

International Network for Cultural Diversity (INCD)

PREAMBLE

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The International Network for Cultural Diversity (INCD) is a world wide network of artists and cultural groups dedicated to countering the corrosive effects of globalization on cultural diversity.

The INCD represents individual artists and cultural activists, cultural organizations and creative industries. Its members come from all continents, sectors and disciplines of the cultural community, ranging from new media artists to traditional artisans. Organizations from more than seventy countries belong to the network.

The following proposal for a Convention on Cultural Diversity is a product of the work pursued by the INCD since its founding meeting in Santorini Greece in 2000. It reflects the direction, advice and comments of more than two hundred delegates who have participated in discussions since the founding meeting and those held subsequently in Lucerne and Cape Town.

This work has been carried out during a time when the need for a new international agreement concerning cultural diversity has been receiving wide attention and broad support at international meetings, conferences and among national coalitions of cultural organizations in all parts of the globe.

The importance of the cultural expression is rooted in the Universal Declaration of Human Rights, the United Nations International Covenant on Economic, Social and Cultural Rights, and in declarations by UNESCO, the International Organization of the Francophonie, and the Council of Europe.

The need to take the next step, by transforming these declaratory statements into a legally binding international agreement has become increasingly apparent as the forces of globalization, trade liberalization and rapid technological change threaten to overwhelm the capacity of many societies to maintain their own cultural institutions and industries, or sustain local artists and creators.

On the government side, the primary impetus for such a new international agreement flows from the work of the International Network on Cultural Policy (INCP) - an informal group of over 40 culture ministers that has been meeting annually since 1998. At its meeting in Lucerne in 2001, the INCP directed a working group on cultural diversity and globalization to prepare a draft of a new international instrument on cultural diversity.

Since their respective meetings in Lucerne, the work of the INCD and INCP have proceeded in tandem. Thus in May, 2002, the first draft of our proposal for a Convention of Cultural Diversity was presented to the Minister's working group at its meeting in Johannesburg. Later that year the INCP published its own proposal for a new International Instrument on Cultural Diversity. Now a third proposal for

such an instrument has been offered by a Canadian multi-stakeholder trade advisory group.^[1]

Common Ground

What is most remarkable about these three initiatives is how much they share in common. It would be difficult to find another instance where governments, civil society and key business groups demonstrate such accord on an important international legal initiative.

Several underlying and common themes emerge from these proposals. First, is the need to ensure that cultural diversity is preserved in the face of the unprecedented challenges posed by rapid technological change, the convergence of telecommunications and media corporations, and the ever increasing global concentration of ownership over the production and distribution of cultural content. At the same time, efforts to dramatically expand the framework of international trade regimes to encompass services, investment, competition policy and government procurement, would impose severe constraints on the capacity of governments to implement cultural policies in response to these pressures.

It is understandable then that all three proposals state the same fundamental purpose: to preserve the sovereign right of all nations to take such actions as they consider appropriate to preserve, promote and enhance cultural diversity.

All three drafts also state explicitly that cultural goods and services must not be treated as mere economic commodities as has been the case when trade dispute bodies have been called upon to adjudicate conflicts between trade liberalization policies and those necessary to achieve non-commercial cultural objectives.

There is also strong agreement about the need for the new international instrument^[2] on cultural diversity to be *legally binding*. A purely declaratory instrument will not be an adequate buffer against the coercive forces that now threaten cultural diversity. For this reason, meaningful enforcement procedures are seen as an essential component of the new Convention.

Third, all three proposals recognize the importance of balancing the goal of protecting indigenous and national cultural institutions and works, with the need to encourage the international exchange of cultural products and forms of artistic expression. Preserving the sovereign prerogatives of all nations to protect their cultures should not, and need not impede efforts to foster greater international cultural cooperation and exchange.

Finally, there is unanimity about the importance of respecting the right of artists and creators to freedom of expression. On this essential point both the INCP and INCD proposals explicitly prohibit government actions that might infringe basic human rights. For the INCD *the right of artists and creators to freedom of expression and freedom from censorship* is pointedly one of five over-arching objectives for the Convention.

A Diversity of Definitions

While there are broad areas of convergence there are also three important differences between our proposal for a new Convention, and that tabled by the Ministerial network.

The first concerns the question of whether the Convention should establish common definitions for key terms, including “culture” and “cultural diversity”. The INCD has considered varying understandings of these terms as they have come to be articulated in different societies and historical contexts. We have had a rich debate about how the meanings of these words differ across cultures and languages worldwide. We have concluded, that there is no need to impose a universal standard for these terms while the other two treaties specifically lay out definitions for their usage of key terms.

