



# America's Image Abroad:

The UNESCO Cultural Diversity Convention  
and U.S. Motion Picture Exports

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FOR ART, ENTERPRISE & PUBLIC POLICY  
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# America's Image Abroad: The UNESCO Cultural Diversity Convention and U.S. Motion Picture Exports

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The programs of the Arts Industries Policy Forum are funded by generous grants from the Ford Foundation and the Mike Curb Family Foundation.

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## Executive Summary

Beginning in 1998, a consortium of cultural ministers led by representatives of Canada and France advanced a set of principles ostensibly formulated to protect creative work grounded in the cultural heritage of communities and nations. Between 2003 and 2005, the informal activities of this group were debated and ultimately memorialized within UNESCO as the “Convention on the Protection of the Diversity of Cultural Expressions.” Most informed observers of the UNESCO negotiation leading up to adoption of the Convention agree that the initiative was not about the integrity of “cultural expressions,” but instead represented an attempt by Canada and France to remove any trade issue exhibiting links to culture from the purview of the World Trade Organization (WTO). Thus, throughout the process leading to adopting of the Convention, an obvious trade objective was pursued indirectly, advanced not by arguments couched in the facts and figures of trade negotiation, but in language supporting the creation of an international cultural instrument in UNESCO.<sup>1</sup>

To ensure that their proposal would receive a warm reception within UNESCO, Canada and France skillfully played on resentment over U.S. motion picture dominance in most foreign markets to appeal to growing concerns over national culture and identity. According to French Culture Minister Renaud Donnedieu de Vabres, “nations had a right to set artistic quotas because 85% of the world’s spending on cinema tickets went to Hollywood.”<sup>2</sup> For several years before the Convention was drafted, France and Canada garnered support for their position in a series of unofficial meetings of culture ministers, a strategy that succeeded in almost totally isolating the United States in the UNESCO negotiation. When adoption of the Convention was put to a vote in October 2005, out of 154 countries voting on the Convention, only Israel joined the United States in voting “No.”

Given the amorphous subject matter of the Cultural Diversity Convention, the unfavorable UNESCO negotiating dynamics encountered by the United States, and the U.S. government’s traditional lack of direct involvement in cultural issues,<sup>3</sup> the United States was weakly positioned either to prevent or delay the Convention’s adoption. In the absence of a high-level U.S. government official or office dedicated to international cultural matters, there was virtually no official engagement with the early, informal process, deliberately limited to Culture Ministers, through which France and Canada marshaled support for the Diversity Convention. U.S. officials who attended such meetings on an observer basis found that their meeting reports, warning of growing support for the Canadian-French initiative, elicited little interest in Washington.

More significantly, between 2003 and 2005 – a period when multiple branches of the U.S. government were deeply concerned about America’s declining image abroad and the Convention was under discussion within UNESCO – there was no high-level recognition of the Convention’s potential for influencing the way foreigners viewed the United States. Failure by U.S. officials to draw a connection between the Convention and ongoing public diplomacy efforts reflects that, as a policy matter, little serious attention was accorded to cultural issues.

This report traces the development of the U.S. response to the Canadian-French initiative in the period leading up to and following the adoption of the Convention in both UNESCO and the WTO. The report concludes

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with a set of recommendations designed to address some of the issues that formed the backdrop to negotiation of the Convention, giving special emphasis to the U.S. film industry as a symbolic and practical arena within which to address attitudes toward U.S. cultural products in the world.

Formulating a response to the anti-American attitudes embedded in the Cultural Diversity Convention is no easy matter, given the stature and complex nature of U.S. motion picture exports. The industry is a major generator of jobs and revenue, an important component of the U.S. trade agenda, and a star-studded business that, for many, remains a positive instrument of public diplomacy and a source of national pride. However, the very success of U.S. motion picture exports allows the industry to serve as a symbol among many foreign policymakers of what is most disliked about the United States in the political and economic, as well as in the cultural, arena.

The recommendation of this report does not address U.S. motion picture exports. Rather, the recommendation suggests a program that attempts to address the frustrations those exports may kindle – an initiative aimed at providing filmmakers from diverse cultures with an understanding of market realities and the expertise and opportunity to distribute and market at home and abroad the films they produce.

