

Report on INCD Interventions to UNESCO Intergovernmental Committee of Experts Meetings May-June 2005

Section 1 - Written Comments Add Reference to Creative Sector

In conformity to the recent Steering Committee discussions, the following additions were made to INCD's analysis of the Chairperson's Text and were made available in writing to delegates. Almost 200 copies were picked up in English and French at the meeting.

"In recent discussions around the Chair's text the INCD Steering Committee has also added a fourth objective that is consistent with earlier INCD comments:

1. The Convention must confirm the vital role of the creative sector, in particular artists, and enable players in the sector to counter the homogenising effects of globalisation on culture....

Vital role of the Creative Sector

The INCD urges that the title of the Convention be amended to return to the language concluding language adopted by the last General Conference, *Convention on the protection and promotion of the diversity of cultural contents and artistic expressions*.

INCD understands that this is part of the operating instructions for this meeting. Further, we urge the following change:

Art. 7.2 – remove the words “endeavour to,” so that the obligation on States becomes “Parties shall also recognize the important contribution of artists and others involved in the creative process,”

Section 2 – Oral Comments Delivered During the Meeting

26 MAY 2005 – COMMENTS ON THEME TWO – SCOPE AND DEFINITIONS

INCD is a worldwide network of cultural organisations, artists and cultural producers from every media, and others working to counter the adverse effects of economic globalisation on world cultures. INCD has 400 members in 71 countries, in every corner of the globe, rich and poor, North and South.

The new text is an important benchmark in the negotiation of a legally binding Convention, since it allows us to begin to analyze its potential overall impact. INCD is looking carefully about whether the text achieves the objectives, one of which is not only to confirm the right of States to implement policies to promote culture and cultural diversity that they deem appropriate, but to balance these rights with concrete obligations to take appropriate actions.

The Convention must also acknowledge the broad scope of policy tools that governments can use to promote and protect cultural diversity and preserve their right to develop new ones as circumstances require and technologies dictates. In this context, INCD observes that Article 3 changed from the version unanimously put forward by the Drafting Group, which had stated the scope including all policies that “have an impact on,” the diversity of cultural expressions, to the less inclusive version that they be “related to” the diversity of cultural expressions.

This diminished scope may be sufficient, providing other Articles confirm the broad range of policy tools that can affect cultural expressions. Foremost amongst these would seem to be following very important and substantive changes to Article 4.5:

Modify the definition of cultural policies by adding the word “indirect” in the third line, so that it clearly covers all of those “*designed to have a direct or indirect effect on cultural expressions.*” Policies may be structured in this way and those that have only an indirect effect on cultural expressions are just as legitimate as those that have a direct effect thereon.

Finally, the definition of “cultural policies” should be amended to add after “access to“, the words “*and preservation of,*” in the final line, since the heritage sector is an important part of the cultural continuum.

Thank you Mr. Chairman.

28 MAY 2005 – COMMENTS ON ARTICLES 7 AND 8

Thank you Mr. Chairman

I speak once again on behalf of the International Network for Cultural Diversity, whose 400 NGO members come from more than 71 countries and every corner of the globe, rich and poor, North and South.

Earlier this week we spoke about how INCD has begun to analyze the text as it is slowly emerging to see if it will achieve the basic objectives we have set for the Convention. These objectives were outlined to delegates at the previous meetings, in writing in response to the circulation of the Cape Town text and were confirmed as recently as last weekend at a meeting in Dakar with INCD Steering Committee members and staff from South Africa, Senegal, Ghana, Benin and the United States.

Yesterday, at approximately 3:35 pm, there was a statement made in this room in response to a proposed amendment from Haiti on Article 5 to the effect that “*it is inappropriate in a declaratory instrument to establish such obligations on Parties*”. What surprised me most Mr. Chairman, was that there was no dissent expressed to this statement. In 2001, UNESCO members unanimously adopted a Declaration on Cultural Diversity. The terms of reference provided by the General Conference in 2003 are clear – this Committee is to develop the terms of legally binding Convention, and not another declaration.

This raises the question of what makes the Convention legally binding? Is it because we wish it so, or because we declare it to be legally binding? INCD believes what will make

this Convention legally binding is if it not only confirms the right of States to implement cultural policies, but limits these rights as appropriate, including a requirement to respect human rights and fundamental freedoms, and balances these rights with concrete obligations to take appropriate actions in their own territories and in their international cooperation efforts. It is precisely such limitations and obligations that can give rise to disputes between Parties and require the establishment of a mechanism to resolve them.

