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**The Convention on the Protection and Promotion of the Diversity of Cultural Expressions:  
making it work<sup>1</sup>**

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### **Introduction**

It is really difficult to determine the genesis of the global movement for the protection and promotion of cultural diversity, and how the important issues were drawn to the attention of the general public. Some believe it started with pressure about audiovisual services during the negotiations for the General Agreement on Trade in Services (GATS). Others evoke resistance of the French and Canadian cultural communities to the proposed Multilateral Agreement on Investment (MAI) being negotiated at the OECD, or the famous *Canadian magazine case* when a WTO panel for the first time ruled in a case involving cultural issues. In late nineties, after several decades and phases of discussion about the term "cultural diversity"<sup>2</sup>, there was a series of events dealing with this issue and the first ideas about translating concerns into an international legal instrument<sup>3</sup>. First the Council of Europe<sup>4</sup> and then UNESCO<sup>5</sup> adopted declarations on cultural diversity and these paved the way for negotiations on the legally binding instrument to start.

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<sup>1</sup> An earlier version of this text has been presented at the Second World Culturelink Conference held in Zagreb, Croatia in June 2005 and at the Euroamerican campus on cultural cooperation, Brazil, September 2005.

<sup>2</sup> See for example document **UNESCO and the Issue of Cultural Diversity: Review and strategy, 1946-2000**.

<sup>3</sup> Intergovernmental Conference on cultural policies, Stockholm 1998 ([http://www.unesco.org/culture/laws/stockholm/html\\_eng/index\\_en.shtml](http://www.unesco.org/culture/laws/stockholm/html_eng/index_en.shtml)) adopted an Action plan which called for a special attention to promotion and protection of Cultural Diversity. A few months later Canadian Minister of Culture Sheila Copps called the first meeting of the ministers of culture that established the International Network for Cultural Policies in 1999 ([www.incp-ripc.org](http://www.incp-ripc.org)). At the same time, a network of non-governmental organizations, artists, academics and cultural activists joined together to form the International Network for Cultural Diversity. In June 1999, UNESCO organized a seminar about culture, market and globalization entitled **Culture: a form of merchandise like no other?** In 2002, the International Liaison Committee of the Coalitions for Cultural Diversity was formed to bring together national networks concerned about promoting cultural diversity. Many international professional organizations and networks have joined the global movement and through their regular meetings and assemblies expressed their concerns about the current trends in cultural exchanges.

<sup>4</sup> In December 2000 the Council of Europe adopted a Declaration on Cultural Diversity ([http://www.coe.int/T/E/Cultural\\_Co-operation/Culture/Resources/Reference\\_texts/Declarations/edec1\\_diversity.asp#TopOfPage](http://www.coe.int/T/E/Cultural_Co-operation/Culture/Resources/Reference_texts/Declarations/edec1_diversity.asp#TopOfPage))

<sup>5</sup> UNESCO adopted the Universal Declaration on Cultural Diversity in October 2001. Declaration included a very broad definition of cultural diversity that reflected well numerous debates about the term itself and the main ideas put forward by the global movement for the protection on cultural diversity. In the Preamble of the Declaration a link between human rights and diversity was established and the emphasis was put on the promotion of dialogues and concerns about the impact of globalization and new technologies on culture. The Declaration includes also a notion of link between cultural diversity and biodiversity that first appeared in the UNESCO Report *Our creative diversity*. The accompanying Action Plan called UNESCO to start preparing new international legally binding instrument that would focus on the protection and promotion of cultural diversity.

Since the adoption of the Universal Declaration on Cultural Diversity, debates about the possible scope and content of the future Convention have intensified. During 2001 and 2002 several possible drafts of the Convention<sup>6</sup> were circulated, illustrating what the proposed instrument could accomplish<sup>7</sup>. In February 2003, a delegation of the ministers of culture organized in the INCN officially submitted to the Director-General of UNESCO their draft of the Convention together with the request to start the process of negotiations<sup>8</sup>.

Following two Executive Board meetings in April and September 2003, and after discussing the document entitled **Desirability of drawing up an international standard-setting instrument on cultural diversity**<sup>9</sup>, Commission IV (culture) of the General Conference adopted a decision in October 2003<sup>10</sup> inviting the Director-General to submit to it at its next session (2005) a report and a preliminary draft *Convention on the protection and promotion of the diversity of cultural contents and artistic expressions*.