However, it is vital to note that when we use the term “cultural diversity” we intend it to be inclusive, and to denote tolerance and respect. Unfortunately, cultural differences all too frequently have engendered discrimination, or led to wars. The INCD believes that cultural differences should instead be nurtured and celebrated, as a source of unity and strength.

Therefore with the important qualification that such definitions not be used to diminish diversity, freedom of expression or basic human rights, we believe that there is no reason to interfere with the right of each nation to define culture and cultural diversity as it considers appropriate and relevant to its particular cultural context.

The Need for Positive Commitments

The second area in which our proposals diverge concerns the need for the Convention to engender a commitment by its signatories to take positive steps to preserve and enhance cultural diversity.

It is vital in our view that the Convention adopt more than a defensive posture. It must, in addition to operating as a bulwark against economic, trade and technological forces that threaten cultural diversity, commit its member States to a proactive agenda for cultural diversity.

Of course we acknowledge that real differences exist in the capacity of nations to take up this challenge, and have fashioned our proposals to accommodate these differences. But while the scale of commitments will vary, the need for all signatories to establish the basic public policy foundation for cultural diversity should be clear.

Therefore we have made explicit the importance of signatories taking positive steps, within their individual capacities, to implement the spirit of the Convention and to develop, implement and maintain cultural programs and policies that support their artists, creators and cultural producers. We will also anticipate and solicit support from international agencies and institutions to provide expertise and

resources to assist this process.

The Need for Precise and Unambiguous Provisions

Our proposed convention is more specific in delineating the types of government measures - policies, programs, laws, regulations and other actions - they may maintain or establish for the purposes of achieving the goals of the Convention. Our approach is to adopt the somewhat arcane language and terminology of trade agreements, but with the fundamental distinction of seeking to preserve the authority of governments to take actions that international trade agreements explicitly forbid.

Thus Part III of our proposed Convention delineates the specific types of government measures which may be needed to achieve the goals of the Convention, but which might otherwise run afoul of international trade disciplines, particularly those concerning investment and services. By borrowing from the language of trade agreements, we also hope to bring into sharper relief the nature of the challenges posed by these regimes.

Transparent and Participatory Dispute Resolution.

The third point of divergence between the draft proposals is the character of the dispute resolution procedures established by the Convention. We propose that transparency be an essential hallmark of a dispute resolution process that would provide *for the protection of individual as well as corporate rights, including non-commercial rights such as freedom of artistic expression.*

The dispute resolution options proposed by the INCP have considerable merit. We strongly support the principle of ensuring that international disputes over cultural matters be resolved by specialized bodies with the mandate and competence to weigh and consider the full spectrum of value of policies and programs that may come under fire, with special attention to the non-commercial aspect.

However, we believe that participation by civil society in the dispute process is as important as the role it has played in working with the INCP to encourage this current initiative. Not only does this require a thoroughly transparent dispute resolution process, but one which specifies a role for civil society as both intervener in, and initiator of, dispute proceedings.

We believe that it may be appropriate to establish more than one dispute resolution regime for the purpose of ensuring compliance with the Convention. For example, the protection of the individual rights of the artist, which are analogous to basic human rights, speaks to the need for procedures which may be invoked by individuals as is the case under certain human rights conventions. For the commercial interests of transnational corporations, or collective interests of arts organizations, a different approach would be needed, perhaps one modelled on the labour and environmental side-accords to the North American Free Trade

Agreement (NAFTA).

For the time being we believe that is more important to seek agreement about the fundamental characteristics of a dispute resolution regime, rather than its details or mechanics.

The Potential for Conflicts With WTO and Other Trade Agreements

Fortunately, the edifice of international trade disciplines concerning investment, services, competition policy and procurement is still only under construction. Current negotiations to extend the application of the General Agreement on Trade in Services (GATS), to audio-visual and other cultural services, is one example where maintaining the status quo will do a great deal to preserve the options of most nations to protect the diversity and integrity of their own cultures

The next few years will be critical in determining the success of efforts to extend the WTO framework in the areas of investment, competition policy and procurement. Each of these encompass areas of domestic economic policy where the tenets of trade liberalization will often cut directly against those necessary to protect indigenous cultural industries, products, artists, and creators from the full onslaught of dominant and global market forces. Moreover, the failure of the most recent WTO Ministerial Declaration adopted in Doha, Qatar, to acknowledge the importance of cultural diversity belies any confidence that this regime will become more sensitive to issues of cultural diversity than it has been to date.

