

## RESPONSE OF THE UNESCO CONVENTION TO THE CULTURAL CHALLENGES OF ECONOMIC GLOBALISATION

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In a ground-breaking 1997 decision, the World Trade Organisation ruled that measures the Canadian government used to support Canadian periodicals violated international trade rules. This ruling and related developments exposed the illusion of “l’exception culturelle” and highlighted the difficulty of trying to exempt cultural policies from trade and investment agreements. After reflecting on the developments, cultural activists in Canada put forward a proposal for a new approach to deal with culture and trade issues that would be based on a legally-binding treaty specifically designed to protect and promote cultural diversity. This concept rapidly gained international support in civil society and among governments and the process culminated in the adoption of the *Convention on the protection and promotion of the diversity of cultural expressions* by UNESCO in October 2005.

This article will explore the extent to which the *Convention* can achieve the objectives of its proponents.

### **Canadian Magazine Policies and the World Trade Organisation**

Canada has a small population spread over an enormous geographical area and shares a border and primary language with the world’s largest producer of cultural goods and services. Canada is also an open market for cultural products and cultural expressions; ideas and information in all media travel freely across the border. Canadians enjoy virtually unlimited access to arts, culture, and popular entertainment from abroad, most of which comes from their southern neighbour.

Cultural producers from other countries enjoy a competitive advantage over Canadian producers. U.S. producers have a substantially larger domestic market and benefit from economies of scale. Producers in other countries may enjoy a competitive advantage arising from the protection of a different language. Still others, before the digital era, had an advantage because of their physical distance from other producers. Canadian producers do not have either the advantages, or the protections. To level the playing field and ensure there are Canadian choices available to consumers, Canadian governments of all political stripes developed what are probably the world’s most comprehensive set of cultural policies, including financial subsidies, broadcasting regulations, ownership and competition measures, domestic content rules, and tax concessions.

The economics of Canada’s magazine industry highlight the problem for Canadian cultural producers. Due to the size of their domestic market, the average print run of a U.S. magazine is many times greater than a Canadian counterpart and U.S. magazine publishers can amortize costs across a very large potential circulation. The cost of an additional copy of a magazine that can be easily exported to Canada is pennies. Some U.S. producers have developed a split-run edition, which uses primarily 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 substantially lower cost than can a Canadian magazine.

Since U.S. magazines account for 80 percent of Canadian newsstand sales, Canadian

magazines rely on subscription sales and advertising revenues to finance their operations. Canadian magazines have been world leaders in the development of strategies to maximize subscriptions, but this alone is insufficient. Since revenues from advertising are essential for the survival of Canadian magazines, the diversion of advertising to split-run editions is a critical issue.

In order to build the Canadian magazine industry, the importation of U.S. split-run magazines was prohibited by a tariff item introduced in 1965 and supported by an income tax provision preventing a business from deducting the costs of advertising it places in a split-run magazine. Since 1849, the government has also maintained a program which provides a preferential postal rate for Canadian magazines shipped across the country, in recognition of the challenges of producing a periodical for a population that is widely disbursed geographically. In the 1980s and early 1990s, this had been in the form of a financial subsidy provided by the ministry of culture to Canada Post.

In 1996, 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 augmented with the introduction of an excise tax of 80 percent on each edition of a split-run magazine. This amount represents the government calculation of the savings for advertisers placing their ads in split-run magazines. To avoid a perception that it was discriminating against U.S. magazines, the tax was applied as well to magazines exported from Canada as split-run editions (including several published by Canadian publishers).

The U.S. appealed these measures before a WTO panel in 1997. Canada argued the measures addressed advertising and thus should be judged against its obligations under the General Agreement on Trade in Services (GATS), where Canada had made no commitments respecting advertising or publishing services. However, the panel and appellate body found that magazines are a “good” and the content qualifies as “services,” and they ruled that the obligations of both the GATT and GATS apply. The panel ruled that these Canadian advertising measures violated commitments Canada had under the General Agreement on Tariffs and Trade (GATT), which regulates trade in goods, to treat foreign products in a non-discriminatory manner in relation to domestic products. The appellate body upheld this decision and also ruled that the postal subsidy was not a direct subsidy of domestic producers, permitted under GATT, but was rather a subsidy of Canada’s postal service. Canada was ordered to bring the measures found to be “inconsistent with the GATT 1994” into conformity with its obligations under the Agreement.

An important element of the decision concerned the issue of whether Canadian and split-run U.S. magazines were “like products.” While the panel decided that indeed they were like products, the appellate body overturned this finding on the grounds the panel had based its decision on an unrealistic hypothetical comparison. However, in a key finding, the appellate body ruled, “But newsmagazines, like Time, Time Canada and Maclean’s *are directly competitive and substitutable in spite of the “Canadian” content of Maclean’s*” (emphasis added).

Maclean’s magazine is Canada’s leading newsmagazine and Times Canada is a split-run magazine. In a recent week, the 60-page Maclean’s contained 30 pages of articles about Canadian society, politics, business, media, sports and entertainment, written by

Canadian authors. It also featured 14 pages of articles about international developments, all of which were written from a Canadian perspective. In that same week, the 58-page Time Canada magazine had only three pages devoted to Canadian items, two of which were authored by U.S. writers and the third by an expatriate Canadian working in the United States. The other pages dealt with U.S. society, politics, business, media, sports and entertainment, or were international stories written from a U.S. perspective.

The appellate body rejected Canada's argument that the editorial content of a magazine is culturally-specific and is crucial to the consumers. It found that, under the trade agreements, it does not matter if the magazine is covering U.S. or Canadian news, or if it is covering international stories from a Canadian or U.S. perspective, all magazines dealing with news and current affairs are goods which are directly competitive and substitutable for each other.