### **UNESCO Prepares a Draft**

Prior to the beginning of inter-governmental negotiations which started in September 2004, three consultative meetings of fifteen independent experts were convened by the Director-General of UNESCO in order to discuss the scope and main provisions of the future Convention. Topics identified as the most relevant by the panel of experts were also those around which most of the debates occurred during the intergovernmental meetings.

According to the reports from these meetings, main discussions led by the independent experts included following issues:

The first one was to identify the objectives of the Convention. Most considerations of the possible future international instrument highlighted the dual nature of cultural goods and services. While such goods and services have an economic value, they reflect the culture and time in which they are created. One of the objectives of the Convention was to recognize that dual role as well as to establish certain legal norms which could guarantee that both cultural and economic aspects are treated equally, especially if there is a concern raised in the context of trade and investment agreements.

Experts also agreed on the need to establish a balance between protection and promotion of cultural diversity. They felt the Convention could not be a narrow *protectionist* instrument. It was also important not to let the Convention become an instrument for the protection of existing industries, their market share and current position and interests.

In order to give an incentive for participation in negotiations to those countries which have less developed cultural industries, experts included in their draft Convention strong measures to assist

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<sup>6</sup> Drafts of the International Network for Cultural Policy (INCP) and the International Network for Cultural Diversity (INCD) were widely circulated. A draft prepared for the Canadian government by a private sector advisor panel was also made available. (SAGIT – Arts and Culture Sectoral Advisory Group on International Trade)

<sup>7</sup> Numerous documents, statements and resolutions about this issue included those of the Francophonie, Organization of African States, UNCTAD, EU, European Parliament etc. This is the period when interesting studies regarding possible impact of the instrument were published. Two most comprehensive analysis include those of professors Ivan Bernier (Université Laval, Quebec) and Hélène Ruiz Fabri (Université de Sorbonne, Paris); [www.francophonie.org](http://www.francophonie.org)

<sup>8</sup> It is important to mention here that there were also some concerns about the choice of UNESCO as a forum for negotiating the Convention.

<sup>9</sup> <http://unesdoc.unesco.org/images/0013/001307/130798e.pdf>

<sup>10</sup> 32 C/Resolution 34 of the General Conference adopted at its 32<sup>nd</sup> session (October 2003); <http://unesdoc.unesco.org/images/0013/001321/132141e.pdf>

the development of cultural capacity in the South, including measures of positive discrimination, where rich countries of the North would agree to increase the market share for cultural goods and services from developing countries. Even though the term *market share* is borrowed from the language of trade, if applied with clear cultural objectives it can be used to achieve balanced cultural exchange.

These preliminary discussions included also reflections about rights and obligations of future signatories of the Convention both within their national borders and internationally as well as about sovereign rights of states to adopt within their territory measures that would guarantee diversity of cultural expressions. It was recognized from the beginning that, as a consequence of a great variety of cultural systems and policies, the Convention should not impose or introduce any uniform rules. However, one of the goals set by the group of experts was to include some provisions in the Convention that would aim at **reversing** trends of vertical and horizontal integration of cultural markets. Thus, they included articles which obligated States to support threatened forms of cultural expression where those existed on their territories, which sought to guarantee the right of access for all citizens to a wide variety of cultural goods and services and which would have prevented States from closing their border to certain forms of cultural expressions in the guise of promoting domestic expressions.

Finally, the most sensitive issue, and the only article which was forwarded by the experts in two different versions, was the article on the relationship of the future Convention with other international treaties. All arguments that were later discussed during inter-governmental negotiations were also addressed by the experts. The two extremes were those who favoured subordinated the Convention to other agreements, including trade agreements in particular, to those who believed that the Convention should ensure that any dispute dealing with cultural goods and services should be adjudicated under this new legal instrument and thus be determined exclusively on the basis of cultural diversity principles and objectives.

Following the three meetings of independent experts, the Director-General undertook consultations with three international organizations: World Trade Organization (WTO), World Intellectual Property Organization (WIPO) and the United Nations Conference on Trade and Development (UNCTAD). All three organizations submitted their comments to the draft Convention such as it was prepared for the first intergovernmental meeting held in Paris in September 2004<sup>11</sup>.

