

**An International Agreement**  
**on Cultural Diversity**  
**A Model for Discussion**



The Cultural Industries Sectoral Advisory Group  
on International Trade (SAGIT)

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September 2002

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## MESSAGE FROM THE CULTURAL INDUSTRIES SAGIT CHAIR TO THE MINISTER FOR INTERNATIONAL TRADE

On behalf of the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), I would like to present you with the following report entitled "*An International Agreement on Cultural Diversity: A Model for Discussion*."

This report was prepared under the direction of the Cultural Industries SAGIT, and follows upon our report to your predecessor in 1999 entitled "*Canadian Culture in a Global World: New Strategies for Culture and Trade*." In that report, we recommended that Canada should pursue a new international instrument on cultural diversity. The Government subsequently adopted that recommendation in October 1999.

Since that time, the issue of cultural diversity and the idea of a new instrument to establish the ability of governments to preserve and promote cultural diversity has received wide attention and broad support in a number of important international groups and conferences. These include the General Conference of UNESCO, the Culture Ministers of the Francophonie, and the International Network on Cultural Policy.

Given this progress, the Cultural Industries SAGIT believes that the dialogue has reached a stage where it would be useful to discuss in concrete terms the elements that an international instrument might contain. With this in mind, we have developed a model for such an instrument and it is included in the attached report, along with a discussion of how it would be intended to apply. While not every signatory member of the Cultural Industries SAGIT subscribes to every clause in the proposed agreement or every statement of the introductory chapters (Chapters 1 and 2), there is a broad consensus within the SAGIT that it is essential to put forward a model of this kind for public discussion.

Members of the Cultural Industries SAGIT consider that it is very timely for interested groups to focus on the specific text of a possible instrument. The SAGIT overwhelmingly supports the publication of the attached discussion paper and commends the draft "*An International Agreement on Cultural Diversity*" for consideration by interested parties. We believe the discussion paper and the draft Agreement on Cultural Diversity represent an important step forward in developing a better understanding of this important subject and, accordingly, propose that this report be used in the government's domestic consultation regarding the development of the instrument as well as to inform international dialogue on this subject.

In presenting this model of a new international agreement on cultural diversity, we are well aware that this is just the first step in a long process to develop an international consensus on how best to support and promote cultural diversity. We expect that other groups, institutions and governments will want to develop alternative models for such an instrument and we welcome such a development. We look forward to further discussion of these issues with interested persons, both at home and abroad.

Finally, I would like to thank all the SAGIT Members for their valuable contributions to this report. I would also like to thank you, on behalf of the SAGIT, for your continued support of the objectives of cultural diversity.

## SIGNATORY MEMBERS OF THE CULTURAL INDUSTRIES SECTORAL ADVISORY GROUP ON INTERNATIONAL TRADE (SAGIT)

- Ken Stein, SAGIT Chair, Senior Vice-President, Corporate and Regulatory Affairs, Shaw Communications Inc.
- Ivan Bernier, former Professor and Dean of Law, Université Laval
- André Bureau, Chairman of the Board, Astral Media Inc.
- Sara Diamond, Media and Visual Arts Department, The Banff Centre for the Arts
- Geoffrey Elliot, Vice-President, Corporate Affairs, CanWest Global Communications Corp.
- Steve Forth, Chairman and C.E.O., DNA Media Group
- Peter S. Grant, Senior Partner, McCarthy Tétrault, Barristers & Solicitors
- Fela Grunwald, Fela Grunwald Fine Arts; Past President, Professional Art Dealers Association of Canada
- Peter F. E. Lyman, Partner, PricewaterhouseCoopers
- Michael McCabe, former President and C.E.O., Canadian Association of Broadcasters
- Elizabeth McDonald, President, Canadian Film and Television Producers Association
- Scott McIntyre, President and Publisher, Douglas & McIntyre Ltd.
- Robert Morrice, Managing Director, Proven Concepts
- Robert Pilon, Executive Vice-President, Coalition for Cultural Diversity
- Ronald Rompkey, Professor of English, Memorial University

The Cultural Industries Sectoral Advisory Group on International Trade (SAGIT) is part of the federal government's advisory system on international trade. The advisory group reports to the Minister for International Trade and provides a means for officials from the Department of Foreign Affairs and International Trade and the Department of Canadian Heritage to consult with representatives of Canada's cultural industries.

# CHAPTER 1

## Introduction

In February 1999 the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT) issued its report, *Canadian Culture in a Global World: New Strategies for Culture and Trade*. That study reviewed how Canada's cultural policy tool kit, and the policy of seeking exemptions for cultural industries in trade agreements, were facing up to the impact of new technologies, the "convergence" of the industries that distribute cultural goods and services, and the evolution of the international trading system. The report concluded that there was a need for a new international rules-based approach to managing the interface between cultural policy objectives and trade obligations. Rather than seeking solely to exempt government measures established to achieve cultural policy objectives from the disciplines of international trade agreements, the report argued that the time was right for the development of a new instrument on cultural diversity that would positively "lay out the ground rules for cultural policies and trade."

