrangements, Article 16 provides that Parties "shall facilitate cultural exchanges," and Article 17 states that Parties "shall cooperate" if a State Party determines that certain "cultural expressions ... are at risk of extinction, under serious threat, or otherwise in need of safeguarding."

Relationship to Other Instruments

Articles 20 and 21 regulate the relationship of this Convention to other instruments. This was the most debated issue and the compromise solution was reached at the last moment. The solution is based on the principles of "mutual supportiveness," "complementarity" and "non-subordination." There is innovative wording in Article 20 which provides that "when interpreting and applying" other treaties or "when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention." However, that language would appear to be contradicted by the following clause which states, "Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties."

Organs of the Convention

The final Articles outline the functional aspects of the Convention and establish a dispute settlement system. The compromise solution on this issue provides that either party to a dispute may invoke a conciliation process, however, the report of the conciliation commission is not binding, it has only to be considered "in good faith" by the parties. In addition, when ratifying the Convention a party may take a reservation against this Article and declare that it will not be covered by the dispute settlement system.

Beside States, regional economic integration organizations can also become a party to the Convention. There must be an explicit statement of how responsibilities are divided between the organization and its constituent parts. A federal clause provides that the Convention is binding on the central government where it has jurisdiction, but is only to be recommended to the sub-national government where it has jurisdiction.

The governing body of the Convention will be a Conference of Parties which is generally to be held at the same time as a UNESCO General Conference. The Conference will elect a regionally-balanced Intergovernmental Committee which will meet annually to review the operation of the Convention. UNESCO's Secretariat will provide the necessary administrative support, including information sharing and analysis.

GOVERNMENTS CELEBRATE A VICTORY

As soon as the Draft Convention was adopted by the Intergovernmental meeting in June 2005, negotiating parties and many of the NGOs concerned with the issue celebrated a victory.

The adoption of the draft Convention is regarded by most as an important step forward for the international movement for the protection and promotion of cultural diversity. The negotiations were completed within the timeframe set by the 2003 General Conference, which is very efficient given its controversial nature. A large majority of UNESCO Member States advocated for respecting the initial deadline, and the negotiations were completed with a broad consensus and few reservations.

The most important achievements of this Convention are that it brings a new position for cultural activities, goods and services in international law, and it will raise awareness of cultural issues in other fora.

The Convention has great political importance. With the innovative wording of Article 20, and a political consensus achieved by such a large number of countries, the door is open for a new treatment and improved position of culture. Signatories will be obliged to take into account the relevant provisions of this Convention when interpreting and applying the other treaties to which they are parties or when entering into other international obligations. This should put cultural objectives on an equal footing with other public policy priorities.

Having put a huge effort into negotiating and adopting the provisions of the Convention, it is anticipated that governments will work to have it ratified by a sufficient number of signatories in the near future. This will create a favourable environment for reflecting on current trends in cultural exchanges and investigating opportunities for introducing new instruments and measures that will help to achieve the objectives set by the Convention.

The concept of the Convention was embraced by countries of the South, as well as those of the North, countries having different cultural systems, those with developed cultural industries, as well as those which are struggling to provide basic support to domestic artists and cultural producers. Regardless of their ability to fund, support and develop their cultures, governments recognized the fundamental importance of creating a legal framework.

THE CONVENTION FAILS TO ACHIEVE ITS PROMISE

To assess the final outcome, the International Network for Cultural Diversity has judged the text based on the objectives for the Convention agreed by the members and the Steering Committee. When the Intergovernmental Committee started its final session, the INCD communicated with all UNESCO delegations and outlined the basic principles INCD had for the Convention.

1. The status of the Convention must be equivalent to the trade and investment agreements and must prevail where the Parties are considering cultural policies and cultural diversity.
2. The Convention must be an effective tool for countries of the South to develop their creative capacity and cultural industries.
3. The Convention must confirm the right of States to implement the policies to promote culture and cultural diversity that they deem appropriate. It must also acknowledge the broad scope of policy tools that are used to promote cultural diversity, and preserve the right of governments to adapt and adopt new ones in the coming years as circumstances require.
4. The Convention must confirm the vital role of the creative sector, in particular artists, and enable players in the sector to counter the homogenizing effects of globalization on culture.

In the Press Release it issued at the conclusion of the talks, INCD stated: "If the objective of the new Treaty is to declare the right of States to implement cultural policies and to establish a new foundation for future cooperation, the Treaty has succeeded. If the objective is to carve out cultural goods and services from the trade agreements, the Treaty is inadequate, at least in the short term."

Equivalent Status to Trade Agreements

One of the INCD's objectives in working for the adoption of a legally-binding Convention on cultural diversity was to get beyond the "cultural exception," which has proven inadequate in the context of free trade negotiations. INCD sought to create a situation in where rules governing trade in cultural goods and services would be developed by cultural experts and that disputes about these matters would be adjudicated in a cultural forum rather than under the trade and investment agreements.

