



**STRATEGIC OPTIONS FOR A NEW INTERNATIONAL INSTRUMENT ON  
CULTURAL DIVERSITY**  
**DISCUSSION PAPER FOR MINISTERS AT THE 5<sup>TH</sup> ANNUAL MEETING OF  
THE INTERNATIONAL NETWORK ON CULTURAL POLICY (INCP)**  
**FROM THE SPECIAL POLICY RESEARCH TEAM (SPRT)**  
**ON GOVERNANCE ISSUES**

**SUBJECT**

The SPRT's studies provide important information that can be used to choose among the governance options evaluated on the basis of the advantages and disadvantages noted<sup>1</sup>. However, given the existence of a certain number of imperatives, or immutable elements, the operational choices are even more limited. That is the subject of this document, whose conclusions call for an examination of the various strategic scenarios for the implementation of the IICD and for the evolution of its governance in the short-, medium- and long-term<sup>2</sup>.

**OBJECTIVE**

The purpose of the SPRT research is to help determine the best framework with which to manage the IICD and in particular:

- to foster recognition of the legitimacy of the instrument to promote the principles of cultural diversity at the national and international levels,
- to foster respect for the integral nature of the measures in the instrument, which are themselves a reflection of the objectives,
- to meet the challenges of multilateral governance of the instrument (implementation, management and recognition), while ensuring that its mechanisms are effective,
- to adapt "to new cultural policy issues in the context of a globalized economy" (evolving instrument).

Each of the options presents challenges of various kinds (political or structural) and the fact there is no one obvious solution means we must consider a strategy for developing an approach to the governance issues. The objective here is to present these challenges and situate them in the operational perspective of implementing the instrument.

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<sup>1</sup> 4 studies have been written by experts in the SPRT that have been used as background resources for this document: David Dubinsky (Canada), "The WTO and a new international instrument on cultural diversity"; Dominique Piot-Morin (France), "Evaluation of the incorporation of the IICD within UNESCO"; Doris Castellanos (Colombia) and Dave Atkinson (Canada), "Implementation of an independent international instrument"; Elizabeth Le Hot (France) and Mans Molander (Sweden), "Comparison with legal instruments in other areas: essential features". Cf "Options and issues for the implementation of an instrument: depositary, mechanism and strategy", July 2002, as support document containing the 4 studies and their résumés.

<sup>2</sup> Determining the executive tasks relating to governance of the instrument such as transparency, dispute settlement procedures, but also information, monitoring and advisory activities such as co-operation or representation of common interests.



## **FIRST ANALYSIS (BASIS FOR DISCUSSION ON A SHORT-TERM STRATEGY)**

The SPRT's research on legal instruments developed in other sectors shows how important recognition is for any international agreement. Recognition can be expressed by the support of an international organization, the number of signatory States, or the mechanisms of the instrument. What are the relative options for an international instrument on cultural diversity in the short term?

### **1. The IICD and the WTO**

With regard to the WTO, the study prepared in the SPRT suggests how difficult it would be to negotiate the initial integration of an instrument on cultural diversity within that organization's multilateral agreements, especially since the IICD, although involving commercial considerations, is being designed from a cultural perspective. It is also within the current context of developing the instrument within the INCP that a link with the WTO, of any kind, is further called into question. The member countries of the European Union cannot subscribe, within an international agreement, to individual commitments relative to multilateral commercial negotiations, since this is a prerogative of the European Union. Thus the countries that are members of both the European Union and the Special Policy Research Team cannot consider the hypothesis of such a link, since they cannot be involved in any effort to link the instrument to the WTO.

The prospect of recognition of the instrument by the WTO can nonetheless be contemplated, further to the development of an "external" agreement, whether in another organization or in an independent context. However, the difficulties experienced in the environmental sector give cause to question the ideal strategic option to be employed. If the idea of creating an instrument that clearly enunciates sectorial (cultural, environmental, ...) principles that can support a bridge with the existing commercial agreements certainly seems to be the best suited, this solution poses structural and time-consuming problems. For example, the inconsistencies appeared between the obligations taken under multilateral environmental agreements (MEAs) and obligations taken under multilateral trade agreements led to current WTO negotiations to resolve the legal relationship of MEAs and WTO agreements.

At this point, these elements indicate that the priority should be on finding the best way to "anchor" the instrument out of the WTO, but keeping in mind the need to achieve coherence between multilateral trade agreements and the instrument. In that context, it is also essential to remember that multilateral, regional and bilateral trade negotiations will be underway during discussions about the development of a new instrument. Because one of the objectives of the instrument is to address the impact of trade liberalisation on cultural diversity, it is important to make timely progress towards an instrument. Moreover, discussion of a new instrument could attract the attention of the international trade policy community just as trade negotiations could raise issues relevant to discussions about the instrument.

## 2. The IICD and the UNESCO

UNESCO would seem to be the (natural) benchmark agency to serve as depositary for such an instrument in the medium to longer term. Based on the results of the second SPRT study on UNESCO, however, a number of scenarios have to be envisaged for a possible "transfer" of the IICD to that organization, and a number of elements have to be considered, starting with the definition of the INCP's and UNESCO's reciprocal intentions.