This discussion paper is a sequel to the 1999 report. A considerable amount of discussion and work has taken place internationally since its publication, and the Cultural Industries SAGIT now believes it can make a further helpful contribution to the debates by putting forth a model agreement for discussion.

The 1999 report was provided to the Minister for International Trade as part of the role of the SAGIT to provide advice. The SAGIT document was published so that the proposal could become the basis for informed public consultation and discussion. It was considered by the House of Commons Standing Committees on Foreign Affairs and International Trade (SCFAIT) and Canadian Heritage (SCCH), both of which endorsed the proposal. It also was used by government officials in country-wide consultations with stakeholders. As a result of these consultations, in October 1999, in its response to the report from SCFAIT, the government announced the following policy:

"The Government agrees that Canada should pursue a new international instrument on cultural diversity. As described by the SAGIT, the purpose of the agreement would be to set out clear ground rules to enable Canada and other countries to maintain policies that promote their culture while respecting the rules of the international trading system and ensuring markets for cultural exports. The agreement would recognize the special role of cultural goods and services and the right of governments to preserve and promote cultural diversity."

The government also announced that it would take a multifaceted strategy to seeking support for this approach in a wide variety of international fora, that it kept "all options open on the most appropriate forum for the negotiation of a new international instrument and its content," and that pending the development of the instrument, it would continue "to seek the maximum flexibility in international agreements to pursue its cultural policy objectives."

Since the adoption of this new policy, there have been a number of positive developments internationally. To begin with, cultural diversity in its broadest conception has gained a higher profile and a new legitimacy in the deliberations of international fora. The Communiqué of the July 2000 Summit of the G-8 described cultural diversity as a "source of social and economic dynamism which has the potential to enrich human life in the 21st century," recognized "the importance of diversity in linguistic and creative expression," and addressed the importance of the preservation of cultural heritage and the economic benefits of cultural interaction. Likewise, the Declaration Summit of the Americas, held in Quebec City in April 2000, stated that cultural diversity "must be a cohesive factor that strengthens the social fabric and the development of our nations." The Action Plan of the Summit set in motion a series of initiatives to deepen hemispheric cooperation on strengthening cultural diversity. The Committee of Ministers for the Council of Europe adopted a declaration on cultural diversity in December 2001 which, among other things, requested the Council secretariat "to identify those aspects of cultural policy which are in need of special consideration in

the context of the new global economy." These developments have created a more welcoming environment where the particular questions of interface between cultural policies and trade obligations can be addressed fruitfully.

The specific proposal of a new international instrument on cultural diversity has also caught the attention of a number of members of the international community and has received support in principle in a number of fora. Culture Ministers of the Francophonie, at their June 2001 meeting in Cotonou, Benin, supported "the principle of a universal international regulatory instrument that supported the promotion of cultural diversity," an instrument that would "uphold the legitimacy of states and governments maintaining, establishing and developing policies in support of cultural diversity."

The adoption of a Universal Declaration on Cultural Diversity by the General Conference of UNESCO in November 2001 also represents a very important consensus among a large part of the international community concerning its understanding of the challenges and opportunities of cultural diversity as well as its commitment to cooperate in taking action in support of it. The declaration's recognition of "the specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods," and its account of cultural diversity as including "the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity," are especially welcome additions. The fact that the Action Plan sets out a commitment that UNESCO members should deepen "the international debate on questions relating to cultural diversity.... taking forward notably consideration of the opportunity of an international legal instrument on cultural diversity" is also a welcome show of support for the development of a new instrument.

The International Network on Cultural Policy (INCP) is an informal grouping of over 40 culture ministers that has been meeting annually since 1998. Consideration of the cultural policy aspects of a new instrument seems to be the most advanced in this forum. Ministers participating in the annual meetings have issued statements which show a

deepening understanding of the issues attached to globalization and cultural diversity. Since 1999, they have had a working group on Cultural Diversity and Globalization which has produced a series of discussion papers to inform the Network's discussions. At their 2001 meeting in Lucerne, participating Ministers asked this working group to produce a draft text of a new instrument on cultural diversity to inform their discussions.

Civil society groups have also begun to engage in a direct way. The International Network for Cultural Diversity (INCD), hosted in Canada by the Canadian Conference of the Arts (CCA), is a network of civil society groups largely representing creators from around the world that was established in 2000. They have met concurrently with the INCP meetings, and have shared their views with Ministers. The INCD has embarked on its own project of preparing a discussion paper setting out their views on the shape of a new instrument, and have put a draft text of an instrument on their website. The Coalition for Cultural Diversity (CCD), a coalition of Canadian cultural industry associations, convened a meeting of international industry associations in Montreal in September 2001. The meeting was intended to find common ground among international cultural industry associations on the challenges of cultural diversity, and to encourage all participants to engage in the debate in their home countries.

There is now a lively international dialogue on the issues related to cultural diversity and globalization. The SAGIT takes some pride in having played a part in starting this dialogue with its report. This discussion paper is intended to help Canadian participants in those discussions continue to make a constructive contribution.

In the first place, there is a need to identify the particular facets of cultural diversity that would be best addressed by a new instrument. While many of the wide variety of public values that have been included in the various fora as being part of cultural diversity would benefit from some form of international cooperation, only some of them would require inclusion in the scope of a legal instrument that sets out ground rules. As elaborated in this discussion paper, these are largely those policies concerned with the creation,

production, distribution and exhibition of creative expression in cultural goods and services.