Canada responded to the decision by rescinding the tariff item and the excise tax and reorganizing the postal subsidy so that it is paid into individual producer accounts. The government also introduced a measure to prohibit the sale of advertising services directed solely to Canadians, except by Canadian publishers. The United States threatened retaliation against this measure and the parties negotiated a settlement bilaterally.

As a consequence of these developments, Canada now permits foreign magazines to sell advertising to Canadian businesses up to certain limits, which increase to the extent the editorial content in the Canadian edition is original and not recycled from the U.S. edition. Canada also agreed to increase its limit on foreign ownership of Canadian magazine publishers to 49 percent.

The WTO decision shook the Canadian cultural community, which had been assured by successive governments that the right of the Canadian government to implement and modify cultural policies was protected in international trade agreements. The Canadian government had argued that the "cultural exemption" of the Canada/United States Free Trade Agreement, which is continued in the North American Free Trade Agreement, was adequate for continental trade, and that there was no danger from the World Trade Organisation, since Canada had offered no GATS commitments for any cultural service. The WTO decision and related developments exposed the fallacy of the government's position.

### **Cultural Policies and Trade and Investment Agreements**

Around the same time as the Canadian Periodicals Case was being considered by the WTO, the Organisation for Economic Cooperation and Development was negotiating the terms of the proposed Multilateral Agreement on Investment. The MAI would have had a profound impact on virtually the full range of cultural policy tools used by many governments since all of them restrict, limit or regulate foreign investment, when that is broadly defined, as in the draft MAI, to include the movement of capital and intellectual property rights. Efforts to include a cultural exception, put forward by the French, would have been inadequate to preserve the right of governments to regulate new technologies and may have precluded government actions in the field of popular culture.

As a result of significant public opposition, the MAI was not concluded and thus the cultural challenges that it presented were not tested in practice. However, the potential implications of any investment agreement were exposed during this debate.

There are many ways in which bilateral and multilateral trade agreements can affect cultural policies.

When the visual artist paints or creates a multimedia piece, when the author writes, when the composer and lyricist collaborate on a new song, when the actor performs, when the talent and technicians on a movie set are working, the artists are providing a service. But when they have completed the creative process, the artistic work is given a concrete form, as a painting, a novel, a film, a script, a musical score or any number of things. The embodiment of the artistic work then becomes a good that can be distributed, exhibited and enjoyed by others.

As the Canada Periodicals case shows unequivocally, this means that trade agreements covering goods and trade agreements covering services both apply to cultural products. In order to appreciate all of the consequences of this fact, we must first understand the underlying principles of free trade.

For many traditional goods and services, economies of scale can benefit consumers. In theory, manufacturers and producers have the potential to create a higher quality product at a lower price. They benefit from capturing a larger share of the market, but consumers benefit by obtaining better value for money. Free traders argue that removing barriers to the free movement of goods and services will extend these benefits globally. The theory holds that when you permit the most efficient producers to dominate global markets, consumers everywhere will benefit. While this may force inefficient producers in some countries out of business, free traders argue that these countries will either have an advantage in another economic sector or can specialize in a sector where their disadvantage is the smallest. On balance, they too will gain from free trade because incomes everywhere will rise.

However, this paradigm does not apply in the cultural field. Cultural goods and services embody cultural traditions, mores and values, and consumers benefit most from having a wider range of choices from a variety of suppliers. Cultural diversity is about ensuring there is a flourishing of local arts and culture, and about more balanced exchanges between cultures of the world. This increased trade will be in the same types of products, with music, films, books and other cultural products moving back and forth across all borders.

The economics of cultural production are also different from other sectors in a number of ways, the most significant of which relates to the cost of each individual unit produced. The cost of the first copy of a work can be substantial, for example, the average production budget of a major Hollywood movie today is more than \$60 million, with promotion and advertising, the total cost exceeds \$100 million. However, each subsequent copy of the movie can be reproduced for only a few dollars. This is unlike virtually all other goods, where there is little difference between the cost of the first and each subsequent unit produced. For the movie, this means that when it is distributed into foreign markets, it can be sold at substantially different prices depending on the circumstances of each market. In most cases, it is sold at a price that is lower than the cost of production of a domestic alternative. A broadcast license fee for a U.S. television

drama series in Canada can be hundreds of thousands of dollars, whereas a broadcast license fee in Nigeria will be substantially less, perhaps only a thousand dollars, despite the larger potential audience in Nigeria. This type of disparity in price simply cannot exist for traditional goods where the cost of each additional product will be much closer to the first one produced.

Public policies and measures have been developed by many countries to level the playing field for domestic artists and cultural producers who have difficulty competing against the imported works. These policies generally favour local artists and producers and provide them with preferential benefits compared to foreign artists, producers and their works. The objective is to increase choice for consumers and to ensure that domestic cultural products can have some space in local markets. Some of these products can also become available in the global markets.

But, what some view as culture, others view as business, and what some view as promoting choice, others view as erecting barriers. When the WTO decision in the Canadian Periodicals Case was announced, the Office of the U.S. Trade Representative said that the case “has nothing to do with culture. This is purely a matter of commercial interest.”

As the Canadian Periodicals Case reveals, writers, editors and illustrators provide services to a publisher, who transforms this work into a concrete form. The WTO trade panel and appellate body found that the magazine is a good, the trade in which has been covered by the GATT since 1947. One of the few exemptions from the original GATT was for cinema screen quotas, a clear indication that films are a good. The articles, advertisements and pictures in the magazines are services covered by the General Agreement on Trade in Services, and its obligations apply in certain respects.

The two most significant principles of international trade law are National Treatment (NT) and Most Favoured Nation (MFN) treatment. To one degree or another, these principles apply to all trade and investment agreements, whether they are bilateral or multilateral, whether they cover goods or services. We will now examine how they come into play in the WTO agreements and how they intersect with cultural policies.