### **Intergovernmental Negotiations**

Three Intergovernmental meetings were held in Paris - September 2004, January/February 2005 and June 2005<sup>12</sup>. During the first intergovernmental meeting, government experts worked on the basis of the preliminary draft convention which had been prepared by the independent experts and the Director-General. The first two meetings did not bring much progress in achieving consensual wording acceptable to majority of negotiating sides. In fact, it seemed that instead of reaching a consensus, the government experts were trying to put forward a large number of new proposals that sought to expand the scope of the Convention (in areas such as intercultural and

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<sup>11</sup> The WIPO and UNCTAD were positively disposed to the Convention highlighting some of the specific topics of interest for these two organizations. WTO's comments were mixed and in fact included individual comments of WTO Member States.

<sup>12</sup> Following the first one held in September 2004, another two meetings took place in February and May/June 2005. In December 2004, between the first and the second meeting, a session of the Drafting committee, elected in September 2004, was held. However, because of the lack of clear mandate and divergent views of the members of the Drafting Committee, this body did not make much progress and was eventually dismissed during the February meeting.

interfaith dialogue) and it seemed that the deadline set by the General Conference for the submission of the draft Convention would be impossible to achieve. However, prior to the third intergovernmental meeting Kader Asmal, Chair of the Intergovernmental conference, together with the rapporteur and the chair of the Drafting Committee, were directed to prepare a consolidated and simplified version of the Convention which was accepted as the basis for the final negotiations. This step enabled the meeting to reach an final agreement on all matter on 3 June 2005.

From the beginning of negotiations countries seemed to be divided in several groups. The most active supporters included Brazil joined by the majority of Latin American and Caribbean States, Canada, Costa Rica on behalf of the Group 77 European Union, Switzerland, South Africa, Senegal and Benin speaking for the African Group, as well as China.

Countries that were searching for alternative wording and direction of the future Convention included Japan, United States of America, Australia, Philippines, Thailand, Israel as well as several states which have in their bilateral trade agreements already made significant commitments in the cultural field such as New Zealand, Chile and Mexico. In fact, it was clear that the main reason of the opposition of this group of countries was arising from their concerns that the wording and draft formulations of this Convention could interfere with some other international instruments – primarily trade agreements.

Finally, in October 2005 the Draft Convention was first debated at the Commission IV (Culture) and subsequently was adopted by the Plenary on October 20, 2005. 148 members states voted for the adoption of the Convention, 2 countries voted against (USA and Israel) and there were 4 abstentions (Australia, Nicaragua, Liberia and Honduras).

### **Main aspects of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions**

The Convention was adopted under the title **Convention on the Protection and Promotion of the Diversity of Cultural Expressions**. The Convention has a standard form and especially in its final provisions the usual UNESCO language. The Preamble introduces the main reasons for drafting this legal text and contains references to the current context in which exchange of cultural goods and services as well as cultural cooperation and communication are taking place. It also evokes some concerns for the future of the diversity of cultural expressions and reaffirms the fundamental importance of the respect for human rights and the future development as well as preservation and nourishing of common heritage of humanity.

Objectives and guiding principles<sup>13</sup> are crucial for understanding the main goals and for identifying the focus of the Convention. The most important objectives of the Convention include protection and promotions of the diversity of cultural expressions, recognition of the link between culture and development and also recognition of the distinctive nature of cultural activities, goods and services.

Guiding principles which are enumerated in the Article 2 are important to understand the full complexity of the issue being addressed. Guiding principles include the principle of respect for human rights and fundamental freedoms, the principle of sovereignty, of equal dignity and respect for all cultures, the principle of international solidarity and cooperation, the principle of the complementarity of economic and cultural aspects of development, the principle of sustainable development and two final principles which are particularly relevant. These deal with access, and openness and balance. It was very important to ensure that the legal value of the principles is reaffirmed in the operational parts of the Convention because they are setting the directions but

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<sup>13</sup> Art 1-2 of the Draft Convention.

also if respected, they will guarantee that the provisions of the Convention will not be misused for the promotion of some goals or practices not necessarily in line with the spirit of this Convention<sup>14</sup>.

The scope<sup>15</sup> of the Convention is rather broad and it states that the Convention 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 particularly important to note that such definition of scope is inclusive and not focused exclusively on cultural policies.