Secondly, the dialogue has reached the stage where further progress could be made by beginning to describe in concrete terms the elements an instrument might contain. This paper offers one approach to designing the mechanisms by which participating countries could agree to act collectively and manage the international challenges and implications of their own domestic efforts to promote cultural diversity in their own societies.

Finally, the paper reviews some of the main considerations in the options related to which international organization could house a new international instrument, as well as the possibility of working towards a stand-alone agreement. There is also the related question of the relationship of the obligations and commitments of a new instrument with other international obligations, particularly existing and future rights and obligations under international trade agreements. The relationship of trade agreements to other international obligations is a complex and sensitive subject, and is currently a matter of negotiation at the WTO regarding the relationship of WTO agreements to Multilateral Environmental Agreements (MEAs). For all of its sensitivity and difficulty, it is nonetheless a central challenge that needs to be addressed.

This contribution to the now lively international dialogue on cultural diversity and globalization is offered in the hopes that dialogue can soon make progress towards developing a new instrument. Canada is making progress in building support among our partners in trade fora for the special consideration of cultural diversity. Canada will need to play a continued and constructive role if we are to realise our overall objectives. It is important to make progress, because managing the interface between the rights and obligations of trade agreements and the means and objectives of cultural policy remains an outstanding challenge in trade negotiations.

While the proposals in audio-visual services made by a number of WTO members in the current GATS negotiations show a welcome new sensitivity to the concerns of domestic cultural policy, it is also evident that there are

WTO members who wish to see further services liberalization in a sector with large cultural implications. Likewise, in the negotiations towards an agreement for a Free Trade Area of the Americas (FTAA) the issue of how to treat cultural industries and domestic cultural policies will arise. The government has stated that it is maintaining its policy of maintaining maximum flexibility to pursue its cultural policy objectives — through a FTAA cultural industries exemption and by not scheduling GATS commitments that would restrict cultural policy objectives. However, it is important to continue work on a future-looking approach that would establish a wide positive recognition of the value of cultural diversity as opposed to the implication that because culture is exempted from trade agreements it is being sheltered behind old-fashioned protectionism.

## CHAPTER 2

### The Options Considered

This chapter sets out some of the considerations that have contributed to the development of the model of a new agreement that is found in Chapter 3. The Cultural Industries SAGIT is proposing this model for discussion purposes, and an appreciation of the reasoning behind this proposal will help others assess how the proposal addresses the many novel and complex problems surrounding the international challenges of preserving and promoting cultural diversity.

The option of proposing a purely declaratory instrument along the lines of the Council of Europe, the Francophonie and the UNESCO declarations on cultural diversity, has been discarded because it was not sufficient to satisfy the SAGIT's concept of a rules-based instrument. These declarations are indeed welcome because they affirm the importance of cultural diversity as an issue requiring international attention. However, while such declarations are useful first steps towards developing a new international instrument, they are not enough given the immediate challenges that globalization, trade liberalization and technological convergence pose. In fact, both the UNESCO Action Plan attached to its Universal Declaration on Cultural Diversity and the Declaration on Cultural Diversity adopted by the Cultural Ministers of the Francophonie in Cotonou make explicit reference to the desirability of pursuing work on the concept of a legally binding instrument.

The model sets out in Chapter 3 consists of:

- Preamble;
- Part I, which establishes the principles and objectives of the agreement;
- Part II, which considers areas where signatories could agree to cooperate on a wide variety of cultural diversity issues;

- Part III, which proposes a framework for measures with respect to the creation, production, distribution and exhibition of cultural content;
- Part IV, establishing the institutional arrangements of the agreement, including a cultural dispute resolution body.

### Preamble

The preamble of the model agreement sets out a number of observations relating to the importance of cultural diversity, its relationship to creativity and expression, concerns with the impact of globalization and technology on cultural diversity, and recognition of the need to ensure that the international trading system is compatible with the goal of preserving and enhancing cultural diversity.

The preamble does not attempt to define the terms "culture" or "cultural diversity", or to focus on the broader aspects of the subject. Some of these broader implications can be found in various declarations on cultural diversity issued by other agencies, e.g. the UNESCO declaration of November 2001.

There are no steadfast rules regarding preambles and while certain instruments tend to have lengthy preambles, others tend to be rather concise in that regard. Given the plethora of agreements that touch on culture in some way, the second type of approach has been adopted, the objective being to give a condensed view of where the instrument comes from and where it is going.

### Principles and Objectives

The proposed model is structured around some basic principles and objectives which are part of the agreement itself. The underlying principle and overall objective of the instrument is to ensure that cultural diversity is preserved in the face of the challenge posed by globalization, trade liberalization and rapid technological changes. Although new information technologies, globalization and evolving multilateral trade policies offer indisputable possibilities for the expression of cultural diversity, they may also be detrimental to ensuring cultural diversity. This is



particularly the case when, for example, domestic cultural content is not accorded reasonable shelf space in its own domestic market, when the over-concentration of production and distribution of cultural content contributes to the standardization of cultural expression, or when developing countries, because of lack of resources, run the risk of being excluded from the international cultural space as it is currently being constructed with new information and communications technologies. There is an urgent need to address these new developments to ensure that cultural diversity, as a source of creativity and as a factor of social cohesion and economic development, is preserved and enhanced.