The recommended film distribution program reflects a shift from the more traditional U.S. “outreach” public diplomacy programs involving U.S. films, an approach that has generally employed motion pictures as “mechanisms of outreach” to convey the virtues of our democracy to foreigners. In contrast, this proposal, which recognizes both the artistic and commercial importance of culture and cultural products, focuses on providing filmmakers outside the United States with the opportunity to be heard, a program that demonstrates both interest in, and respect for, the cultural output of others. Underlying this proposal is an assertion that cultural issues exhibit broad policy implications and, as such, should be addressed as part of a comprehensive public diplomacy strategy.<sup>4</sup> An appendix to the report enumerates related issues that require further discussion.

Negotiation of the Diversity Convention was exceedingly complex, effectively spanning two international organizations, one of which the United States had only recently rejoined after a nineteen-year absence, several U.S. government agencies, and a set of vague objectives subject to multiple interpretations by the different players. While it is impossible to determine how the outcome of the negotiations might have been different, the inability of the United States to respond effectively to the cultural issues that Canada and France so successfully manipulated to their advantage can be viewed as symptomatic of inadequate high-level attention to cultural matters in an international context. At the same time, analysis of the UNESCO negotiation suggests a proposal to address specific aspects of foreign cultural activity where implementation of new policies and programs by the United States can positively affect attitudes abroad, advancing U.S. objectives.

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## Introduction

On October 20, 2005, the UNESCO General Conference adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions ["Cultural Diversity Convention" or "Convention"] by a vote of 148 to 2. The Convention's nine stated objectives cover a broad range of measures that governments can justifiably enact, "to protect and promote the diversity of cultural expressions."<sup>5</sup> In a strongly worded statement of opposition, the United States, joined only by Israel, voted to oppose the Convention. Australia, Nicaragua, Honduras and Liberia abstained.<sup>6</sup>

Adoption of the Convention revealed strong anti-Hollywood sentiment abroad among many policymakers and their film communities – negative opinion based in large part on the overwhelming presence of U.S. films in foreign markets. According to foreign press reports, the Convention's adoption represented a vote against U.S. "cultural hegemony." In the lead up to the Convention's adoption in October 2005, Canada's *Globe and Mail* wrote that internationally, cultural diversity is "code for 'let's all get together and protect our national cultures against Hollywood,'" <sup>7</sup> while French Minister for Culture Renaud Donnedieu de Vabres, responding to a question from *Liberation* on whether "The Americans feel they are being attacked" by the Convention, said "The reality is domination [by American films] and thus a risk of uniformity....Our American friends are overwhelmed, they didn't see the international mobilization getting under way."<sup>8</sup> Adding to the anti-Hollywood chorus, Brazil's Culture Minister said of the Convention "We need to do something to avoid being suffocated by the unscrupulous presence of foreign [cultural] products in our countries."<sup>9</sup>

Foreign resentment over U.S. film exports can be better understood by examining some statistics for the period: In 2003, for example, exports of U.S. motion pictures accounted for 73% of box-office revenues in Europe.<sup>10</sup> The U.S. film export-import ratio, calculated by David Waterman, is even more telling than box office earnings as an indicator of U.S. dominance in the international motion picture marketplace. The ratio shows not only U.S. box office dominance abroad, but also underlines the relatively weak showing of foreign films in the United States.

"In 2000," reports Waterman, "U.S. exports of 'audiovisual products' (all theatrical, video, and television software, the large majority of which are theatrical features) to the fifteen countries of the European Union were at a roughly 10-to-1 ratio," with the audiovisual export-to-import ratio "probably just as lopsided for non-European countries." Continuing, Waterman points out that "Very few, if any significant U.S. industries seem to have such a skewed export-import ratio....American supremacy in the world trade of movie products is not unique; but in economic terms it is an extreme, as well as a very significant, case."<sup>11</sup>

In the United States, adoption of the Convention received only limited press coverage; the few articles on the subject that appeared focused primarily on problems with UNESCO as an institution and Jacques Chirac's vanity.<sup>12</sup> The *New York Times*' Alan Riding, while acknowledging that cultural diversity had become "the buzz phrase for opposition to cultural homogeneity a l'americaine," did not explore the reasons for the near-universal resonance of the term, nor did he probe the attitudes that justified the willingness of 148 countries, including

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close allies of the United States, to override U.S. objections to the Convention.<sup>13</sup>

The minimal, cursory domestic news coverage of the near-total isolation surrounding U.S. opposition to adoption of the Convention is notable because the vote in October 2005 took place at a time when the declining image of the United States abroad was an issue of growing concern to U.S. policy makers,<sup>14</sup> as well as to the private sector<sup>15</sup> and academics.<sup>16</sup> In 2003, the Pew Global Attitudes Projects had reported that in one poll after another, “the portrayal overseas of American democracy, values and culture is at an all time low.”<sup>17</sup> In July 2005, with considerable fanfare, presidential advisor Karen Hughes assumed the title of Under Secretary of State for Public Diplomacy and Public Affairs. But even as public diplomacy was shifted to a front burner, no link was established between the hostility that U.S. officials encountered in the UNESCO Convention negotiations and the front-page attention accorded to America’s declining image abroad.