The GATT covers virtually all trade in goods between the member States. It is sometimes known as a top-down agreement, since it applies to all goods and all government measures affecting trade in goods, except those which are explicitly excluded in the agreement itself, or are reserved explicitly by a member State if the GATT allows it in the circumstances. The GATS is structured differently. While it covers all services sectors, the full disciplines of the Agreement apply only to those services sectors which a State decides specifically to include, or to commit. Thus, it is sometimes known as a bottom-up agreement. Certain GATS obligations, such as transparency, which is the requirement for States to make public all of the rules and regulations that can affect a service, apply to all services, whether they have been committed or not. These obligations are known as horizontal commitments.

National Treatment (NT) obligations under the GATT, and for service sectors that have been committed under the GATS, require that WTO members accord to the goods and services of all other WTO members non-discriminatory treatment relative to those produced domestically. Essentially, this means that member States must treat foreign suppliers identically to their own nationals.

Most Favoured Nation (MFN) under the GATS requires that, if a member provides preferential treatment to the services of any other WTO member, it must provide identical treatment to all other WTO members for those services. It is a horizontal commitment that applies to all services sectors, whether or not the member has committed the sector.

### **Cultural Policies and Trade Agreements Come into Conflict**

Government cultural policy measures vary greatly and can be anything from direct financial support for individual creators, subsidies of arts and crafts businesses, preferential tax rules, restrictions on foreign ownership of domestic cultural businesses or properties, content quotas, public institutions, production subsidies, regulatory measures, support of cultural industries, use of competition policies, and many others. All of these are “government measures” as defined in the trade agreements and most are limited in application to domestic citizens and firms, or provided reciprocally to nationals of other countries.

*Prima facie*, many of these cultural policies would appear to be contrary to National Treatment obligations, since they discriminate in favour of domestic artists and producers. Thus, from the beginning of the multilateral trading system, the issue of whether or not cultural goods and services are covered, or should be covered, has been a sensitive one. When the WTO trade panel ruled that magazines are a good, they found that Canada’s magazine policies discriminated against foreign goods and concluded that Canada had violated its commitment to provide National Treatment.

Under the GATS agreement, the MFN provision is a horizontal commitment and applies to all services sectors, whether a member State has committed that sector or not. When GATS was implemented in 1995, this provision affected film and television co-production treaties. A number of countries have concluded such treaties to encourage partnerships between producers from specific countries, for example among the members of the *Organisation Internationale de la Francophonie*. Since they provide that producers from partner countries are treated more favourably than producers from other countries, generally equivalent to nationals, they violate MFN treatment.

States which maintain co-production treaties responded to this problem by taking a reservation against the NT obligation for these treaties, as they are permitted to do under the terms of the GATS. Thus, co-production treaties were listed as being not in conformity with NT obligations when the GATS came into force.

Special rules apply to non-conforming measures. While States have a right to withdraw from co-production treaties and thus to treat all foreign film and television producers equally, the treaties cannot be changed in a way that would make them less conforming. As a consequence, States might be unable to expand the scope of their co-production treaties to include digital media productions and they would be unable to conclude treaties with new partners. Furthermore, an underlying principle of the GATS is to seek progressively higher level of liberalisation and, when the GATS was implemented, it was agreed that MFN reservations were to be reconsidered in 2005. Negotiations on the continuation of MFN reservations are continuing in early 2006.

It is also critical to note that cultural policies are susceptible to services commitments made in other fields as well as to changes made to the horizontal commitments. If a

State commits its distribution, telecommunications or computer and related services, it may be restricting its ability to implement policies and measures dealing with the cultural goods and services that are produced, distributed or transmitted through these services sectors. If negotiations on domestic regulations result in new horizontal commitments, these would apply to cultural services, whether States have committed them or not.

Technology is rapidly changing the way that cultural goods and services are created, produced, distributed, exhibited and preserved. Digitally-produced television programmes are now being delivered to handheld devices, often by telephone companies. In many countries, telephone companies are now competing with cable and satellite companies to supply a range of voice, data and entertainment services. In Japan, it is already the case that 59 percent of cell phone airtime is used to access entertainment content. In popular music, downloading to personal devices is now the most common form of distribution in western countries. Convergence of telecom, information technology, the Internet, media and entertainment, is here and changing dramatically the way we live.

But all of this means that commitments States may take in telecommunications services or with respect to electronic commerce may limit their ability to introduce policies that promote local artists and cultural producers. For example, if a State were to commit its telecommunications services under the GATS, it may be unable to apply content quotas on television programmes delivered to handheld devices by a telephone company. Beginning with the free trade agreement it negotiated with Chile, the U.S. has reached agreement bilaterally on clauses that prohibit or limit the introduction of measures that would regulate goods or services produced, stored or transmitted digitally. Of course, this includes virtually all movies, music, television programmes, books and magazines. Discussions and commitments around electronic commerce may affect the right of States to regulate the electronic distribution of music, or films.

### **The Convention Concept Emerges and Gains Support**

Key players in the Canadian cultural community and cultural industries looked at all these developments and realized that the battle to maintain a cultural exception was futile. The pressure for progressively higher levels of liberalisation is a fundamental part of the free trade philosophy and would continue to affect cultural policies both directly and indirectly. Even if language carving out “culture” could be included into agreements, technology was eroding the protection. They began to explore a new approach.

In February 1999, the Cultural Industries SAGIT (Sectoral Advisory Group on International Trade), a private sector advisory panel to the Canadian government, issued a report calling for the development of a new international cultural instrument that would:

- acknowledge the importance of cultural diversity;
- establish rules on what kinds of measures countries could use to protect that diversity; and
- establish how trade disciplines and measures adopted in conformity with these rules would co-exist.