Among definitions<sup>16</sup>, the most important one is certainly the definition of cultural goods and services as it is the first time that a dual nature of cultural goods and services is recognized in an international legally binding instrument<sup>17</sup>. The definitions of cultural policies and of the term “protection” are also very useful for the interpretation of the provisions of the convention especially if the dispute arises involving regulations referring to culture or if the legitimacy of cultural policies is questioned in the context of some other policies regulated at the international level.

The central part of the Convention consists of 15 Articles governing the rights and obligations<sup>18</sup> of the Parties. The accent is put on the sovereign rights of states to adopt policies and measures they deem appropriate to protect and promote cultural diversity. This operational part of the Convention includes Articles about information sharing and transparency<sup>19</sup>, education and public awareness,<sup>20</sup> and an article acknowledging the important role of civil society in protecting and promoting the diversity of cultural expressions<sup>21</sup>. Articles 12 to 18 refer to the promotion of international cooperation. Innovative wording is found in the article 16 where it is envisaged that developed countries shall facilitate cultural exchanges with developing countries by granting preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing country. Finally, article 18 envisages establishment of International Fund for Cultural Diversity, which has, regardless of the opposition of developing countries, a voluntary and not obligatory character. In other words, there will be no mandatory contributions to the fund. In all of these Articles, except Article 16, the language provides that “parties shall endeavor to” achieve the goals of the Article, such as making the contributions needed to implement the Convention.

Articles 20 and 21 regulate relationship of this Convention to other instruments. This was the most debated issue and the compromise solution was found only a day before the end of the last intergovernmental meeting. In the end, the compromise solution was based on several key principles: mutual supportiveness, complementarity and non-subordination. Such a solution brings innovative wording in the treaty law<sup>22</sup>.

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<sup>14</sup> There are however some concerns that the text of the Draft convention does not take sufficiently into account principles of openness and balance and that it lacks some operational clauses in order to ensure the respect of this principle.

<sup>15</sup> Art 3

<sup>16</sup> Art 4

<sup>17</sup> Original draft of the experts group included two annexes with non-exhaustive lists of cultural goods (Annex A) and services (Annex B). Majority of delegations already at the first intergovernmental meeting requested the deletion of both annexes – some arguing that it was too broad and others because they thought that it was dangerous to include such a list

<sup>18</sup> Art 5-19

<sup>19</sup> Art 9

<sup>20</sup> Art 10.

<sup>21</sup> Art 11

<sup>22</sup> A formulation *taking this Convention into account when interpreting and applying the other treaties* is certainly inspired also by the Article 151 of the EU Treaty which includes similar wording referring to the position of culture and the promotion of cultural diversity within the European Union.

In the final part of the Convention, organs of the Convention are established<sup>23</sup> as well as provisions referring to the settlement of disputes<sup>24</sup>. The compromise solution on this issue involves retaining a conciliation process to resolve disputes. While one party to the dispute can initiate the procedure, the final report of the conciliation commission is not binding, it has only to be considered "in good faith" by the parties to the dispute. In addition, when ratifying the Convention a party may take a reservation against this Article and declare that it will not be covered by the dispute settlement system.

Beside states, regional economic integration organizations can also become a party to the Convention. Special provisions that apply to regional economic integration organizations are contained in the Article 27. This was particularly important for the European Union and its Member States because some provisions of this Convention fall within exclusive or shared competences of the European Communities. A failure to achieve a compromise on this issue would have prevented EU Member States from becoming parties to the Convention. Similarly, several federal states insisted on inclusion of «federal clause»<sup>25</sup> in order to ensure that they would be able to ratify the Convention.

### **Celebrating a victory**

As soon as the Draft Convention was adopted by the Intergovernmental meeting in June 2005, and following its final adoption at the General Conference, negotiating parties, professional and non-governmental organizations concerned with this issue and other supporters of the Convention celebrated a victory.

The adoption of the draft Convention has been 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 General Conference in 2003 and the Convention was adopted in October 2005. This is unusually fast for a text that was in some ways considered as controversial and where certain states were fiercely opposing most of the ideas that it was trying to put forward. However, a large majority of UNESCO Member States advocated for the respect of the initial deadline and the negotiations were completed with a broad consensus and a few reservations.

Probably the most important achievement of this Convention is the fact that it ensures a new position of culture in the international law and fills a legal gap which has in the past years often put the diversity of cultures much lower on the list of priorities to the benefit of some other fields.