It is beyond the scope of this report to attempt resolution of the “longstanding debate” between those who explain the decline in global goodwill towards the United States in terms of legitimate differences over U.S. foreign policies and America’s role in the world, most especially the war in Iraq,<sup>18</sup> and those who point to issues such as American values, business practices, and entertainment exports as having influenced foreigners’ views of the United States long before the war in Iraq began.<sup>19</sup> Rather, we take the position of Joseph Nye that the “image of the United States and its attractiveness to others is composed of many different ideas and attitudes,” of which reactions to U.S. foreign policy constitutes only one.<sup>20</sup> As such, the causes for the decline in foreigners’ attitudes towards the United States are complex and often interrelated, and feed into the rising anti-American sentiment engendered by our foreign policy. No matter their source, perceptions of the United States outside our borders have serious implications not only for our political goals, but also for our economic, social, health, and environmental objectives as well.

The Cultural Diversity Convention, with its vague language and undefined objectives, may well sink into oblivion. “Indeed,” wrote Riding, “many experts expect the convention to have little impact on what is already a globalized market for cultural products, one in which India’s Bollywood, Japanese animation movies and Brazilian and Mexican television soap operas have a place alongside Hollywood blockbusters....”<sup>21</sup> American films are likely to continue to dominate most foreign film markets in the foreseeable future, however. “For 2006,” reports the Motion Picture Association of America (MPAA), “worldwide box office [receipts have]... reached an all-time high of \$25.82 billion, an 11% increase from the previous year.”<sup>22</sup> And *Variety’s* “top” online story of January 8, 2008 was that “Hollywood beats local films in France,” with U.S. movies taking 49.9% of the French market compared to 36.5% for French films.

Given that the reality of U.S. box office domination shows little indication of weakening, it remains likely that the sentiments that led to the Convention’s adoption – resentment over the dominant presence of U.S. motion pictures in foreign markets, coupled with the weak performance of foreign films in the United States – will continue to reinforce negative images of the United States abroad. At the same time, however, the 148 to 2 vote by which the Cultural Diversity Convention was adopted and the ease with which American movies were employed as a symbol of U.S. culture hegemony offer an unexplored opportunity to understand how our

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motion picture exports affect foreigners' views of the United States, and how the United States may develop a constructive response to those attitudes.

The report implicitly questions the way the United States engages cultural issues in an international setting: Does the United States direct sufficient high-level attention to cultural matters, and, if not, what institutions in our society – commercial, non-commercial, or governmental – should be doing more? If cultural matters are recognized as important policy tools, why were the public diplomacy implications of the Convention accorded so little attention by policy makers at the very moment when other public diplomacy concerns were front-page news?

The report that follows will discuss (I) why Canada, and then France, developed and supported the proposal for the Cultural Diversity Convention, (II) how Canada and France were able to attract broad support for their proposal, (III) the U.S. response to the Convention, and (IV) challenges the U.S. faced in attempting to win support for its position on the Convention. The report concludes (V) with an assessment of the negotiations and recommendation for a U.S. response, and (VI) describes and assesses the possible impact of a proposed film distribution program.

## I. The Convention: A Canadian-French Initiative

### A. Canada

Support for the Cultural Diversity Convention was spearheaded by a tightly organized and well-financed campaign initiated by Canada in 1998.<sup>23</sup> The initiative was later joined by France. Both Canada and France were motivated in large part by the goal of excluding cultural goods and services from WTO trade rules to ensure that trade disciplines would not interfere with the ability of national governments to self-determine internal cultural policies. Adoption of a new international agreement was viewed by Canada and France as the appropriate instrument to attain this objective.