- Is the INCP prepared to entrust governance of the instrument to UNESCO? The Network members' choice must be the object of a policy decision. If the answer is yes, official relations will have to be established with this organization. In this event, feasible timeframes and operational capacity will have to be considered. Indeed, the possibility of a rapid "adoption" of the instrument by UNESCO faces certain obstacles that could compromise that adoption unless extraordinary measures<sup>3</sup>; one alternative however would be to consider repatriating the IICD within UNESCO in the longer term (cf. stand-alone instrument). In all cases, the probability of having to conduct negotiations on the instrument within UNESCO, with the risk of producing a "resized" tool must also be considered. Finally, it would be worthwhile assessing the organization's structures more fully, in particular the dispute settlement procedures, in relation to the instrument's objectives.
  
- Are the UNESCO members interested in the possibility of UNESCO serving as depositary for the instrument? An official response is required and will come from a) a formal request from the INCP (cf. above), b) a request from the members of UNESCO and the INCP within UNESCO, c) a UNESCO solicitation to the INCP. At present, the attitude UNESCO can only be guessed, given its reserved position on the process for an instrument in light of the hope the USA will someday return to the organization, and given the ambiguous statement in the action plan accompanying the 2001 Universal Declaration on Cultural Diversity: "taking forward notably consideration of the opportunity of an international legal instrument".

## 3. The IICD as a Stand Alone Agreement

There remains the possibility of developing a stand-alone instrument. While this solution poses the risk of failure for lack of institutional "sponsorship" or because of limited support -an insufficient "critical mass" of signatory countries-, but also of funding, it also offers the advantages of being able to preserve the instrument's content intact and to implement it in a fairly short time frame: once the text is agreed upon, the ministers of the countries interested in the instrument can decide

<sup>3</sup> Finalization of the drafting of the instrument, slated for the 6th annual meeting of the INCP in fall 2003 following the two years mandate given to the WG-CDG in Lucerne to develop an IICD, almost coincides with the holding of the 32nd UNESCO General Conference, i.e., too late to commence an integration process. The next opportunity is in 2005. One possibility might be to accelerate the INCP agenda, but the cumbersome UNESCO structure by its nature cannot allow for a consensus to be reached in less than two conferences. Another option is to call a special session of UNESCO at the request of the INCP members (all members of UNESCO), although the feasibility of such an option is yet to be determined.



to quickly convene an official ad hoc meeting -outside the INCP- to launch a formal negotiation process. However, as this would not involve integration into an existing structure, this proposal entails the construction of an “environment” for the instrument, i.e., definition of institutional and dispute settlement mechanisms adequate to guarantee the emergence and recognition of the principles of cultural diversity that are set forth -in the form of substantive rights in the current version, but binding. Consensus at this level is certainly not easy to achieve -cf. Convention on Biological Diversity, "Study of other instruments".

To continue this line of thought, the positioning of a stand-alone instrument within the international legal fabric -the work for its recognition- depends on the binding force of the agreement and the dynamic capacity that must accompany its governance. The first of these characteristics is achieved if the parties agree on certain commitments about information and co-operation regarding cultural policy making, as much as the degree of constraint adopted in the instrument to ensure its transparency in the event of cultural conflict, so to speak, when the parties accord on the precedence of the settlement system provided for by the agreement over any other instrument in the event of cultural conflict -a subject that will require in-depth examination. Apart from the obligation to designate the depositary of the IICD – if its members agree, a good possibility could be a "housing" within the ministers' committee described under-, the second characteristic -the dynamic capacity of the instrument- can only be provided by an active structure that will act as a follow up group in charge of gather and analyse the various transformations of cultural policies in the signatory countries. In order to perform these tasks, it has been proposed in the Working Group's draft text to create a ministerial committee together with a secretariat that can manage communications at a minimum, with its role being expandable to other functions of monitoring, control, information, support, etc.

These questions (depositary, secretariat, management) might suggest the founding of a new organization, but it seems necessary to rule out this option, not only because of the costs generated -some idea of which can be gleaned from the study of instruments in other sectors- but also pending a decision on the development and management options of the instrument in the medium term.

Finally, the study on "other instruments" highlights the value and strength of developing such a "co-operation" instrument with international institutions. On the one hand, this opportunity takes advantage of the weight of an established international system, and on the other hand, the other members of the partner organizations can be invited to adhere to the instrument even though they did not participate in its development.

## **CONCLUSION**

Through the various elements mentioned in this document, the intention is to establish a sort of governance pre-selection that strengthens the framework of the SPRT studies, pointing up the advantages and disadvantages described in the

options for governance of the IICD. Some intrinsic conclusions could arise out of the work of the SPRT that have to prevail for the Ministers' discussion

But what is more, and especially in relation with the actual WG-CDG's draft text of the instrument which contains precise chapters devoted to the operational drive of the agreement, this exercise highlights clearly the need to develop a strategy to implement and apply the instrument. The choice of institutional mechanism has an impact on the definition of the instrument's content -its design and drafting-, if only in terms of the structures it requires: management of the transparency of the instrument, dispute settlement procedures, but also information, monitoring and advisory activities, and indeed lobbying or representation during negotiations.

These are the elements of a governance strategy: choices in their regard clearly follow from a political decision, as well as these directly depend on the Ministers' priorities for the instrument itself. Short-, medium- and long-term "operational projections" for its governance, including the "structural specifications", could give reason to one of the discussed solutions.