The Canadian government adopted the recommendation in October 1999. From this beginning, the idea of drafting a convention on cultural diversity burst onto the global scene.

Over the next few years a number of industrialised countries embraced the convention proposal and France became a leading proponent. They saw in it a means of protecting their own cultural industries by removing trade in cultural goods and services from the ambit of the trade and investment agreements, the same reason it had been put forward by Canada. It would confirm the right of countries to maintain content quotas and to subsidise cultural producers.

What was perhaps surprising was that countries which do not have well-developed cultural industries also embraced the concept for other, complementary, reasons. The challenges of globalisation and the threat of cultural homogenisation are differently experienced in countries that are struggling to develop their own cultural capacity in the face of an avalanche of imported cultural products that arrive from a handful of countries, some nearby and some far away. They are attempting to promote their own artists and cultural producers in an environment in which government cultural policies are generally not well developed and few public financial resources can be directed to these activities. Unfortunately, in most developing countries, the predominant view is that arts and culture are a frill that must take a back seat to basic public health and economic development concerns. Culture ministers in most countries are marginal players in the political process, with far less influence over government policy than trade and finance officials.

When representatives from the developing world and least developed countries examined the concept of the convention, many considered it as an opportunity. They saw the convention not primarily as a defensive instrument, since they do not have established industries to protect, but as a tool to promote cultural policies and encourage cultural development. If the industrialised nations of the north were serious about promoting more balanced exchanges between cultures, this implied an understanding of the need to encourage countries which are rich in cultural traditions, stories and music, but lack the resources needed to make these available in the forms consumed in the north. Non-governmental organisations saw that, if the convention were to catalogue measures that states can utilize to promote local artists and cultural producers, this would become a positive model of cultural policies to which they could aspire, and for which they could advocate with their own governments.

### **Civil Society Groups Take the Lead in Promoting the Convention**

From the beginning, civil society groups have been in the forefront of the campaign. The leading advocate has been the International Network for Cultural Diversity (INCD), launched in 1998. INCD is a worldwide network working to counter the adverse affects of economic globalisation on world cultures. Cultural organisations, artists and cultural producers from every media, academics, heritage institutions and others in more than 70 countries are now joined together around fundamental principles which motivate and guide INCD's campaigns to promote cultural diversity, cultural development and increased exchanges between cultures.

At its founding meeting in Santorini, Greece, in 2000, the INCD endorsed the proposed convention. At its 2001 meeting in Lucerne, Switzerland, it put forward basic principles and objectives for the convention and in early 2002 it published the first text of a possible convention to demonstrate its potential. When UNESCO decided to take on the task of developing the terms of a legally-binding treaty, INCD offered specific proposals and language to the expert panel that had been asked by the Director General to draft an initial version for UNESCO's consideration. INCD was an active participant throughout



the 2004-2005 negotiating process, both at the intergovernmental meetings and in written communications to member States and delegates.

A key element of INCD's submissions concerned the basic objectives the convention should achieve, which responded to the full range of issues being raised by its widely disbursed membership. These were expressed in the following way in a submission the INCD put forward to the UNESCO intergovernmental meeting in 2005:

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.* This was an essential objective since the core challenge to which the convention was meant to respond was the erosion of cultural sovereignty by commitments made in the context of trade and investment negotiations.
2. *The convention must be an effective tool for countries of the South to develop their creative capacity and cultural industries.* The proponents of the convention in countries of the global south supported the convention primarily because they saw it as an instrument to promote cultural development. This position was widely endorsed because others believe that cultural diversity will not be achieved until there is more balanced exchange between all cultures and this requires a development strategy.
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.* The primary purpose of the convention is to confirm the sovereign right of states to take action. Since GATS commitments that states make in distribution, telecommunications, e-commerce and other services can have an impact on policies that promote local artists and cultural producers, particularly as technology changes the way that cultural products are created, produced, distributed, exhibited and preserved, the scope of the convention must be broad.
4. *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.* The role of artists and other creative participants in the production cycle is central to promoting cultural diversity. Proponents believe that the convention must acknowledge this and also provide a formal role for civil society in its administrative mechanisms.

These objectives constitute a check-list against which the final text could be judged.

INCD was not the only civil society organisation promoting the proposed convention. The Coalitions for Cultural Diversity, national coalitions of cultural professional organisations launched in more than 30 countries, have also been involved in the debate. The first Coalition was created as a national organisation in Canada in 1999. The international liaison committee of these coalitions was an advocate for the convention and a participant in the UNESCO process. Canada's Cultural Industries SAGIT prepared and circulated its own draft convention in 2003.

During the UNESCO intergovernmental committee process negotiating the text of the convention, a wide range of other non-governmental organisations joined the campaign and worked to make the convention text as effective as possible. Most of these NGOs were coordinated by the UNESCO NGO Liaison Committee, which played an active and positive role.

### **The Convention Comes to Life**

Culture ministers organised in the International Network on Cultural Policy (INCP) took up the campaign in 2002. They also developed principles for a convention and published a draft in early 2003. They were instrumental in convincing UNESCO to take on the task of elaborating the terms of a legally-binding treaty, which was agreed at the 2003 General Conference. UNESCO then launched a two-year process to develop a text. The outcome of this work is a convention adopted in a near unanimous vote at the UNESCO General Conference in October 2005. It has a standard form for international agreements and takes much of its administrative language from 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 notes that the processes of globalisation can both enhance interaction between cultures and challenge cultural diversity; reaffirms the fundamental importance of respect for human rights; acknowledges the need for greater cultural interaction; acknowledges that diversity is strengthened by the free flow of ideas, as well as freedom of thought, expression and information, and diversity of the media; and the need to preserve cultural and linguistic 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 distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning; recognition of the link between culture and development; strengthening international cooperation to enhance the capacity of developing countries; and reaffirmation of the sovereign right of states to maintain, adopt and implement cultural policies.