Canada had long equated cultural sovereignty with exclusion of all its cultural activities from the scope of international trade disciplines. In the North American Free Trade Agreement (NAFTA), for example, government measures other than tariffs and quotas “that affect trade in cultural goods and services between Canada and its two NAFTA partners are subject to a broad exception first put in place at Canadian insistence under the earlier Canada -U.S. Free Trade Agreement.”<sup>24</sup> In the Uruguay Round, Canada refrained from making commitments involving any cultural service in the General Agreement on Trade in Services (GATS), and simultaneously carved out a series of Most Favored Nation (MFN) exceptions designed to preserve Canada's flexibility in dealing with its trading partners on a broad range of cultural issues.

Despite Canada's efforts to keep its cultural activities beyond the purview of trade agreements, the United States in 1996 brought Canada into a WTO dispute settlement process over Canada's attempts to reserve Canadian

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advertising for Canadian magazines.<sup>25</sup> The WTO ruled against Canada, “causing a panic in the culture community. It was the first time a Canadian cultural policy was challenged at a trade forum and no one really knew what would be next. . . . How long before Canadian media ownership rules, Canadian content rules and even the Canadian Broadcasting System were challenged?”<sup>26</sup>

For Sheila Copps, Canada's Minister of Heritage, the answer was simple: “If international rules were carving away her policy space, she needed an international forum to get them back. The only problem was that the forum didn't exist. . . .”<sup>27</sup> Canada's response to a perceived loss of autonomy in cultural matters was to launch a campaign to create a broad international agreement that would, at a minimum, “represent some sort of customary international law which could get some attention in a WTO case, and save Canada from much of the blow they took on the magazines case.”<sup>28</sup>

In 1998, Copps established the International Network of Cultural Policy (INCP), an informal group of culture ministers who began to meet periodically to draft the new instrument and search for an institutional setting where it could be negotiated.<sup>29</sup> The quest for an institutional setting in which to negotiate the Convention was resolved in February 2003 when, in a meeting with UNESCO Director General Kohichiro Matura, INCP representatives persuaded him to place the draft Convention on the agenda of the forthcoming meeting of the UNESCO General Conference in October 2003.

When the decision was reached by the UNESCO Intergovernmental Committee in June 2005 to recommend the Convention's adoption, Canada's *The Globe and Mail* wrote, “Never again, would the government be forced to bow to pressure from U.S. trade negotiators when it tried to regulate Canadian content or support Canadian cultural industries. Never again would a culture minister face the humiliation Copps had faced in 1999 when the government softened a bill to protect the Canadian magazine industry from U.S. incursions into its advertising market rather than face retaliation against Canadian exports, such as steel, wood and clothing.”<sup>30</sup>

## B. France

Unreconciled to the European Union's failure to obtain a “cultural exception” in the Uruguay Round GATS negotiations, France was a ready partner in Canada's effort to develop a new international instrument to address cultural goods and services.

During the Uruguay Round of negotiations within the GATT (which later became the WTO), France had fought bitterly for the cultural exception on the grounds that cultural activities, especially motion pictures, embodied expressions of a country's unique national identity and should not be subjected to the same rules imposed on traded commodities. Although France was not successful in obtaining a legal carve-out for audiovisual services from the GATS, when it became apparent in the final days of the Uruguay Round that the EU was not going to make an audiovisual services commitment, a number of countries which had already negotiated audiovisual commitments decided to withdraw them (e.g., the Czech Republic, Finland, Romania,

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the Slovak Republic, and Sweden, among others),<sup>31</sup> creating what the French came to call *l'exception culturelle*.<sup>32</sup>

France's campaign for a cultural exception did not end with conclusion of the Uruguay Round. In the post-Uruguay Round period, the EU, at France's insistence, instituted a master plan to ensure that any potential EU candidate would refuse to include audiovisual services in its GATS schedule of commitments. As a result, a number of WTO accession countries with EU aspirations found themselves caught between U.S. demands for audiovisual services commitments and the EU's warning that such commitments would be inconsistent with the EU's *acquis communautaire* (the rights and obligations that EU countries share) – an inconsistency that would doom their prospects for joining the EU.<sup>33</sup> It was no surprise that, in the Doha Round, WTO member countries queued up for EU membership expressed reluctance to discuss audiovisual services.