While the contradictory wording of Article 20 is likely the best that could have been achieved, it fails to provide the clarity needed to prevent further erosion of cultural sovereignty, let alone to begin the difficult process of rolling-back the extensive influence of the WTO and other agreements. Further, while the Convention is very strong and explicit in reaffirming the "rights" of sovereign states to adopt various measures and regulate policies in favour of cultural diversity within their territory, it does not provide correspondingly strong "obligations" on members to use these rights to achieve agreed objectives. This imbalance does not leave much hope for an effective dispute settlement system because, in the absence of obligations or commitments from one state to another, it is difficult to imagine any basis on which disputes could arise. In addition, the findings of the dispute body are not binding, they are merely advisory.

Even the Article on transparency falls short. Government negotiators were unwilling to create new administrative structures and thus the Articles on information sharing and transparency merely require Parties to report on their measures every four years and to designate an official contact for these purposes.

The INCD has concluded that the Convention has failed to achieve this objective.

An Effective Tool for Cultural Development

Although the ideas behind the Articles referring to international cooperation and cooperation for development were embraced by all negotiations, the wording is extremely weak. In the key provisions, States are obligated only to “endeavour” to do the things outlined, in other words, they only have to try. Given the number of competing priorities for government spending, the absence of mandatory contributions and the fact UNESCO already has a similar fund, the creation of the International Fund for Cultural Diversity is unlikely to make a difference

It would also appear that the innovative solution found in Article 16, providing preferential treatment for developing countries, will be impossible to enforce without appropriate data and statistics which would in a reliable manner compare market size and market share of particular country or groups of countries. It is important to note that several countries that supported the Convention also read into the record statements to the effect that this provision could not be interpreted as requiring them to change their current policies and practices relative to the importation of foreign works, or the cross border movement of artists.

While the rights of states to implement their cultural policies are reaffirmed, there is a legitimate concern about what can be done by countries that lack the resources to develop their cultural industries through cultural policies and subsidies. It is clear there could have been more incentives for countries of the South in the Convention.

The INCD has concluded that the Convention has failed to achieve this objective.

Confirm Cultural Sovereignty and the Broad Scope of Cultural Policy

The right of Parties to develop, implement and amend policies that affect the diversity of cultural expressions is the central focus of the Convention. It appears as an Objective, a Principle and it is the centrepiece of the operative provisions of the Convention. The Scope of the Convention is very broad and the definitions should be adequate to ensure that future policy measures fall under the provisions, regardless of the technologies in use at the time.

*The INCD has concluded that the Convention **has achieved** this objective.*

Confirm the Vital Role of Artists and the Creative Sector

There are several elements that touch on this issue and some of these were introduced into the text as a consequence of the INCD’s advocacy efforts.

Within the range of measures that are enunciated in Article 6, Parties may adopt “measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions.” Parties have also agreed to “endeavour to create an environment that encourages individuals and social groups (a) to create, produce, disseminate, distribute and have access to their own cultural expressions.” Article 7 also commits

Parties to “endeavour to recognize the important contribution of artists, others involved in the creative process ... and their central role in nurturing the diversity of cultural expressions.”

The Article on Participation of Civil Society is also relevant here. Parties both acknowledge the fundamental role of civil society and agree to encourage its active participation.

Finally, in the Articles addressing international cooperation, Parties commit to working to strengthen “cultural production and distribution capacities in developing countries;” to provide “support for creative work;” to facilitate the mobility of artists from developing countries; and to promote collaborative arrangements to build capacity. Article 16 provides that developed countries shall provide “preferential treatment to artists and other cultural professionals and practitioners.”

While these provisions are useful, the commitments are generally not obligatory on the Parties to the Convention and thus there is no guarantee they will be acted upon.

*The INCD has concluded that the Convention **partially achieves** this objective.*

Despite its Limitations, INCD Should Support the Convention

Overall, the Convention is a useful political tool that confirms the right of States to take actions in support of their own artists and cultural producers and in favour of cultural diversity. It could also provide a focus and a forum for States to continue to work together and hopefully with civil society to achieve the objective of carving out cultural goods and services from the trade and investment agreements. By outlining a range of measures that States can take to promote their domestic cultural capacity, it can act as a model for countries which do not yet have developed cultural policies.

INCD supports the Convention and will work to make it as effective as it can be. To give effect to the objectives, INCD needs to continue to work in the trade arena to prevent the further erosion of cultural policies and to work for the strong measures and programs to support cultural development.

IMPLEMENTING THE CONVENTION

The next step in the process is for the Convention to be ratified by member States. According to its terms, the Convention will “come into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession.” This is the minimum number required, but many more are needed if the Convention is to make a significant difference.

The ratification process will not be an easy one. For countries with developed cultural industries that have been negatively affected by trade negotiations, the Convention will be supported strongly. The endorsement of the European Commission should result in early ratification by many European nations. However, given the absence of strong incentives within the Convention, it may not have a high priority on a crowded public policy agenda in countries with less developed cultural industries. Further, the U.S. can be expected to apply pressure on a bilateral basis to try to slow down or stop the ratification process.