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 and 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; and

- 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 Convention. The text provides that when they introduce measures, 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 concept of “openness” is a potentially important one since many fear that the Convention could be used to justify a closed society denying access to all foreign cultural products. The concept of “balance” in an international instrument normally prevents states from introducing a measure wildly disproportionate to the scope of the problem they are addressing, using the instrument as a justification. While the word “balance” appears in the title, the use of the term “geared to” in the body of the Article sends a different signal that is somewhat unclear.

What began as a statement of the right of individuals to have choice in cultural products was transformed into a principle of “equitable access”. In this process, what would have been a powerful limitation on the sovereign right of states was confused and weakened in the push to achieve a consensus, by the introduction of additional elements:

“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. Article 7.1 provides that states “shall endeavour” to create “an environment which encourages individuals and social groups ... to have access to diverse cultural expressions from within their territory as well as from other countries of the world.” Article 2.1 provides that guaranteeing the “ability of individuals to choose cultural expressions,” is a fundamental principle in protecting and promoting cultural diversity.

### **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 things which “embody or convey cultural expressions, irrespective of the commercial value they may have.” This is the first time that this dual nature of cultural goods and services is recognised in an international legal instrument.

The definition of cultural policies and measures is also significant. It is broad, referring to “those policies and measures relating to culture ... that are either focused on culture as such, or are designed to have a direct effect on cultural expressions ... including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.”

The definition of cultural expressions, significant for the operative provisions of the Convention, is: “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.” Cultural content in turn “refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.”

The definitions as a whole draw an effective perimeter around the Convention and confirm that it is dealing with a portion of the intellectual output of a society. Importantly, the Convention is not attempting to deal with agriculture, biodiversity, or other issues which can be considered part of “culture” in the anthropological sense.

### **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 right 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, the need for information sharing and requirements to implement educational campaigns to promote public awareness. There is also an Article which attempts to address the “special situations where cultural expressions ... are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.”

With only a couple of exceptions, the rights are expressed in the discretionary form, “Parties may” take certain actions favouring cultural diversity, rather than the obligatory form, “Parties shall.”

Article 6 is significant since it is specific about the nature of measures that a Party may employ to protect and promote the diversity of cultural expressions within its territory. These include:

- regulatory measures;
- measures that “provide opportunities for domestic cultural activities, goods and services” within the overall market, including “provisions related to the language used for such cultural activities, goods and services”;
- public financial assistance;
- public institutions;
- measures aimed at supporting artists and others involved in the creative process;
- measures aimed at enhancing diversity in the media, including through public service broadcasting;
- measures aimed at ensuring access for domestic cultural industries; and
- measures which promote the “free exchange and circulation” of ideas and cultural expressions and which stimulate the “creative and entrepreneurial spirit.”

Article 9 provides that Parties shall exchange information, report to UNESCO and “designate a point of contact responsible for information sharing.” While the title includes the word “transparency,” there is no obligation for measures to be made public. 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.” There is agreement on the need to increase capacity in the public sector, public institutions, the private sector, civil society and non-governmental organisations, all of which have a role to play in fostering the diversity of cultural expressions.

The objective of the cooperation is to “foster the emergence of a dynamic cultural sector.” The tools to be used include:

- Strengthening the cultural industries through increasing production and distribution capacity, wider access to global markets, encouraging local markets, supporting creative work and facilitating the mobility of artists from the developing world and encouraging collaboration between the North and South.
- Capacity building through information, training and skills development.
- Incentives to encourage technology transfers.
- Financial support to be delivered through a new International Fund for Cultural Diversity.

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 countries.” Article 18 establishes the Fund. Despite the strong push from developing countries, contributions to the Fund are voluntary and not obligatory.

In the key Articles on international cooperation, the language provides that parties “shall endeavour to” achieve the goals of the Article. In other words, they need only make an effort to achieve the objective or to introduce the measure. There are three cases where the language is obligatory rather than discretionary. Article 15 provides that Parties “shall encourage” collaborative arrangements involving the private sector and civil society, Article 16 provides that Parties “shall facilitate cultural exchanges,” and Article 17 states that Parties “shall cooperate” if a state 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 international 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,” wording found in the title of the Article.

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.” This is a strong provision and the first time in international law that Parties agree to use one instrument as an interpretive tool when negotiating or applying others. It is reinforced by Article 21 which commits Parties to work together to promote the principles of the Convention in other international fora.

However, this language would appear to be circumscribed by Article 20.2 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 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 the information collection, sharing and analysis.

In case of a dispute between Parties about the interpretation or application of the Convention, the Parties agree first to attempt to resolve it directly through negotiations, failing which they may jointly request mediation by a third party. A compromise solution about what happens in case this process is unsuccessful 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 organisations can also become a party to the Convention. There must be an explicit statement of how responsibilities are divided between the organisation 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 over the matters addressed by the Convention.

The Convention comes into force three months following the deposit of the thirtieth instrument of ratification. Ratification by regional economic integration organisations is not counted as additional to those deposited by Member States of such organisation.

### **Convention Proponents 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 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 remarkable 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 final vote on the Convention in October had 148 States in favour, with only two opposed and four abstaining.

The Convention should have political importance. With the innovative wording of Article 20, and a political consensus achieved by such a large number of countries, there may be a different treatment and improved position for culture in other international discussions and negotiations. 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 help to put cultural objectives on an equal footing with other public policy priorities and improve the position of culture in international law.

Having put a huge effort into negotiating and adopting the provisions of the Convention, it is anticipated governments will work to have it ratified by a sufficient number of states in the near future. This will create a favourable environment for reflecting on current trends in cultural exchanges and cultural development, and considering opportunities for new instruments and measures to help achieve the objectives of 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 recognised the fundamental importance of creating a legal framework. By enunciating the measures that Parties can use to protect and promote cultural diversity, the Convention can become a benchmark against which countries and their citizens can measure their own cultural policies.