Over the past two meetings, INCD has witnessed a steady erosion of the limitations and obligations contained in the earlier versions, to the point where the Convention is in danger of achieving the status of a Declaration.

This morning, delegates have one of their last opportunities to reverse this trend. A modest change to Article 7 could achieve the objective that India spoke to on behalf of the G77 in the passionate defence of retaining Principle 8 as including the concepts of openness and balance. An amendment to separate what are two distinct elements and provide in 7.1(b) that *“Parties shall create in their territory an environment in which individuals and groups have an appropriate access to the cultural expressions of other countries”* would create a limitation on the sovereign right of States to implement cultural policies that is both modest in its effect and reasonable in a legally binding Convention.

Finally, Mr. Chairman, with respect to Article 8, INCD urges each State to assume at least a minimal obligation to act to protect a vulnerable or threatened form of cultural expression where it exists on its territory. Delegates have already confirmed that each culture is unique and that collectively all cultures form part of the shared heritage of humankind. States thus must commit to do whatever they can, within their own means and circumstances and with the support of other States if they need and request it, to ensure the survival of cultures that are at risk of extinction.

INCD looks forward eagerly to the coming discussion and to having additional opportunities to share our analysis as you make further progress over the coming days.

Thank you Mr. Chairman.

31 MAY 2005 – COMMENTS ON ARTICLES 20 AND 21

Thank you Mr. Chairman

I speak once again on behalf of the International Network for Cultural Diversity which has been working for an effective Convention since 2000.

In the past weeks of negotiations, where given the option, generally States have chosen not to limit their sovereign rights under this Convention, despite the urging of INCD and others that certain limits are both appropriate and would strengthen the Convention by making it more robust legal instrument. However, INCD notes that the sovereign right of States to implement cultural policies is already limited substantially, by the trade and investment treaties. And these limits are expanding with each successive negotiation. It has struck me that the strongest supporters of the Convention seem reluctant here to acknowledge that one of its purposes is to halt this erosion.

In discussing definitions on Saturday, the distinguished delegate of the United States made an interesting point when he said, *“If the purpose of this Convention is to carve out cultural goods and services from trade agreements, you have done a very poor job!”* Regretfully, from the perspective of someone who wishes to achieve precisely this goal, I am inclined to agree with him.

It is clear in the language of trade agreements and is confirmed by decisions of WTO trade dispute panels that films, magazines, books, sound recordings and other forms of cultural expressions contain elements of goods and services. The obligations of the General Agreement on Tariffs and Trade apply to cultural goods and it was under GATT that Canada’s magazine policies were struck down by a WTO dispute panel in 1999.

Increasingly, the rules of the General Agreement on Trade in Services apply to the services contained in these cultural products. This application can either be in the nature of the so-called horizontal commitments of the GATS, such as transparency and Most Favoured Nation, or because States have committed these services, directly or indirectly. The indirect commitment can occur in a manner analogous to the process described in the recent WTO Gambling Decision, to the chagrin of the United States which was found to have inadvertently committed Internet gambling services.

The INCD principle for Articles 20, 21 and related clauses is that the status of the Convention must be equivalent to the trade and investment agreements and must prevail where the Parties are considering cultural policies.

To achieve this objective, we believe there must be no hierarchy of treaties, except for the supremacy of human rights instruments, and the text is slowly beginning to move in this direction. But other improvements are needed as well:

- Article 20.2 should be amended to provide that *“Parties shall bear in mind the provisions of this Convention”* when they are interpreting or applying other international instruments, rather than merely agreeing to *“take into account the principles and objectives;”*
- Provide for a pre-commitment for Parties to resolve under the terms of the Convention any dispute between them on matters relating to cultural diversity. While they cannot prejudice the rights of a State that chooses not to ratify the Convention, they can certainly agree among themselves to operate in this way;
- Provide for binding arbitration of such disputes; and
- Create a process to permit a Party to seek an opinion from the Intergovernmental Committee on the consistency of its actions with the provisions of the Convention if it is involved in a dispute with a State which is not a Party to the Convention.

I hope the Plenary will consider such amendments in the coming debate.

Thank you Mr. Chairman.

2 JUNE 2005 – FINAL COMMENTS

This is likely the final time I will have an opportunity to take the floor, so let me thank you Mr. Chairman for providing opportunities for us to intervene. Let me also thank delegations that have been consulting regularly with us throughout this process.

In commenting on Articles 20 and 25, I will also summarize the position of the International Network for Cultural Diversity on the likely outcome of these discussions.