A similar trade liberalization agenda is also being pursued in regional fora, such as the Free Trade Area of the Americas initiative. While in that context Ministers have been willing to recognize the importance of cultural diversity in hortatory terms, experience has shown that it takes more than preambular language to counter the precise, substantive and enforceable disciplines of the agreements themselves.

Under international law, the provisions of this Convention would be deemed to prevail over those of an earlier treaty relating to the same subject matter, but only as between States that are parties to both Agreements. For states that are not party to the Convention, a prior treaty (e.g. certain agreements of the WTO) will govern with respect to their relationships with all State Parties to that earlier treaty, including those which may also be Parties to the Convention.

In other words, it is not open to the Parties to the Convention to assert the Convention's priority with respect to non-signatory nations with which they have pre-existing international obligations - namely those arising under the WTO, international investment treaties, and regional trade agreements.

Therefore until an international Convention on Cultural Diversity is concluded and ratified, the most important strategy for most nations seeking to protect cultural diversity will be to resist entreaties to make further trade commitments that may undermine the objectives and ultimate effectiveness of the Convention.

Conversely, the adoption of the proposed Convention has the potential for not only qualifying past commitments, but for establishing important safeguards against the future expansion of the multilateral trading framework for government measures taken to preserve or foster cultural diversity. It may also serve to qualify future commitments that may be made under such agreements as the GATS, or to frame reservations under other trade agreements.

However, even after the Convention is established, considerable caution should guide judgment about any proposed new trade commitments in favour of nations not party to the Convention. A non-signatory to the Convention would still be entitled to stand on its rights under international trade agreements, even where entirely contrary to the goals of the Convention. Moreover the efficacy of unilateral reservations declared in favour of the Convention is far from certain.

The best guarantee therefore that future trade commitments will not undermine the capacity of nations to protect and enhance cultural diversity, is for those commitments to be made only in respect of nations that are also Party to the Convention on Cultural Diversity, and which have explicitly acknowledged its primacy concerning matters of cultural diversity when conflicts arise with past or present trade obligations.

A New Vision

The INCD understands that adoption of the Convention by governments is only one step in our campaign to promote global cultural diversity. The Convention can ensure a space for domestic artistic creations, but it cannot guarantee every country will have the capability to occupy that space. It cannot guarantee that every artist and cultural producer will be able to work and create, to interact with their community. All of the world's citizens are impoverished when they are denied the opportunity to experience the full rich diversity of artistic expression, language and culture which is our common human heritage.

During a time when cultural divisions and intolerance has spawned the most egregious assaults on human dignity and security, we believe that this modest initiative may also offer a guidepost to a peaceful path for resolving our most pressing challenges.

Proposed Convention on Cultural Diversity

The State Parties to the present Convention,

Desiring to maintain and strengthen the capacity of all sovereign states to preserve and enhance cultural diversity, and to ensure their capacity to develop and implement measures to support diversity of artistic, linguistic and cultural expression, within and among nations; and taking into account the potential impediments to these goals that may arise from international trade, investment and services disciplines,

Desiring to promote the full social, human and economic aspects of cultural diversity;

Acknowledging the need to increase the exchange of ideas, information and expression around the world;

Recognizing that support for artistic expression and cultural production can be an important tool of sustainable economic development;

Acknowledging that many forms of artistic and cultural expression have value, meaning and importance for human societies greater than their commercial value as goods and services;

Recognizing that the rights of individual artists and creators to practice their craft in security and freedom are fundamental human rights;

Endorsing the right of artists and creators to freedom of expression and freedom from censorship;

Recognizing that freedom of information and freedom and pluralism of the media are preconditions for diverse cultural creation and exchange;

Recognizing that there is a clear link between cultural diversity and identity, pluralism of ideas, human and societal values and sustainable development;

Confirming that there is a special need to preserve the cultures and traditional knowledge of indigenous peoples;

Confirming the importance of preserving languages as reservoirs of thought, history and knowledge;

Recognizing also the special needs of the less developed country members for maximum flexibility in the domestic implementation of laws and regulations in order to achieve the objectives of this Convention;

Recognizing the need for effective and appropriate means for preventing and settling disputes concerning measures adopted in accordance with the provisions of this Convention;

Desiring to establish a mutually supportive relationship with the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), and the United Nations Educational, Scientific and Cultural Organization (UNESCO); and

Emphasizing the need to ensure that the implementation and enforcement of international disciplines concerning trade in goods, investment, services and intellectual property, not occur in a manner that may undermine, or derogate from the rights and obligations of Parties to this Convention.