The optimistic timetable would be for more than 30 ratifications to be secured by June 2007, in which case UNESCO could convene the first meeting of the Conference of Parties at the time of the 2007 General Conference meeting. That body would then select the Intergovernmental Committee and decide on the operational guidelines to implement the Convention.

APPENDIX A

Assessing how the Convention would affect the Canadian Periodicals Case

Background

A split-run magazine is one that recycles U.S. editorial content, inserts a small Canadian section, and then sells itself to Canadian advertisers. Because it has lower editorial costs and generally broader reach, it is able to sell its space to advertisers at a lower cost than Canadian magazines. Since advertising is an important revenue source for Canadian magazines, this diversion of revenues is significant.

In order to build a Canadian magazine industry, the importation of U.S. split-run magazines was prohibited by a tariff item introduced in the 1960s. At the same time, an income tax provision was introduced which prevented Canadian companies from deducting magazine advertising costs as a business expense unless the ad was placed in a Canadian magazine. When technology allowed split-runs to circumvent the border measure by transmitting the copy electronically to be printed in Canada, rather than importing the finished magazine, the tariff item was supported by an excise tax. Since 1849, Canada has also provided a financial subsidy to Canada Post enabling it to provide a preferential postal rate for Canadian magazines shipped across the country, in recognition of the challenges of producing a magazine for a population that is widely disbursed geographically.

The U.S. appealed these measures before a WTO panel in 1999. Canada argued the measures addressed advertising and thus should be judged against GATS obligations where Canada had made no commitments respecting advertising services. However, the panel and appellate body found that magazines are a “good” and the content qualifies as “services,” and thus the obligations of both the GATT and GATS apply. It ruled that all of the Canadian advertising measures violated commitments Canada had made under the GATT. The appellate body upheld this decision and also ruled that the financial subsidy was not a direct subsidy of cultural producers, permitted under GATT, but was rather a subsidy of Canada Post.

Would the outcome of this case change if the Convention had been in place?

To begin this analysis, the following assumptions are made.

1. The Convention has been ratified by a reasonable number of countries and has been implemented.
2. Canada’s magazine measures are identical to those that existed before the WTO panel decision and the U.S. action is also identical to the one it took earlier.

The first scenario would assume the U.S. does not join the Convention. The outcome of the U.S. action would have to be identical to the earlier decision.

Because the United States is not party to the Convention, there is nothing in it that could in any way affect the rights it has under the WTO Agreements, nor affect the obligations that Canada has assumed relative to the U.S. under those Agreements. At best, Canada could wave the Convention before the trade panel and argue that international law now confirms its right to implement cultural policies.

The U.S. response would be:

1. That the U.S. is not bound by the Convention and, in any case, the Convention does not affect the commitments made by States under WTO agreements.
2. That magazines are not cultural products and therefore that the policies related to them are not “cultural policies.”

The trade panel will agree with them on both counts. It is important to note that the original decision rejected Canada’s argument that magazines are “cultural” products. They found that Canadian and United States magazines were like goods that were interchangeable.

The second scenario would have the new periodicals case re-considered with the U.S. as a party to the UNESCO Convention. There is every reason to believe that the outcome would be identical to the earlier scenario.

Canada would use Article 20.1 (b) and argue that the U.S. and Canada have agreed to interpret other treaties taking into account the relevant provisions of the Convention. Canada would argue that the relevant provisions include Article 5 and 6 which provide broad scope to States to support their cultural industries. Canada would argue that its magazine support measures are thus fully in conformity with the Convention, since they do not violate any of its provisions. Canada could unilaterally launch a dispute under the Convention and seek a conciliation commission report to support its position.

The United States response would be:

1. That magazines are not cultural products and therefore that the policies related to them are not “cultural policies”. This argument would be rejected by the trade panel in this scenario, since the U.S. will have agreed to the Convention under which a strong argument can be made about magazines as “cultural products.” This is likely to be confirmed by a conciliation commission report under the Convention.
2. Article 20.2 precludes the parties from interpreting this Convention in a manner that would modify their rights and obligations under other treaties. Thus, the way to resolve the apparent contradiction between Article 20.1(b) and Article 20.2 would be to confirm that Canada does indeed have a right to implement policies respecting magazines, but to confirm that there is nothing in the Convention that prevents Canada from agreeing to limit this sovereign right by making commitments under other treaties. Therefore, the United States would argue that Canada is free to support its magazines, but it must do so in a manner that is consistent with the commitments it has made to the United States under the WTO agreements. They would point to financial subsidies as an example of the kind of policy tool that Canada can and does use to support its magazines. The trade panel would be likely to agree to this argument, since this is essentially what the 1999 decision said.

The second scenario gives far greater weight to the moral argument that Canada would put to the trade panel, since both it and the U.S. would be Parties to the Convention. However, this is unlikely to be sufficient to defeat the U.S. argument that also conveniently resolves an apparent contradiction within the UNESCO Convention.