(I should tell you I regret I could not bring with me to these meetings various INCD Steering Committee members. Maybe Nise Malange, of Durban's BAT Cultural Centre; or Korkor Amarteifio who is working to build a music industry in Ghana; or Jacques Béhanzin of Bénin, Secretary-General of the African Federation of Filmmakers, would have been more able than I to convince you of the need in the Convention for richer countries to make concrete commitments to help to build the cultural capacity and creative industries in poorer countries. Maybe Octavio Arbelaez from Columbia and President a network of performing arts organizations in Latin America, or Rafael Segovia from Mexico, could have convinced you about the urgent need to take strong actions to preserve vulnerable cultures throughout the region. Maybe Bruce Paddington, a filmmaker from Trinidad and Tobago, or Danny Yung a theatre and new media artist and entrepreneur from Hong Kong, China would have helped delegates to understand the need to limit the sovereign right of States to implement cultural policies with measures and obligations entirely appropriate for cultural diversity. But we don't have the resources to do that.) – This paragraph was available only in the written version circulated later.

When INCD first put forward the concept of a legally-binding convention on cultural diversity in 2000, we envisioned a Treaty with a balance of rights and obligations and a strong commitment from States to take action within their own territory and internationally. Perhaps naively, we thought governments would negotiate with each other to make commitments about how they would provide more balanced exchange in cultural goods and services. We thought this would become the definitive legal instrument on questions of cultural policy.

But, what we have instead is a declaratory instrument. In your own words Mr. Chairman, such an instrument cannot impose obligations on Parties.

Thus, in Articles 20 and 25, what we are left with is the following –

In the logic of the INCD vision, Article 20 must be strong and confirm that this instrument and not the WTO agreements will regulate the commercial trade of cultural goods and services. Article 20.2 would need to be modified considerably. In the INCD vision, Article 25 would need to contain an obligatory and binding dispute settlement system, because the Convention would be a robust legal instrument.

But, in the logic of the vision that has prevailed here, a largely declaratory instrument, the delicate balance provided in the compromise text of Article 20 is no doubt appropriate, because everyone can claim a partial victory. Maybe Article 20.2 can be improved slightly to confirm that existing rights and obligations are confirmed and not to prejudice future considerations by giving additional weight to negotiations in other fora. INCD has previously noted that the commitment to take into account this Convention when interpreting or applying other Treaties is a new concept in international law that has some merit.

In the logic of the vision that has prevailed here, there really is no need in Article 25 for a binding dispute settlement system because there is little in the Convention that can give rise to a dispute. How can you dispute a cultural policy when the only operative provisions merely confirm the rights of States to do whatever they want? However, surely States must see it is a very small and only symbolic step to provide a mechanism for a non-binding conciliation process to be launched by only one party. I should not have to remind you that most States in this room, including India, have agreed to a binding dispute settlement system that can be launched by only one party, for example in the WTO and several other international instruments.

In the same way that governments need to discuss issues with their capitals, INCD will take all of this back to its membership. I should tell you that my mid-meeting report circulated a few days ago on the Internet has already launched a significant internal debate, I have received a substantial number of emails in response. Some INCD members believe this Convention falls so far short of the objectives that INCD should oppose it, others believe we should be neutral about its adoption and still others believe it has value as a political and organizing tool and should be supported for that reason. I don't know the final outcome of this internal debate but I can tell you this – INCD intends to continue to be involved in the debate and we will continue to work to counter the corrosive affects of economic globalization on world cultures.

Thank you Mr. Chairman.

Section 3 – Preliminary Analysis Sent to All INCD Members

Convention on the protection and promotion of the diversity of cultural expressions
Intergovernmental Committee of Experts, UNESCO, Paris
Report from Garry Neil,
INCD Executive Director
31 May 2005

We are only half way through the third and final meeting of the Intergovernmental Committee of Experts which is considering the terms of a Convention on cultural diversity. However, the rhythm of the meeting is well established and it is now possible to contemplate the broad parameters of the final outcome, with only a couple of elements remaining under consideration. The meeting may conclude ahead of schedule.

When it began, the meeting adopted as its starting point the Chairperson's draft, now referred to as the Cape Town text. In the past week, there has been pressure on this text from different perspectives.

The United States, supported on some occasions by Japan, Australia, Mexico and Korea, attempted to weaken the text by removing references to “goods and services”, the word “protect,” “cultural industries” and other elements that deal with the commercial trade. These amendments are being defeated through votes in the plenary session and the United States has formally registered opposition to these decisions in several cases.

Japan has signaled that it may be unable to ratify the Convention given the agreed treatment of these issues in one clause.