Hereby agree as follows:

PART I: OBJECTIVES AND SCOPE

Article I: Objectives and Purposes

1. The objectives and purposes of this Convention are to:
 - (a) establish a multilateral framework of principles, rules and disciplines for the purpose of preserving and enhancing cultural diversity both within and among nations;
 - (b) maintain and strengthen the capacity of sovereign states to preserve and enhance cultural diversity by taking actions, or adopting, maintaining and enforcing measures to preserve or enhance cultural diversity;
 - (c) secure the rights of individual artists and creators to freedom of expression and to work in security and free from censorship,
 - (d) promote the exchange of ideas, information and artistic expression around the world; and
 - (e) provide effective and appropriate means for preventing and settling disputes concerning measures adopted in accordance with the provisions of this Convention.

Article II: Definitions

1. Subject to the proviso that such measures are consistent with the objectives and purposes of this Convention, and conscious of the often unique characteristics of the social, linguistic, economic, educational, recreational, ecological and aesthetic values that are inherent to cultural diversity, nothing in this Convention shall be construed to limit the sovereign authority of a Party to define such terms and concepts as "culture", "cultural diversity", and "indigenous or national culture" in a manner it considers appropriate to the characteristics of its particular society.
2. Subject to the same proviso, and for the purpose of defining the "diverse" rather than "like" characteristics of cultural goods and services, a Party may distinguish between goods and services based upon the:

- (a) distinct indigenous, and national forms of cultural expression;
- (b) country of origin of the artist or cultural producer;
- (c) character, content, language or informational characteristics of such goods or services; or
- (d) any other qualities or features that are relevant to preserving and enhancing diverse forms of cultural expression.

PART II: GENERAL COMMITMENTS

Article III: Policies, Plans and Programs

1. Each Party shall, in accordance with its particular conditions and capabilities:
 - (a) develop policies, plans or programs for the preservation and enhancement of cultural diversity or adapt for this purpose existing strategies, plans or programs which shall reflect, *inter alia*, the measures set out in this Convention; and
 - (b) integrate, as far as possible and as appropriate, the preservation and enhancement of cultural diversity into relevant economic, international trade, social and environmental policies and programs.

Article IV: Protection of Human Rights

1. In addition to ensuring that all actions taken pursuant to this Convention are consistent with the objectives of Article I:1(c), each Party further affirms that nothing in this Convention shall be construed to permit actions or activities that infringe upon human rights as guaranteed either by international law, or by the domestic law or custom of that State-Party.

Article V: Protection of Linguistic Diversity and Indigenous Cultures

1. Each Party shall respect, preserve, maintain and support linguistic diversity, and the diverse forms of cultural expression practiced by aboriginal, indigenous and local communities within its society, including those embodied in traditional lifestyles.

Article VI: Transparency

1. Understanding the importance of transparency each Party shall, in accordance with its particular conditions and capabilities, publish all relevant measures of general application which pertain to or affect the operation of this Convention and also establish one or more inquiry points to provide specific information on all such measures.

PART III: SUPPORTING CULTURAL DIVERSITY

Article VII: Financial Support

1. Each Party undertakes to provide, in accordance with its capabilities, financial support and incentives in respect of activities which will achieve the objectives of this Convention. These measures may include, but are not limited to: the provision of subsidies and grants; and the granting of any advantage, favour, privilege or immunity, including tariff and/or tax preferences.
2. These financial supports and incentives may be allocated in a manner which accords special, preferential, or more favourable treatment to indigenous, or national forms of cultural expression where the Party considers that such measures

will support or achieve the objectives of this Convention.

3. Such financial supports and incentives may be provided directly or indirectly to individuals, institutions, state enterprises, associations, non-governmental organizations or cultural enterprises.

Article VIII: Development Assistance

1. The developed country Parties may also provide, and developing country Parties avail themselves of, financial resources related to the implementation of this Convention through bilateral, regional and other multilateral channels.

2. The Parties shall take full account of the specific needs and special situation of less developed countries in their actions with regard to funding the international exchange of cultural goods and services.

PART IV: MEASURES TO PRESERVE AND ENHANCE CULTURAL DIVERSITY

Article IX: General

1. Each Party may adopt and implement appropriate measures which from time to time it considers necessary for the purpose of achieving the objectives of this Convention.