For France, the Cultural Diversity Convention was a natural continuation of its ongoing battle for the cultural exception, and as the campaign for the Convention gathered momentum after 2000, the two issues began to merge as a top foreign policy goal. "First victory for the exception culturelle at UNESCO," reported *Le Monde* following the June 2005 Intergovernmental Committee recommendation that the General Conference adopt the draft Cultural Diversity Convention.<sup>34</sup> Similarly, when the Cultural Diversity Convention was formally adopted in October 2005, France's President Jacques Chirac issued a communiqué "welcoming UNESCO's approval of the Convention on cultural diversity," and underscoring the active role that France had played in achieving its success, which "endorses the rights of states to define and conduct cultural policies."<sup>35</sup>

France's interest in cultural diversity in the Uruguay Round was in large part based on concern over imports of American motion pictures. To France's cultural elite, the overwhelming presence of American films in French cinemas appeared responsible for depriving domestically produced films the opportunity to be viewed by the local population. While nine of the top ten films in France in 1975 were French produced, by 1999, nine of the top ten films were American, with the tenth slot taken by a French movie co-produced with a U.S. company.<sup>36</sup>

For the French, American movies represented more than a commercial threat to their motion picture sector: the pop culture of American films represented a broader threat to French culture, arousing longstanding fears of cultural domination and loss of what they considered to be unique in French identity and culture, especially the French language. According to public opinion surveys, fear of U.S. cultural dominance was widespread in France, with a majority of the French believing that globalization was a threat to their national identity. Polls also showed a particular concern in the form of Americanization: "65 percent of the French see 'excessive' U.S. influence on French television, 57 percent on French cinema, 37 percent on French music, [and] 34 percent on the French language...."<sup>37</sup> The link between French film and the French language was especially strong, with French film exports regarded as a medium for helping to preserve the international standing of the French language.

France's resentment of Hollywood's dominant presence in France was aggravated by the difficulties that French film producers encountered in attempting to penetrate the U.S. market. The EU market for U.S. audiovisual goods, including box-office receipts, video cassette rentals, and television rights, was \$7.4 billion in

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1998, compared with a U.S. market for European films of just \$706 million (a ten to one ratio that parallels that reported by Waterman for the EU as a whole, see above, p.3). At the time, barely two percent of films shown on U.S. screens were translated, and hardly any European productions appeared on American television.<sup>38</sup>

Against this multilayered background of hostility to American motion pictures, President Jacques Chirac assumed a prominent role in support of the Cultural Diversity Convention. In 2003, representatives from cultural organizations of thirty-five countries met at the Louvre “to campaign for the preservation of the cultural exception and to promote adoption of a global Convention on cultural diversity by UNESCO as a way to remove culture from the WTO,” reported Riding. “The entire gathering,” Riding continues, then “went to the Elysee Palace where President Jacques Chirac spoke to the participants, and leading movie directors, actors, and writers ...endorsed the meeting’s objectives.”<sup>39</sup>

## II. Campaign to Gain Support for the Cultural Diversity Convention

### A. The Rationale

The argument made by Canada and France to support the Convention was grounded in the concept that cultural activities are “special” in that they are conveyors of a nation’s unique identity and thus essential to the nation’s survival as an independent, distinctly recognizable entity.<sup>40</sup> To extend the Convention’s appeal to the agendas of developing countries, leading advocates in Canada and France amended the language of diversity to specifically encompass the need to protect “indigenous cultures.”

Once established in various reports and meeting summaries, the premise that cultural activities are “special” was in turn used as the rationale for the argument that cultural activities, because of their unique connections with national and community heritage, should not be subject to trade rules imposed on ordinary merchandise. activities should instead be carved out of the framework of WTO trade disciplines.<sup>41</sup> This was a straightforward restatement of the cultural exception argument for audiovisual services that France had advanced during the Uruguay Round, now expanded to extend beyond audiovisual services (motion pictures, video cassettes and television programs) to include all cultural goods and services, e.g., music, books, and magazines, among others.

A corollary to the cultural exception argument was the message that adoption of the Convention would ensure something called “cultural sovereignty.” While the term “cultural sovereignty” was never defined, it was broadly understood as an enabling clause, guaranteeing states the “sovereign right ...to maintain, adopt and implement policies and measures which they consider suitable for the protection and the promotion of the diversity of cultural expressions on their territory....”<sup>42</sup> By removing cultural activities from trade disciplines, so the argument implied, states would be able to regain control over their cultural activities and impose policies that might be viewed as morally or legally impermissible in other areas of trade.