This does not require, however, that we adopt an approach that reduces the whole problem of preserving cultural diversity to the issue of preserving distinct cultural expressions within particular societies. Pushed to its limit, this could be seen as a return to the old "cultural exemption" which was rejected by the SAGIT in its Report of 1999. The new approach of "cultural diversity" involves both the preservation of distinct cultural expression within particular societies and opening up to the distinct cultural expression of other societies. To survive and flourish, cultural expression itself must have both strong support within its own cultural community as well as the widest possible contact with all other cultures.

These and other fundamental principles of cultural diversity, are set out in Article I of the agreement. Article II on Objectives then sets the stage for how the agreement is structured and therefore how the agreement will help signatories give effect to the principles they have agreed upon. These two articles play an important role in the binding part of the instrument in Part III, establishing in part a test for the purposes of determining whether a measure is permitted under the agreement. In particular, measures taken by signatories to support or create shelf space for their domestic cultural content must remain consistent with the principles of openness to foreign content.

## Scope and Coverage

The scope and coverage of an instrument could vary widely depending on the interpretation given to the expression "cultural diversity." To some, the term "cultural diversity," borrowed from the notion of bio-diversity, refers to the totality of cultural communities in existence throughout the world, each of them with their own identities determined by their specific features (language, religion, ethnicity, history, heritage, etc.). To others, it signifies, first and foremost, the diversity of cultural expression, as cultural expression is the vehicle through which cultural communities are able to convey their vitality. To others still, the term has a broader meaning, one that encompasses not only the diversity of existing cultural communities, with their own unique characteristics and expression, but also cultural pluralism in the sense of pluralism of opinions and life styles.

But these different meanings of "cultural diversity" are not equally relevant in the context of a legal instrument that is intended to preserve cultural diversity in the face of trade liberalization and economic globalization. Indeed, there may be a serious danger of weakening the instrument itself in adopting an approach that is too wide, such as the one that extends the meaning of "cultural diversity" to include pluralism of opinion and life styles and other aspects outside the realm of cultural expression.

The SAGIT model therefore attempts to make a distinction between those broad areas of cultural diversity that could benefit from international cooperation or where there are in place already agreements or fora for addressing specific cultural diversity challenges, and the specific issue of diversity of cultural expression and measures relating to cultural content. The former can be further addressed in Part II under the rubric of international cooperation. It is quite brief in this draft because, as SAGIT members, the mandate is to focus on the trade dimensions of cultural content, but the work of others could no doubt expand this section.

It is in Part III of the agreement where we narrow our focus to provide rules for measures taken by governments in respect of the creation, production, distribution, performance

and exhibition of cultural content. Article IV deals with the issue of scope and coverage, by defining the terms "cultural content" and "cultural undertakings." As will be seen, the definitions focus on creative expression in the performing arts, festivals, museums, and in the media for popular expression such as films, videotapes, sound recordings, books, magazines, broadcast programs, multimedia and the like. At the same time, the definitions exclude three areas that are not seen as having a role directly related to the enhancement of cultural diversity, namely, manufacturing activities unconnected with content creation (e.g. book manufacturing plants, compact disc pressing plants, etc.), products not intended for use by the general public (e.g. legal opinions, private correspondence, etc.) and those intended for industrial use (e.g. software intended for commercial use, industrial training manuals, etc.). These exclusions raise issues related to classification that will require careful handling.

### Rules for Measures in Respect of Diversity of Cultural Expression

The objective of Part III of the agreement is to ensure that member states have the means to determine from a cultural standpoint and on the basis of their own conditions and circumstances the policies that are needed to ensure the preservation and promotion of diversity of cultural expression. It provides a mechanism that establishes rules to guide Member States taking measures to achieve those ends.

In considering the kind of mechanism to propose to establish both the rights and obligations of signatories, the SAGIT reviewed and considered various approaches that are already included within international trade agreements that allow governments to address overriding interests and non-trade policy objectives in relation to their trade commitments.

Generally speaking, they include:

- self-defining exemptions, such as the national security exemption, where signatories define for themselves what measures are necessary for national security, which measures are then excluded from the agreement;

- exclusion of a list of specific industries, where listed industries are totally excluded from the agreement (e.g. the FTA/NAFTA cultural industries exemption);
- defined sector governed by a separate agreement in order to address different objectives (e.g. the WTO Agreement on Agriculture) or which recognizes the right of governments to pursue broad policy objectives while mindful of existing obligations (e.g. prudential carve-out in financial services agreements);
- permissible measures broadly defined by object and purpose (public morals, health, environment as in GATT Article XX) but constrained by certain tests (e.g. not arbitrary or unjustified discrimination, disguised restriction on trade, necessity, etc.); and
- narrowly circumscribed emergency safeguards to deal with threats associated with rapid import growth.