The Convention is of highest political importance but the consequences and effects of the objectives and principles set in the Convention are yet to be seen. For the moment, it is fair to say that, with the innovative wording of the article 20, and a political consensus achieved by such a large number of countries, the door is open for a new treatment and improved position of culture in the international arena. The fact that the 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<sup>26</sup>, puts cultural objectives on an equal footing with other public policy priorities.

Having put such an effort in negotiating the provisions of the Convention it is logical to expect that governments will continue to lobby in order to have it ratified by the sufficient number of signatories in the near future. This will create a favorable environment for further reflections about current trends in cultural exchanges and investigating opportunities for introducing new

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<sup>23</sup> Art 22-24

<sup>24</sup> Art 25

<sup>25</sup> Art 30

<sup>26</sup> Art. 20, para 1.b)

instruments and measures in order to respect the principles and achieve objectives set by this Convention.

It is also important to note that the ideas of the Convention have been embraced by countries of the South as well as those of the North, countries having fundamentally different cultural systems, those with developed cultural industries as well as those which are struggling to provide a basic support to cultural operators. Regardless of their ability to fund, support and develop their cultures, governments recognized the fundamental importance of creating this legal framework which should result with more coordination and more efforts in order to achieve balanced cultural exchanges as prerequisite for flourishing of cultural diversity across the globe.

### **Are expectations too high?**

Even though there are indeed many reasons for optimism and celebration, at the same time supporters and key players of the cultural diversity movement are expressing also some concerns and criticism regarding the presented compromise Draft. In the Press Release it issued at the conclusion of the talks, the International Network for Cultural Diversity stated: "If the objective of the new Treaty is to declare the right of States to implement cultural policies and to establish a new foundation for future cooperation, the Treaty has succeeded. If the objective is to carve out cultural goods and services from the trade agreements, the Treaty is inadequate, at least in the short term."

One of the ideas behind lobbying for the adoption of a Convention on cultural diversity was to ensure different treatment for cultural goods and services and possibly provide a legal basis for such a treatment in other international fora that would go beyond the current "cultural exception" referred to in connection with free trade agreements and which has proven to be insufficient to ensure the appropriate position of culture.

While the current wording of the article 20 represents most probably a maximum of what could have been achieved, a careful analysis has to show if it is sufficient to address the above-mentioned concerns. The Convention is very strong and explicit in reaffirming the "rights" of sovereign states to adopt various measures and regulate policies in favor of cultural diversity within their territory but it is very weak on the "obligations" side. This imbalance does not leave much hope for an effective dispute settlement because, in the absence of obligations or commitments from one state to another, it is difficult to imagine any basis from which disputes could arise

Government representatives were careful not to create heavy administrative structures. This is why the Advisory group envisaged in the Draft from the Experts was not retained and one of the reasons why the role of the Cultural Diversity Observatory was reduced to «information sharing and transparency» through «existing mechanisms». Along similar lines, although the ideas behind the Articles referring to international cooperation and cooperation for development were embraced by all negotiations, current wording of the relevant articles is extremely weak<sup>27</sup>. Moreover, innovative solution found in the article 16 on the preferential treatment for developing countries, will be impossible to enforce without appropriate data and statistics which would in a reliable and comparable way show the actual size of the markets and market share of particular country or groups of countries.

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

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<sup>27</sup> 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.

industries through cultural policies and subsidies. It is clear there could have been more incentives for countries of the South in this Convention.

## **Future developments**

After the adoption of the Convention it is necessary now to continue lobbying for its adoption and ratification by the sufficient number of States. It will also be necessary to continue raising awareness about the potential of this instrument and about "relationship with other policies and treaties" to ensure that it really respects the principle of mutual supportiveness and that the provisions are taken into account where making other agreements.

When discussing possible enforcement and monitoring, it will be necessary to improve existing data and statistics as well as to provide assistance to those Parties which will have no capacity to gather such information. Without proper monitoring it will be impossible to implement most of the provisions of the Convention.

In the end, it is crucially important to understand that this is just a step, and not the end result for the global movement for cultural diversity. Reflection and debate, particularly about relevance of the principles of this Convention, including those of human and cultural rights or balance and openness, need to go beyond the text of the Convention. This is necessary if we want to create an environment favourable to the ideas promoted by the Convention especially in the context of convergence and technological developments which are bringing rapid and fundamental changes of the cultural field.

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