All elements of the previous drafts that dealt with intellectual property rights and piracy were removed from the substantive clauses of the Convention. The only reference to IP is now in the preamble. Several countries and regions, including the African group and Mexico attempted to reintroduce some of these elements. With the exception of an additional preamble provision on the importance of the protection of indigenous knowledge, these have been defeated.

Some pressure came from sources that seemed to misunderstand the purpose of the Convention. Some of these have been rejected, some have been accepted. For example, the Principle of Access in Article 2.8, was amended at the urging of some supporters to become the principle of “equitable access”, thus limiting the nature of the objective, rather than expanding it.

Finally, a few positive amendments have been agreed, including:

- recognition of the right of States to introduce policies that promote diversity in the media, including through public service broadcasting
- an amendment to Article 7.1(b) that Parties “shall endeavour to” create an environment in which individuals and groups have access to a diversity of cultural expressions from their own territory and from other countries
- major changes to the definitions that simplify them and make them more precise, and
- a stronger Article 11 which acknowledges the fundamental role played by civil society in protecting and promoting cultural diversity.

As the session concluded today, the key elements remaining include:

- the provisions of Article 20, 21 and others dealing with the relationship of this Convention to other treaties
- Article 16, which currently provides an obligation on States to provide preferential treatment for artists and cultural goods and services from developing countries has been challenged by several countries, and
- Article 18 where the African group has put forward a proposal to make contributions to the proposed Cultural Diversity Fund mandatory, with a right for nations to take a reservation against this provision on ratification.

The nature of the dispute settlement system also remains to be considered, however, it is unlikely to be any stronger than the non-binding mediation/arbitration proposed in the Cape Town text.

Preliminary Analysis

I believe the Convention falls short of the objectives adopted by the INCD.

While it will confirm the sovereign right of States to implement cultural policies, it will not balance this right with significant concrete obligations. The only limits on the right are the (very significant) need to respect human rights and fundamental freedoms and to respect the principle of “openness and balance.” The scope of the Convention is limited to policies that have a direct effect on cultural expressions, rather than incorporating

those that might have an indirect effect, even if this is intended. The clauses on international cooperation, with the exception of the disputed Article 16, remain as obligations that States “shall endeavour to;” in other words, States have only to try to do the things outlined. Similarly, States will not even commit unequivocally to take action to protect a form of cultural expression that is at risk of extinction in its territory. Finally, there are no obligations to support domestic artists and creators.

In a previous analysis of the Convention, I observed the following:

“If it continues, this erosion of substantive obligations may well result in a Convention that cannot possibly be equivalent to the trade and investment agreements, because it merely has the effect of reaffirming the sovereign rights of States to do whatever they want in the cultural field. If there are no limits on these rights, or mandatory obligations, there is no basis for any dispute.”

Several times, the Chairman stated that, “it is not appropriate to impose obligations on States in a declaratory instrument.” The Convention is indeed in danger of achieving this outcome, rather than the legally binding instrument agreed to by the last General Council meeting.

On balance, the Convention would seem to be a rather weak shield against continuing pressure in the multilateral and bilateral trade negotiations to eliminate or amend policies and measures which promote a diversity of cultural choices.

Accordingly, it is now time for the cultural diversity movement to step back and consider whether the Convention has value as a political tool. While it has not achieved the outcome we had hoped for, is there sufficient benefit in confirming the right of States to implement cultural policies to justify organizing a campaign to have it approved and ratified? Will the Convention be a useful organizing tool in the ongoing work? Can it become a rallying point for civil society groups and governments that remain concerned about how the trade and investment agreements are being used to stifle cultural policies and local artists and cultural producers?

I will provide a more thorough analysis when the meeting concludes and look forward to our discussions of this critical issue in the coming months.

Section 4 – INCD Press Release

INCD Position on New UNESCO Treaty

UNESCO
Paris, France
June 3, 2005

The International Network for Cultural Diversity took a cautious approach on the final outcome of UNESCO negotiations for a new convention on cultural diversity.

Speaking in Paris today, Garry Neil, INCD Executive Director said: “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.”

Since 2000, the INCD has been in the forefront of the campaign to advocate for a legally binding convention on cultural diversity to halt the growing pressure on cultural policies caused by the multilateral and bilateral trade agreements. It represents more than 400 cultural organizations in 71 countries.

“INCD played an active and positive role in the process and we appreciate the efforts of negotiators to deal with very difficult issues over the past months. INCD will carefully analyze the final text over the next few weeks to assess its value as a tool for protecting and promoting cultural diversity,” concluded Mr. Neil.

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