### **Has the Convention Achieved its Promise?**

In order to assess the extent to which the Convention has achieved its promise, it is necessary to determine what it is that the Convention was to have done. During the negotiating process, only the INCD offered a coherent list of fundamental objectives for the Convention, and it is useful to evaluate the final outcome against those objectives.

When the negotiating process concluded in June 2005, the INCD was less enthusiastic of the final text than other key participants. It issued a press release stating:

“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.”

*INCD Objective: 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*

The primary reason the concept of a legally-binding instrument on cultural diversity was developed was to get beyond the “cultural exception,” which has proven inadequate in the context of free trade negotiations. The proponents sought to create a situation where rules governing trade in cultural goods and services would be developed by

cultural experts and disputes about these matters would be adjudicated in a cultural forum rather than under the trade and investment agreements.

While the ambiguous wording of Article 20 is likely the best that could have been achieved, it does not provide the clarity necessary 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 bilateral and multilateral agreements.

### **Balancing Rights with Obligations**

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 the agreed objectives. The strength of the WTO agreements arises from the fact States have made specific and concrete commitments to each other, the dispute settlement system is obligatory and the decisions are enforceable. The UNESCO convention falls well short of this standard.

In the Articles of the Convention which enunciate the mechanisms states can utilize to protect and promote cultural diversity, the language is generally the discretionary “may,” rather than the obligatory “shall.” Parties are thus free to define the challenges in their own territories and to respond to these with cultural policies, or to refrain from responding at all. It is entirely within their authority to determine if a particular form of cultural expression is at risk of extinction, there is no room for another Party, a human rights organisation or any third party to raise issues in this respect. In the area of international cooperation, Parties are generally obligated merely “to endeavour” to accomplish the objectives, they are under no statutory obligation to take any of the proposed actions.

If there is no obligation on a Party to act in a certain way, there can be no dispute about any failure to take action.

### **Limiting Sovereign Rights**

In the absence of statutory obligations, one might ask whether there are limits on the sovereign rights of Parties, since such limits could give rise to a dispute as a consequence of the provisions of Article 5.2. This provides that when a Party takes action, “its policies and measures shall be consistent with the provisions of this Convention.”

The strongest limit on the sovereign rights is the obligation to respect fundamental human rights. This is found in the Preamble and is explicitly contained in Article 5 which reaffirms the sovereign right of Parties to adopt measures to protect and promote the diversity of cultural expressions. The strongest confirmation is in the Guiding Principles:

“Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.”



These provisions create the possibility that a Party could object to a policy or measure of another Party on the grounds that it violates the fundamental human rights of individuals. The Universal Declaration of Human Rights guarantees, among many other things, the right to “freedom of opinion or expression;” the right “to seek, receive and impart information and ideas through any media and regardless of frontiers;” and the right “freely to participate in the cultural life of the community [and] to enjoy the arts ....”

A dispute launched on this basis would have a large hurdle to overcome. The Party against which the dispute is launched would argue that the Convention confirms explicitly and repeatedly that it is free to identify the challenges in its own territory and to implement such measures as it sees fit to respond to these challenges. It is even solely responsible for defining whether or not a form of cultural expression on its territory is at risk. Thus, a complaint that a particular measure violates the human rights of individuals in the country which has implemented that measure, is likely to fail outright. A complaint that a particular measure violates the human rights of individuals in the country launching the complaint, for example as being a violation of the right to “impart information and ideas,” has a slightly greater chance of being considered.

Should either type of a dispute be launched, the Parties would be obligated to “seek a solution by negotiation,” or jointly to request mediation. But there is no obligation on the Party against which the challenge is made to participate in any form of binding dispute settlement, or to implement any decision of a Conciliation Commission. In the end, the dispute settlement system is not obligatory, binding or enforceable.

It bears repeating that third parties have no ability to launch a complaint and no standing in the process. Thus, civil society organisations, including the strongest supporters of human rights, can have no say. Only another Party to the convention can file a complaint.

The other concrete limitation on the sovereign right of Parties to do whatever they want in the cultural diversity field may arise from the provisions concerning “access and openness.” The Guiding Principle above covers “the ability of individuals to choose cultural expressions,” another provides that Parties “should seek to promote, in an appropriate manner, openness to other cultures of the world,” and still another provides there should be “equal dignity and respect for all cultures.” Article 7 provides that Parties shall endeavour to create an environment which “encourages individuals and social groups ... to have access to diverse cultural expressions from within their territory as well as from other countries of the world.”

Using a hypothetical example of a measure introduced by one Party which expressly prohibits the importation of cultural expressions from another Party, these provisions may create an opportunity for the aggrieved Party to object. *Prima facie*, such measures would appear to contradict several objectives of the Convention and thus to be in violation of Article 5.2.

Assuming that the Party which introduced the measure has not taken a reservation against the dispute settlement system when it ratified the Convention, a dispute could be launched. That Party would no doubt defend its exclusionary measure by pointing to the numerous articles which enunciate the right of Parties to introduce whatever measures they need to protect and promote cultural diversity within their own territory. While a panel of objective cultural policy experts appointed to a Conciliation Commission may be

inclined to find that such a measure is contrary to the spirit of promoting cultural diversity, any proposal they put forward is not binding, it needs only to be considered by the parties “in good faith”.

**What would be the outcome of the Canada Periodicals Case if the Convention had been in place?**

Given the genesis of the convention concept was the decision of the WTO in the Canada Periodicals Case, it is instructive to consider how that case may have been adjudicated if the Convention had been in place. To begin this analysis, it is assumed that the Convention has been ratified by a reasonable number of countries and has been implemented. It is also assumed that Canada’s magazine measures are identical to those considered by the WTO panel and that the U.S. action is identical to the one it took earlier.