Canada and France, in seeking support for the Convention, were clearly aided by the absence of any generally

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accepted understanding of the phrase “cultural diversity,” which was only vaguely defined in the Convention.<sup>43</sup> Article 4 of the Convention, which relates to “Definitions,” reads that:

For the purposes of this Convention, it is understood that:

“Cultural diversity” refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.

Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic reaction, production, dissemination, distribution and enjoyment, whatever the means and technologies used.<sup>44</sup>

In fact, the term “cultural diversity” was sufficiently vague to ensure that no agreement was reached on the basic issue of whether the term was intended to apply to diversity *within* a given nation or to diversity *among* nations – two fundamentally different and in some cases contradictory concepts. While diversity within a given nation refers to the variety of available choices to consumers (resulting, in part, from protection of the art of minorities), diversity among nations “refers to whether each society offers the same menu.... When a new artwork is traded from one society to another,” points out Tyler Cowan, “diversity within society goes up (consumers have greater choice), but diversity across the two societies goes down (the two societies become more alike).”<sup>45</sup>

By allowing “cultural diversity” a loose and open definition, advocates broadened the Convention’s appeal, permitting each UNESCO member to read its own objectives into the Convention’s broadly defined goals. Some, for example, looked on the Convention as a means to preserve indigenous artifacts and customs and promote ethnic traditions and minority languages, while others looked to the Convention to protect the rights to express one’s culture, carry out domestic cultural policies, and foster the development of local cultural industries,<sup>46</sup> processes that include the application of quotas and subsidies.

## B. The Rhetoric

### 1. *Emotional Language*

The message linking cultural diversity to national identity resonated with potential signatories to the Convention at several levels. On an emotional level, the diversity concept was attractive to countries uncertain about the development and sustainability of their own culture in a globalized environment. Simultaneously, those concerned that their domestic cultural activities, especially their motion picture sector, were being overwhelmed by the dominant presence of U.S. motion picture imports, were drawn to the Convention’s promise of protection from Hollywood’s blockbusters and the other movies that, since the 1970’s “have become the world’s common denominators, submerging many countries’ indigenous film industries.”<sup>47</sup>

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Still others likened cultural activities to the endangered species of the Biodiversity Convention, and looked to the Cultural Diversity Convention to prevent their local culture from becoming extinct in the same way that the biodiversity initiative was intended to protect endangered species.<sup>48</sup> In this context, the goal of “cultural diversity” took on a distinctly anti-foreign tone, and was interpreted as code for keeping out foreign product to preserve locally produced content. Reflecting this protectionist aspect of the Convention, Kenyan actress Lucy Nyaga, noting the availability of Hollywood’s latest releases in local [Kenyan] movie theaters, observed that “Changing these tastes is a priority for Kenyan filmmakers...It’s about time we saw things that are familiar to us and the world we live in today.”<sup>49</sup>

## *2. Right to regulate*

Those seeking to carve out cultural goods and services from WTO trade disciplines found allies among those WTO members fearful that trade disciplines would restrict their ability to regulate a domestic film sector. In a WTO discussion of the Convention, some WTO member states complained that the domestic policy tools they had implemented to support their cultural objectives “had been challenged in trade fora, and it was thus important that the Convention clarified the rights of governments to take measures to promote and preserve cultural diversity...”<sup>50</sup>

A case in point was New Zealand, one of the few WTO members to have scheduled a meaningful audiovisual commitment in the Uruguay Round. New Zealand discovered at the end of the 1990s that the country’s planned introduction of local content quotas for radio broadcasts would, if enacted, likely be inconsistent with its WTO commitments. When informed of the potential conflict, New Zealand’s Premier and Culture Minister observed: “We have unilaterally disarmed ourselves on trade, but very few others have been so foolish. We’re now left with perfectly legitimate calls for local content and people saying ‘You can’t do that because of GATS’. This seems a bit ridiculous...”<sup>51</sup>

Under threat from the United States to take the matter to WTO dispute settlement,<sup>52</sup> the New Zealand Government eventually backed off its proposed mandatory quotas and left to radio and television broadcasters the decision on whether to adopt voluntary local content targets. Despite this softened position, the United States included New Zealand’s local content quotas as a “Service Barrier” in its 2004 National Trade Estimates Report,<sup>53</sup> a report closely followed by foreign trade officials as an indication of the direction of U.S. trade policy.