International agreements frequently stipulate the right of governments to regulate in order to pursue certain policies. For example, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) states that "Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement." Likewise, the preamble of the GATS recognizes "the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives."

Also worthy of mention is the "traffic light" approach, used in the WTO Agreement on Subsidies and Countervailing Measures (SCM) and in parts of the Agreement on Agriculture, which involves a framework of green, amber and red "light" categories of measures: *Green category* — government policies and programs beyond the reach of the rules if they meet certain criteria (e.g. generally available across the country) or deemed to be exempt from trade obligations because of certain circumstances; *Amber category* — government measures are generally allowed if they clearly meet the object and purpose of the agreement,

but countries agree to follow certain principles, best practices, agreed guidelines or negotiated limitations. *Red category* — government measures that are the most trade distorting or that fall outside the object and purpose of the agreement.

The SAGIT believes that some of these approaches can be dismissed outright. For example, an instrument modelled on the national security exemption, while appearing to offer the greatest flexibility, poses the real danger of being open to the abuse of using the "cultural" exemption for any variety of non-cultural purposes. The inadequacies of exempting listed industries as in the "cultural exemption" — principally the lack of positive rules on what measures were allowed — was a theme we explored at length in our previous study. Likewise, since many of the WTO safeguard provisions are of a temporary nature (e.g. balance of payments provisions, infant industry protection, waivers) and/or deal with very industry specific 'emergency' or 'unfair trade' situations, they would also not seem to be instructive to the task at hand as they provide neither certainty nor predictability.

The SAGIT has, however, borrowed elements from a number of the other precedents, in order to design a hybrid approach that allows us to consider the issues at hand from a cultural perspective while still being attentive to some basic tenets of trade agreements. For instance, Article VI establishes a positive right to take measures with respect to the creation, production, distribution and exhibition of cultural content. That right, however, is circumscribed by a number of tests. Measures must for certain purposes have as their object and purpose the preservation and promotion of cultural diversity. Moreover, in taking such measures, the signatories shall be guided by the principles and objectives of the agreement, in particular the objective of ensuring choice, space and visibility for domestic and foreign cultural content. Annex 1 then provides an extensive illustrative list of measures that could be taken to fulfill the principles and objectives of the agreement. It is important to stress that this list is not intended to dictate what any country may decide to do in furtherance of its cultural policies; this will depend on the individual circumstances in each country and its own perception of its needs. While the proposed agreement does not

embrace the "traffic light" approach in full, it does contain a list of "exceptions" in Article VII. This Article recognizes that certain types of measures should not be permissible, including measures which abridge constitutional guarantees of freedom of expression, which expropriate certain property without compensation, or which breach international treaty obligations for the protection of intellectual property. In regard to the guarantees of freedom of expression, it is recognized that courts generally accord higher levels of protection for print media than for broadcasting undertakings; such a differentiation is not precluded by the agreement.

Part III concludes with Article VIII, which requires Member States to publish all relevant measures of general application enacted pursuant to Article VI. These transparency measures can add predictability to the international environment, place a hurdle in front of frivolous or arbitrary measures, and facilitate international cooperation and consultation.

### **Institutional Issues**

The development of a new instrument, with new forms of cooperation and new legal rights and obligations, requires some form of institutional framework to administer the agreement and ensure its implementation. Article IX in Part IV establishes a Council as a consultative forum that will also administer the various elements of the agreement. This includes coordinating the cooperation agreed to in Part II of the agreement, receiving and distributing the submissions of Members under the transparency obligations of the agreement, and establishing relations with other international organizations, such as UNESCO and the WTO.

For handling disputes arising out of this agreement, the SAGIT proposes the creation of a Cultural Dispute Resolution Body. In the event of a disagreement, signatories would be obliged to turn first to the mechanisms offered by the agreement before availing themselves of dispute settlement procedures in other agreements.

Given the mandate to develop a rules-based instrument, the first and most obvious option to consider was an instrument negotiated in the first instance within the WTO itself.

Negotiations concerning the treatment of cultural goods and services within the WTO might appear *a priori* as the most efficient way of addressing issues related to the trade and culture interface. However, as noted in the SAGIT's previous report, we are looking for an instrument that promotes the preservation of diverse cultural expression while ensuring the continuing international exchange of cultural content. In other words, it is important that it be first and foremost a cultural instrument and this has raised the question how best to establish these cultural principles.

As is clear from principles set out in the model, the issues involved transcend purely commercial considerations and need to reflect and embrace a much wider cultural context. Until there is an international instrument that articulates from a cultural perspective the distinctive social, cultural and economic characteristics of cultural content, the WTO may not be in a position to take into account what is required to ensure the preservation of cultural identities and cultural diversity. As noted in May 1998 by the first Director General of the WTO, Renato Ruggiero, WTO Members "should not underestimate the growing pressure on the multilateral system to give answers to issues which are very real public concerns, but whose solution cannot rely on the trading system alone." Among such issues, he expressly mentioned cultural diversity. If the solution to the cultural diversity issue cannot come from the trading system alone, then obviously a contribution coming from outside that system is also important.