Article X: Investment, Competition Policy and Procurement

1. Each Party shall, in accordance with its particular conditions and capabilities, ensure that its investment and competition policies reflect the objectives of this Convention, and may for such purposes prohibit or limit foreign investment in the cultural sector. Where such investment is allowed in cultural undertakings, a Party may maintain, adopt or enforce any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
- (c) to restrict sales of goods or services in its territory that such investment produces or provides;
- (d) to enter into independent, co-production, or co-distribution agreements; and
- (e) that members of the board of directors or senior management be nationals of that Party.

2. For greater certainty, nothing in this Convention shall be construed to prevent a Party from adopting, maintaining or enforcing measures to ensure that investment activity in its territory is undertaken in a manner sensitive to concerns and policies concerning cultural diversity.

3. Each Party may adopt procurement policies and practices which favour or accord preferences to indigenous and national cultural goods and services in order

to preserve or enhance cultural diversity.

Article XI: Cultural Goods and Services

1. Each Party shall ensure that all measures of general application established to preserve and enhance cultural diversity both in and among nations, are administered in a reasonable manner, but nothing in this Convention, or any other International Agreement to which it may be a Party, shall be construed to prevent a Party from adopting, maintaining or enforcing measures that accord special, preferential, or more favourable treatment to indigenous or national goods and services for the purpose of achieving the objectives of this Convention.

2. Each Party undertakes to establish, in accordance with its capabilities, measures intended to preserve and enhance cultural diversity, and foster the exchange of ideas, information and artistic expression regionally, nationally and internationally, which may include measures relating to:

- (a) qualification requirements and procedures, technical standards and licensing requirements with respect to cultural goods and services;
- (b) limitations on the number of cultural service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (c) limitations on the total value of cultural service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (d) limitations on the total number of cultural service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- (e) limitations on the total number of natural persons that may be employed in a particular cultural service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; and
- (f) measures which restrict or require specific types of legal entity or joint venture through which cultural goods or services are supplied.

Article XII: Public Cultural Institutions

1. In recognition of the vital role that governments have to play in providing cultural goods and services, each Party may, in accordance with its particular conditions and capabilities, establish institutions, such as museums, theatres and libraries; language and/or heritage programs which it considers necessary to achieve the objectives and purposes of this Convention.

2. Each Party may establish, endow or empower state enterprises, monopolies, and other publicly governed institutions to provide cultural goods and services, such as arts education and funding, film development, and public service broadcasting.

PART V: DISPUTE SETTLEMENT

Article XIII: Relationships With Other Agreements

1. Nothing in this Convention shall derogate from existing obligations that Parties may have to each other under the Paris Convention, the Berne Convention, the Rome Convention, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty and the Treaty on Intellectual Property in Respect of Integrated Circuits.²

Article XIV: Dispute Resolution:

1. The Parties agree to establish by the first anniversary of the ratification of this convention a dispute resolution regime that will have the following essential characteristics and features:

- i) disputes arising under this Convention will be initiated, conducted, and resolved in a manner that places the greatest emphasis on transparency, fairness, and respect for the interests of all those potentially affected by the resolution of the matters in issue;
- ii) dispute procedures, while emphasizing the value of consensual resolution, will nevertheless provide for the final and binding determination of any disagreements or disputes concerning the implementation, or application of this Convention;
- iii) dispute procedures will allow for the protection of individual and collective interests, as well as those of corporations including non-commercial rights such as freedom of artistic expression.
- iv) dispute procedures should provide for the intervention by interested third parties, including non-governmental organizations;
- v) dispute procedures should be multifaceted and draw upon the experience of other multilateral agreements that provide for investigation, reporting, alternative dispute resolution and other means for encouraging compliance with the requirements of the Convention;
- vi) dispute procedures may be initiated only after recourse is sought under the domestic laws and procedures of the State Parties against which the complaint is made; and,
- vii) dispute procedures shall provide an effective incentive for nations to become Parties to the Convention, and thereafter to comply with its requirements;

2. The Parties agree those empowered to resolve or mediate disputes arising under this Convention will possess the specialized expertise needed to address the full social, aesthetic, as well as commercial dimension, of the cultural measures at

issue.

3. As among or between Parties, disputes concerning the meaning or application of the Convention will be resolved in accordance with the dispute procedures of this Convention and not those provided for by international trade agreements that might also apply to the measures in question.

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