The first scenario further assumes the U.S. will not join the Convention, which is almost certainly to be the case, since the U.S. opposed the Convention at each stage of the process and voted against it at the General Conference. A number of senior administration officials, including Dana Gioia, Chairman of the National Endowment for the Arts and Secretary of State Condeleezza Rice have spoken publicly against it, as has Dan Glickman, Chairman and CEO of the Motion Picture Association of America.

The outcome of the U.S. action would have to be identical to the earlier WTO 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 panel and appellate body would, however, reach an identical conclusion to 1997, since there is nothing that could alter the reasoning of those decisions.

The second scenario, however unlikely from a practical perspective but crucial from a theoretical perspective, would have the new periodicals case re-considered with the U.S. as a Party to the UNESCO Convention.

Unfortunately, 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 Article 5.1 confirms the right of Canada to formulate and implement cultural policies and otherwise to adopt measures to protect and promote the diversity of cultural expressions. It would argue that magazines are goods and services that are “cultural expressions” containing “cultural content” as defined in the Convention, and that Canada has a sovereign right to introduce such policies and measures that it determines are necessary to promote Canadian magazines.

Canada would point to Article 6.2(a) and (b), which specifically authorise the use of regulatory measures and “measures that provide opportunities for domestic activities, goods and services” among all those available in Canada. 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, including the limitations around respect for human rights, openness and access. Canada could unilaterally launch a dispute under the Convention and seek a Conciliation Commission report to support its position.

In this hypothetical scenario, the United States could still argue that Canadian and U.S. magazines are “like products.” This argument would have to be rejected by the trade panel, since the U.S. will have agreed to a 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. However, it is critical to recall that the WTO appellate body did not uphold the trade panel’s finding that Canadian and U.S. magazines are “like products,” finding instead that the examples used were “directly competitive and substitutable in spite of the ‘Canadian’ content.” In other words, they are distinct from each other and could be considered “cultural expressions” within the meaning of the Convention on cultural diversity, but they are nonetheless competitive for purposes of obligations states have assumed under the GATT.

The United States would further argue that Article 20.2 precludes the parties from interpreting the Convention in a manner that would modify their rights and obligations under other treaties.

Thus, the trade panel and the appellate body would be presented with a convenient way to resolve the apparent contradiction between Article 20.1(b) and Article 20.2 of the UNESCO Convention. They could confirm that Canada does have a sovereign right to implement policies respecting magazines as cultural expressions, but to confirm also that there is nothing in the Convention that prevents Canada from agreeing to limit its sovereign right through commitments it makes under other treaties.

Therefore, the WTO panel could reasonably find 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 could point to financial subsidies and content quotas as examples of the kind of policy tools that Canada could use to support its magazines that would be consistent with its GATT obligations. Other tools, such as the prohibition on the sale of advertising services directed solely to Canadians, except by Canadian publishers, which Canada introduced briefly after the initial WTO decision, are likely also to be acceptable, since they would be determined under a different GATT Article, where the narrower “like products” test would apply.

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 a U.S. argument which conveniently resolves an apparent contradiction within the UNESCO Convention.

### **Importance of the commitment to work together on culture and trade issues**

One must conclude that the language of the Convention fails to provide any immediate comfort for those seeking to reduce the threat to cultural policies from the trade and investment agreements. It is not the legal shield that its most ardent proponents wanted. Indeed, in a press release issued on 20 October 2005, the European Commission, one of the strongest proponents of the convention, explicitly acknowledges this reality:

“The Convention does not call WTO commitments into question. *There is no objective nor effect to remove or exclude cultural goods and services from the WTO agreements.* (Emphasis in original)....

“The Unesco (sic) Convention will not alter the WTO agreements (which is not possible in any case – only the Organisation’s members can do this by following the established procedures) but will require parties to consider the objectives of cultural diversity and the terms of the Convention when applying and interpreting their trade obligations, as well as negotiating their trade commitments....”

When the terms of the Convention were concluded in June 2005, the Motion Picture Association of America seemed to take a similar approach. The Hollywood Reporter interviewed Bonnie Richardson, MPA vice president, who said she does not believe there are any “immediate commercial ramifications from this [convention], nor do I believe it will lead to any immediate or even long-term decisions by governments to restrict Hollywood imports.”

However, there is hope in the longer term since Parties are obligated to work together in other fora to achieve the objectives of the Convention. Article 20.1(b) provides that “Parties shall take into account the relevant provisions of this Convention,” when they are “entering into other international obligations” and Article 21 provides that “Parties shall consult with each other” as they are working to promote the Convention’s objectives and principles in these other fora.

Thus, the Convention should provide a focus for continuing efforts to limit the application of the trade and investment agreements to cultural policies and to begin to roll back existing provisions that have restricted cultural policies in several countries. Further, while the efforts will have to be carried out in the other fora, such as the WTO, the Convention should also provide a forum for the coordination of these efforts.

UNESCO has a central role to play in determining how effective the Convention will be in this respect. Since the organisation will provide the secretariat for the Convention governing bodies, will be the focus of the exchange, analysis and dissemination of information, and will be responsible for convening the meetings of the governing bodies, it will be the focus of these collaborative efforts. If Article 20.1(b) and 21 are to have meaning, UNESCO must monitor bilateral and multilateral trade and investment agreements and the ongoing negotiations and provide this information to the Parties to the Convention so that they can implement their commitment.