For these reasons, the SAGIT is proposing that the instrument be developed outside the framework of the WTO agreements. As noted above, the dispute settlement mechanism set out in Part IV of the proposed model would have signatories resolve cultural disputes within the scope and framework of the agreement before resorting to the dispute settlement mechanisms of other agreements, including WTO agreements or bilateral or regional trade agreements through dispute resolution panels made up of persons familiar with cultural matters.

That being said, we recall that one of the objectives for the instrument the SAGIT proposed in its first report was to provide governments with sufficient guidance and clarity so that they can confidently pursue their legitimate domestic cultural policy objectives without fear of trade reprisals. To achieve this objective, the new agreement will need to be recognized by a broad range of countries and its principles and objectives recognized within WTO agreements. Cultural goods and services are already covered by a number of WTO agreements, including GATT 1994, GATS, TRIPS and the Dispute Settlement Understanding. It should also be noted that there would be nothing stopping non-signatories of the agreement from making use of the WTO dispute settlement process, and there is nothing to prevent WTO Members from assuming new obligations in that context. In the new round of trade negotiations now underway in the WTO, various issues will be considered that have a direct or indirect impact on the treatment of cultural goods and services.

In proposing that a new instrument on cultural diversity be developed outside the WTO, we recognize that the relationship between the instrument and the WTO will need to be addressed. Once the instrument has been finalized, it is envisaged that signatories to it would seek to have its principles recognized by the WTO, although the agreement would continue to be a distinct stand alone agreement. In this regard, the proposal mandates the Executive Council, that is mandated to administer the agreement, to establish relations with other intergovernmental organizations that have responsibilities related to those of the agreement. This would include the WTO, which itself, under Article V of the *Marrakesh Agreement Establishing the World Trade Organization*, has the capacity to establish relations with other intergovernmental organizations.

In this regard, it will be important to learn from the experience of other agreements dealing with non-trade matters that touch on the trading system. For instance, international labour conventions and environmental agreements are referred to or taken into account in WTO documents, but there is not yet a consensus among WTO members on the relationship between such agreements and WTO agreements. Those agreements were

negotiated without a deliberate attempt to agree on their interface with trade agreements. Indeed, as a result of the launch of new negotiations at Doha, WTO members will be conducting negotiations on the relationship of WTO agreements and multilateral environmental agreements. Given that the SAGIT model deals with measures affecting trade in cultural content, the challenge before us is to construct an agreement that provides a balance between the right of countries to achieve their cultural policy objectives while being mindful of the principles, objectives and obligations of the trading system. It is only by achieving this balance that we can avoid some of the uncertainties we have seen in other non-trade issues and facilitate an eventual formal relationship with the WTO and/or other relevant trade agreements.

## **Conclusion**

The proposed new international instrument on cultural diversity is intended to serve as a code of conduct for all those States that consider the preservation and promotion of distinct cultural expression and of cultural diversity itself as an essential component of globalization, as well as a document of reference that could be used by them as a common position in other international fora. From that point of view, it would be consistent with the position taken by Canada in its initial negotiating proposals on trade in services that it would not make any commitment that restricts its ability to achieve its cultural policy objectives "until a new international instrument, designed specifically to safeguard the right of countries to promote and preserve their cultural diversity, can be established."

## CHAPTER 3

### INTERNATIONAL AGREEMENT ON CULTURAL DIVERSITY

#### A Proposed Draft for Discussion Purposes

##### Preamble

Member States,

*Noting* that cultural diversity, a common asset of humanity, represents a source of individual and collective wealth and, as such, must be recognized and affirmed for the benefit of present and future generations;

*Considering* that the reflection and celebration of distinct cultural identities through media and other forms of expression enriches humanity and fosters greater understanding, as well as peace and development;

*Recognizing* that the strengthening of creativity and expression is a fundamental part of cultural diversity, from the development of diverse cultural expression to preserving cultural heritage;

*Noting* that sustaining cultural diversity as a positive force in society requires policies aimed at promoting mutual understanding, ensuring respect for and acceptance of differences and values;

*Noting* that for many developing countries the global environment means uncertainty and vulnerability, and that addressing their particular needs and concerns as well as clarifying the rules of the international trading system play an important part in the social and economic prosperity of all nations;

*Noting* further that there are some valid concerns that the forces of globalization may adversely affect cultural diversity if local cultural expression is overwhelmed by cultural products from other cultures, or where local cultural expression cannot obtain proper access to the global information society, particularly as reflected in the local media of expression;

*Noting* that changes in technology may offer new international horizons for expression of cultural diversity;

*Noting* that at the same time the evolution of the global information society offers great social and economic opportunities if prosperity is built by the enabling forces of the market and *ensuring* that the benefits are enjoyed for all the world's people;

*Noting* that the clarity, transparency and openness achieved through management of the modern trading system can contribute to the goal of enhancing cultural diversity;

*Noting* the recent adoption of the UNESCO Universal Declaration on Cultural Diversity;

Hereby agree as follows:

#### PART I

#### PRINCIPLES AND OBJECTIVES

##### Article I

##### Declaration of Principles

Member States recognize and affirm the following principles:

1. Cultural diversity plays an important role in human development and social cohesion.
2. Governments have a legitimate role to play in supporting, preserving and promoting cultural diversity.
3. Cultural goods and services play a broader role in our societies than that of simple commodities.
4. Cultural diversity recognizes the importance of promoting domestic expression as well as openness to diverse cultural influences.
5. Market forces alone cannot guarantee the preservation and promotion of cultural diversity, which is the key to sustainable human development.
6. Cultural pluralism and freedom of expression are essential for the inclusion and participation of all citizens in civil society.