Claims that GATS rules would restrict the ability of WTO Members to subsidize their film sector also resounded with a number of Member States, notably those for whom film subsidies appeared to be the only defense against U.S. film imports. “Without systems of support and the application of quotas and subsidies, culture is likely to become hostage to a market where only profitable cultural goods survive,” said a French Trade Union representative.<sup>54</sup>

Attempts by U.S. negotiators to explain that most subsidies were not in fact inconsistent with GATS rules

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went unheeded. U.S. negotiators pointed out, for example, that as currently formulated, the GATS (unlike the GATT), contains no subsidies code, and other GATS rules are sufficiently flexible to permit countries to maintain most film subsidy programs. Despite the arguments of U.S. negotiators, the subsidy issue remained part of France's litany to gain support for the Convention, (French cinema was reported in 2004 to have received support equivalent to \$668 million)<sup>55</sup> and was adopted by a number of other countries in order to justify their support of the Convention.<sup>56</sup>

### 3. *Right to restrict*

The Convention's messages of cultural diversity, exception and sovereignty together provided the appearance of a moral, if not entirely legal, justification for measures that would restrict imports of cultural goods and services. Commenting on the Convention's adoption, BBC News reported that the Convention "enables countries to take measures to protect what it describes as 'cultural expressions' that may be under [serious] threat... Serious threat can cover a broad variety of situations, including a film industry under 'serious threat' from foreign competition."<sup>57</sup>

Spokesmen representing Korea, for example, were clear in explaining that their support for the Cultural Diversity Convention was intended to protect their domestic film industry: "Korean cultural organizations believe that the adoption of the accord will buttress the country's case for maintaining a quota system that requires cinemas to dedicate 40 percent of shows to domestically produced films," reported the *Korea Times*. "The US has been putting pressure on Korea to weaken the domestic content requirements."<sup>58</sup>

Drawing on the Convention's justification of internal policies taken by members to secure a place in their own domestic market for locally produced cultural goods and services, Brazil's Culture Minister said that the Convention gives member countries the right to "take all appropriate measures to protect [their] cultural expressions...." He especially applauded the fact that "the new Convention would allow countries to extend laws [governing broadcast transmission] to lesser regulated products, such as movies, music or books."<sup>59</sup> Similarly, China, which had earlier expressed concern over "its large-margin adverse balance of culture trade" with the United States,<sup>60</sup> argued for the Convention's ratification on the grounds that ratification of the Convention would help China protect its culture, promote the development of a cultural industry and reverse its imbalance in cultural trade with the United States.<sup>61</sup>

UNCTAD (the United Nations Conference on Trade and Development), too, set the stage for smaller developing countries to look to the Convention to justify protectionist measures for their nascent cultural industries. "During the year 2000, it was estimated that less than 2 per cent of Africans saw an African film," reported UNCTAD in a report on improving participation of developing countries in audiovisual services. The report went on to note that "US films have a 70 per cent share of the African market, while African films have a 3 per cent share in their own market."<sup>62</sup> According to the UNCTAD report, "The dominance of a few integrated producers of audiovisual products at the global level makes it difficult even for successful producers of films and TV programs from developing countries to compete in world markets and even in their domestic markets."<sup>63</sup>

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## 4. A *de facto* “cultural exception”

Finally, the language of the Convention implied that a cultural exception had somehow been agreed to, an impression that served to help Canada and France advance their master plan to discourage audiovisual commitments both in the WTO and in bilateral trade negotiations with the United States.<sup>64</sup>

In the WTO, countries within the EU orbit were closely monitored by the EU and relied on the *acquis communautaire* to justify their refusal to commit to liberalize audiovisual services. Some nations outside the EU orbit linked their refusal to discuss audiovisual services to the ongoing negotiations on cultural diversity.<sup>65</sup> Referencing the cultural diversity negotiations, while not necessary under GATS rules to justify the absence of audiovisual commitments, nonetheless served to raise questions about whether cultural issues, such as audiovisual services, would remain within the scope of GATS disciplines.