The Convention was approved by an overwhelming vote and has been welcomed by a broad range of countries. There is clearly a political will to make it effective and if this translates into action, it may yet be possible to begin to carve out trade in cultural goods and services from the trade and investment agreements. In the same way WTO negotiators now regularly discuss the relationship between trade agreements and MEAs (Multilateral Environmental Agreements), in future they should be obligated to discuss the relationship between trade agreements and the CCD (Convention on Cultural Diversity). One can speculate that it is in response to these political considerations that the MPA changed its position on the convention’s potential impact.

Clearly, civil society also has an important role to play. If it continues to raise awareness of the ongoing problems, and challenges the Convention's signatories and UNESCO to live up to the commitments in Articles 20 and 21, the issues will be kept on the agenda.

*INCD Objective: The Convention must be an effective tool for countries of the South to develop their creative capacity and cultural industries.*

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. Perhaps it can become a forum for the collection and exchange of information about best practices in cultural development, technology transfers and culture exchanges, or the home to a few significant individual projects. But, it is unlikely to become a primary vehicle for transferring significant resources from the North to South.

Because there are no concrete obligations on Parties to take actions in these areas, there are unlikely to be disputes between member states of the Convention. As with the cases discussed above, if any dispute could arise from one of the few commitments posed as mandatory rather than discretionary, it is unlikely to succeed because the dispute settlement is not binding in any case.

It would also appear that the innovative language of Article 16, which establishes that developing countries shall provide preferential access to their markets for the artists and cultural products from developing countries and is perhaps the strongest obligation on member states, will be difficult to enforce without appropriate data and statistics which would in a reliable manner compare market size and market share of a particular country or groups of countries. It is important also 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.

### **Importance of promoting cultural policies and cultural development**

While the Convention does not contain strong provisions obligating member states to collaborate to promote cultural development, it is an important political instrument.

Article 6 provides a shopping list of measures that other countries use to promote their local artists and cultural producers. Articles 12 to 18 outline ways in which developed countries should be assisting developing countries as they seek to increase their cultural capacity and build creative industries. Particularly if UNESCO is able to compile information on best practices, as provided in Article 19, the Convention and

accompanying information sharing will establish benchmarks to which states can aspire and against which they can be judged.

This would be a useful advocacy tool for civil society organisations in the south which are working to promote cultural development and for their government officials responsible for cultural policy. In developing countries, civil society groups can use the commitments as an advocacy tool and can appeal to the moral obligation states have assumed to take the actions contemplated by these articles.

Finally, the market access requirements of Article 16 should be pursued aggressively by interested parties. Member states of the Convention should be challenged to introduce new and creative measures to provide access to their markets for cultural products and artists from the south.

*INCD Objective: 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.*

The Convention has achieved this objective. 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 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.

If a Party enacts policies in telecommunications, e-commerce, or retail and distribution services in order to protect or promote cultural diversity, these would be considered cultural policies as long as they “are either focused on culture as such, or are designed to have a direct effect on cultural expressions.” Regulations which require telephone companies to ensure that some domestic television shows are available to subscribers using hand held units would no doubt be considered to be measures “related to the protection and the promotion of the diversity of cultural expressions” and thus fully compliant with the Convention. Similarly, if a Party has laws or regulations limiting media concentration or restricting foreign ownership, or if it uses competition laws to regulate anti-competitive behaviour by giant international entertainment companies operating in their market, such measures would fall within the parameters of the Convention, as long as they are designed to have a direct effect on the availability of cultural expressions.

*INCD Objective: 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.*

Within the range of measures 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. However, the Convention can be seen as an important political tool in these respects.

### **Conclusions**

As envisaged by its original proponents, the Convention was to carve out trade in cultural goods and services from the trade and investment agreements; it was to be a legal shield. The concept of the Convention was embraced by civil society and governments in the South because they saw it as a potentially powerful tool to promote the development of cultural capacity and creative industries. INCD, the leading civil society advocate of the Convention, built on these views and enunciated four basic objectives which its members wanted the Convention to achieve.

The Convention adopted by UNESCO in October 2005 is an important political tool which confirms the right of states to take actions in support of their own artists and cultural producers, and in favour of cultural diversity. It confirms in international law the dual nature of cultural activities, goods and services, as having both economic and cultural value. The Convention defines the issues in a way that clarifies the challenges, and gives states the scope to respond to the changing technological and political environment. While it effectively remains subordinate to existing trade and investment agreements in the short term, it provides a focus and a forum for states to continue to work together and with civil society to achieve, in the longer-term, the objective of carving out cultural goods and services from the trade and investment agreements.

The Convention is also an important political tool for cultural development. 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. Civil society groups can use it in their advocacy work. By enunciating detailed measures that developed countries should use to support the development of cultural capacity and creative industries in countries of the global South, it has established benchmarks for these countries to meet. It may well exercise moral suasion on these states to undertake the actions contemplated.

### **Challenges and opportunities**

There are certainly important challenges ahead. The first is to have the Convention ratified, not only by the minimum 30 countries required for the Convention to come into force, but by a sufficient number to demonstrate the existence of a strong international

political will to tackle the problems, and to achieve more balanced exchanges between cultures. This requires the chief proponents, both within governments and civil society, to continue to collaborate to raise awareness of the challenges of globalisation and the opportunities afforded by the Convention.

UNESCO also has a critical role to play and the Convention's proponents will need to work to ensure it fulfills its responsibilities. UNESCO must encourage ratification, convene an early meeting of the Conference of Parties and the Intergovernmental Committee, and be proactive in collecting, analysing and sharing information. It must also be proactive in circulating information about the potential consequences of the ongoing multilateral trade negotiations.

In many respects, the UNESCO convention is a remarkable achievement. It went from conception to adopted text in less than a decade. However, it is only one small step in the long campaign to achieve cultural diversity. However flawed, it remains only a tool, which must now be wielded by its proponents and used to develop a range of initiatives, measures and activities that will bring about a flourishing of arts and cultural activities in every community, in every language and in every corner of the globe.