7. While ensuring the free circulation of ideas and works, cultural policies must create conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level.

## **Article II**

### **Objectives**

This Agreement is intended to enhance and promote the following objectives:

1. To recognize the importance of cultural diversity within the global commons;
2. To enhance international cooperation with respect to cultural diversity;
3. To maintain the flexibility for governments to support, promote and preserve cultural diversity so that they may ensure choice, space, and visibility for both domestic and foreign cultural content; and
4. To provide an institutional framework to administer this Agreement and to provide a mechanism for the resolution of cultural disputes between Member States.

## **PART II**

### **INTERNATIONAL COOPERATION**

#### **Article III**

##### **International Cooperation on Cultural Diversity**

Members agree to consult and coordinate through mechanisms to be established by the Executive Council established in Article IX in such areas as:

1. The promotion of the principles of this Agreement in other international fora;

2. The exchange of knowledge and best practices in regard to cultural pluralism, the preservation and enhancement of the cultural heritage, and the combatting of illicit traffic in cultural goods and services;
3. The sharing of domestic reviews and assessments of policies in support of diversity of cultural expression. The consideration of improved international cooperation to assist developing countries, least-developed countries, and countries in transition in the development of infrastructure, and human resources for viable cultural industries and of domestic cultural policy and regulatory frameworks; and
4. The promotion of cultural diversity as a positive public value internationally and domestically.

#### **Article IV**

##### **Information Exchange**

1. Member States recognize that domestic policy and international cooperation would benefit from timely access to information on:
  - a) the availability and distribution of cultural content from diverse cultures in and between countries and regions of the world;
  - b) the financial, ownership and other information on cultural undertakings and industries around the world; and
  - c) measures taken by governments in regard to cultural content or cultural undertakings that may affect cultural diversity and other information concerning the state of cultural diversity.
2. Member States agree to cooperate in developing and sharing the information described in paragraph 1, and to encourage international organizations to which they belong, to contribute to the provision of such information.

### **PART III**

## **THE RIGHT TO PROMOTE AND PRESERVE DIVERSITY OF CULTURAL EXPRESSION**

### **Article V**

#### **Scope and Coverage**

1. This Part shall apply to measures Member States take with respect to the creation, production, distribution, performance, and exhibition of cultural content, and to the activities of cultural undertakings.
2. The term "cultural content" is defined as:
  - a) the creative expression of individuals in the performing arts, visual arts and crafts, architecture and design;
  - b) the sounds, images and texts of films, video, sound recordings, books, magazines, broadcast programs, multimedia works, and other forms of media, whether now existing or to be invented, that are creative expressions of individuals; and
  - c) the collections and displays of museums, galleries, and libraries, including archives relating to the cultural heritage of a society.
3. Notwithstanding paragraph 2, measures taken with respect to the following products or activities shall not be subject to the provisions of this Agreement:
  - a) the manufacturing of the physical goods that carry cultural content except when combined with the creation, selection or editing of content;
  - b) goods or services containing cultural content where the intended ultimate user or consumer of the product is not a member of the public; and

- c) where the goods or services are intended primarily for industrial use, and not for inclusion in products containing cultural content intended to be provided to the public.

4. The term "cultural undertakings" is defined as persons, organizations and firms that produce, publish, distribute, exhibit or provide cultural content.

### **Article VI**

#### **Measures to Preserve and Promote Diversity of Cultural Expression**

1. Member States have the right to take measures with respect to the creation, production, distribution and exhibition of cultural content and to the activities of cultural undertakings in order to support, promote and preserve diverse cultural expression. In taking such measures, Member States shall be guided in general by the Principles and Objectives of Part I of this Agreement and in particular by the objective of ensuring choice, space, and visibility and space for domestic and foreign cultural content.
2. An illustrative list of measures that may be taken to achieve the objectives of this Agreement is provided in Annex 1. Each Member State may decide on the basis of its own circumstances what measures to take in order to promote and preserve diverse cultural expression, provided that the measures fall within the scope of paragraph 1.
3. In taking measures within the ambit of this Part, each Member State shall have the right to determine what constitutes cultural content of national origin, and the right to adopt or define characteristics upon which types of cultural content may be distinguished from other types for the purpose of applying measures within the scope of paragraph 1.



4. Where two or more Member States have entered into a regional trade agreement or a specific agreement respecting cultural content which grants national treatment to each other's cultural content, the measures within the scope of paragraph 1 may be made applicable to the cultural content made by the nationals of the other Member States or otherwise.

## **Article VII**

### **Exceptions**

1. The following measures are not permissible under this Agreement:
  - a) measures which abridge legal guarantees of freedom of expression as adjudged by the courts in the Member State;
  - b) measures which expropriate the investment of non-nationals in existing cultural undertakings without fair compensation; or
  - c) measures which are inconsistent with international treaties respecting the protection of intellectual property to which the Member State taking the measure belongs.
2. Nothing in this Agreement prevents Member States from taking such measures as they deem necessary to protect public morals or public security.

## **Article VIII**

### **Transparency**

1. Each Member State shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application enacted pursuant to paragraph 1 of Article VI.
2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Member State shall promptly and at least annually inform the Executive Council of the introduction of any new measures which significantly affect the creation, distribution, and exhibition of cultural content.
4. Each Member State shall respond promptly to all requests by any other Member State for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member State shall also establish one or more enquiry points to provide specific information to other Member States, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of this Agreement. Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Member States. Enquiry points need not be depositories of laws and regulations.
5. Any Member State may notify to the Executive Council any measure, taken by any other Member State, which it considers affects the operation of this Agreement.

## **PART IV**

### **INSTITUTIONAL MATTERS AND DISPUTE RESOLUTION**

#### **Article IX**

##### **Executive Council**

1. An Executive Council to deal with institutional matters in respect to this Agreement is hereby established.
2. The Council shall be open for membership to all Signatories of this Agreement.
3. The Council may establish sub-committees as appropriate. The Committee shall establish its own procedures and those of its sub-committees.

4. The Council will make all its decisions by consensus.
5. The Council shall perform such functions as may be necessary to ensure that this Agreement is implemented and achieves its objectives, including the development and implementation of a work program.
6. The Council shall establish a Secretariat to maintain membership and other records, prepare for and organize meetings, communicate to the public on behalf of the Council, and perform such other administrative functions as the Council may determine.
7. Should the Council so determine, some or all of the functions of the Secretariat may be carried out by one or more existing organizations to whom the Council has delegated such functions.
8. The Council shall make appropriate arrangements for consultation and cooperation with other intergovernmental organizations that have responsibilities related to those of this Agreement.

## **Article X**

### **Cultural Dispute Resolution Body**

1. The Council shall establish a Cultural Dispute Resolution Body (CDRB) to develop and administer rules and procedures governing the resolution of disputes in respect to the interpretation and application of this Agreement.
2. The CDRB shall have the authority to establish panels under Article XIII.
3. Member States shall avail themselves of the dispute settlement provisions of this Agreement in respect to measures taken by another Member State that fall within the scope of Part III of this agreement.

## **Article XI**

### **Consultation on Cultural Matters**

1. Each Member State undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member State concerning measures affecting the operation of this agreement taken within the territory of the former.
2. If a request for consultations is made, the Member State to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member State does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member State that requested the holding of consultations may proceed directly to request the establishment of a panel.
3. All such requests for consultations shall be notified to the CDRB by the Member State which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.
4. In the course of consultations, before resorting to further action under this Agreement, Member States should attempt to obtain satisfactory adjustment of the matter.
5. Consultation shall be confidential, and without prejudice to the rights of any Member State in any further proceedings.

6. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

## **Article XII**

### **Good Offices, Conciliation and Mediation**

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.
2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.
3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

## **Article XIII**

### **Establishment of Panels**

1. If the complaining party so requests, a panel shall be established at the latest at the CDRB meeting following that at which the request first appears as an item on the CDRB agenda, unless at that meeting the CDRB decides by consensus not to establish a panel.
2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the

problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

3. Panels shall be composed of well-qualified governmental and/or non-governmental individuals who are familiar with cultural matters and cultural industries.
4. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.
5. Citizens of Member States whose governments are parties to the dispute shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

## **Article XIV**

### **Decision of Panel**

1. The decision of the panel shall be advisory only, unless the parties to the dispute agree in advance to give it binding force. Parties to the dispute shall consider the decision of the panel in good faith.
2. The decision shall be communicated to the Executive Council.

## ANNEX 1

This Annex provides an illustrative list of measures that may be taken to meet the objectives of this agreement:

1. Measures to support the creation, production, distribution, exhibition, performance and sale of cultural content of national origin through subsidies, fiscal measures or other incentives to the creators of the content or to the cultural undertakings that provide them;
2. Measures respecting screen quotas for the exhibition of cinematographic films of national origin, subject to the provisions of Article IV of the General Agreement on Tariffs and Trade (GATT 1947);
3. Measures to require that cultural undertakings operating within their jurisdiction support the creation of cultural content of national origin in appropriate genres or languages through financial or other support;
4. Measures to require that broadcasting programming undertakings within their jurisdiction provide a proper proportion of program content of national origin in appropriate genres or languages on the program schedules of such undertakings, such proportion to be determined by each Member State taking into account the relevant circumstances;
5. Measures to provide for the funding of public service broadcasting, insofar as such funding is granted to broadcasting organizations for the fulfilment of the public service obligations as conferred, defined and organized by each Member State;
6. Measures to require that cultural undertakings of a particular class operating within the jurisdiction of a particular Member State be owned or controlled by nationals of that State;
7. Measures to require that cultural undertakings that have a dominant position within a particular genre or activity support or give equitable access to cultural content of national origin that is created or originated by independent creators or producers; and
8. Reasonable measures that otherwise seek to implement part of a national cultural policy framework in support of diversity of cultural expression.