To protest the refusal by some countries to discuss audiovisual services and negative publicity creating uncertainty over the future of cultural issues within the GATS, members of Audiovisual Friends – a group of WTO members openly supporting liberalization of audiovisual services (Japan, Chinese Taipei, Hong Kong, China, Singapore, Mexico, and the United States), “complained in the Council for Trade in Services about efforts by certain Members to create an *a priori* exclusion for the sector.”<sup>66</sup>

Parallel to WTO negotiations, in the 2000 to 2005 period, the United States was involved in a number of free trade area negotiations (e.g., Jordan, Chile, Singapore, Morocco, Australia.). France especially targeted these negotiations to ensure that no member of the French community – such as Morocco – would break ranks on the audiovisual issue by accepting inclusion of audiovisual services in their agreement with the United States.<sup>67</sup> “The State Department in Washington and the Motion Picture Association, which represents U.S. media giants, have pressured countries such as Chile, South Korea, Morocco and former members of the Soviet bloc in negotiations on bilateral trade agreements,” warned *Le Monde Diplomatique*. “In exchange for compensation in other sectors, they have encouraged these countries to waive their right to independent policies on film production.”<sup>68</sup>

## C. Carrots and Sticks

In addition to using emotionally charged, all-things-to-all-people rhetoric, Canada and France sought support for the Convention by combining promises of financial support<sup>69</sup> and preferential market access to developing countries with threats of economic retaliation should a nation fail to support the Convention.

Prominent among inducements offered to developing countries was the promise to create an International Fund for Cultural Diversity in parallel with the Convention, a voluntary fund that would serve to help build capacity in developing countries to produce and distribute their own cultural products and establish their own cultural industries.<sup>70</sup> The Fund’s establishment, explains Ivan Bernier, a strong supporter of the Cultural Diversity Convention, was “the result of an urgent plea from developing countries that didn’t want to see the diversity of

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cultural expressions limited *de facto* to the diversity of developed country cultural expressions. In their eyes, the creation of the Fund has both symbolic and practical value.”<sup>71</sup>

Offers of financial assistance to developing countries extended beyond promises of support for the Cultural Diversity Fund. U.S. delegates report that Canada and the EU also paid the travel expenses of delegates sympathetic to their position so they could participate in Convention negotiations at UNESCO headquarters in Paris. Some of these delegates emerged as highly vocal critics of the United States, strongly echoing the position of their sponsors on the UNESCO negotiating floor.<sup>72</sup>

In addition to promised funding of the International Fund for Cultural Diversity, France and Canada arranged numerous seminars on cultural topics for developing countries, and funded the travel of developing country delegates. Taking advantage of the unspecific character of the Convention's goals, these seminars carefully tailored the cultural diversity message to the narrow interests of developing countries. Announcing that it would actively participate in the World Social Forum, to be held in Mumbai, India, the Canadian-sponsored INCD, for example, announced that it would join in presenting a program on “The New Imperialism of Globalization,” focusing on “the role of artists and indigenous peoples in protecting cultural diversity.”<sup>73</sup>

Funding for such local cultural initiatives did not end when the Convention was adopted. Immediately after the Convention's adoption, the EU announced that it had “drawn up an ambitious development policy with a cultural dimension with some of the world's regions, especially in African, Caribbean and Pacific (ACP) countries but also in the Mediterranean and, more generally, among the Union's neighbors. In this context, the community's policies targeted the implementation of specific objectives enshrined in the adopted Convention: examples of such policies included developing viable local cultural industries and improving the movement of cultural works at global level, especially products and services from developing countries.”<sup>74</sup>

While the Convention's broad, undefined messages resonated with many countries, agreement with some, or all, of the Convention's messages did not always translate into support for the Convention. Those delegations expressing less than full support for the Convention encountered both economic and political pressure from the EU. Delegations of wine-producing countries, for example, concerned that the Convention's vague language on cultural diversity could be interpreted to restrict their wine exports, were undoubtedly mindful that their movie industry would likely lose support from the EU's Media II program if they supported the Convention. Moreover, the EU possessed a powerful political card in addition to Media II funding: would-be EU members were well aware that failure to support the EU on the Convention could doom their candidacy for EU membership.<sup>75</sup>

So aggressive were France, Canada, and Brazil in using threats and favors, lobbying other delegations to isolate the United States and create an atmosphere of hostility to the U.S. position, that a number of delegates indicated that, while they supported the U.S. position, they feared ostracism if they publicly expressed their support. While some delegations may have used the threat of “ostracism” as a mere excuse not to support the U.S. position on the Convention, such an excuse could not have been effectively offered had the negotiations not been marked by an obvious atmosphere of intimidation.<sup>76</sup>

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## III. U.S. Position on the Draft Cultural Diversity Convention

### A. Background

The United States had little opportunity to state publicly its position on the Cultural Diversity Convention until it rejoined UNESCO in October, 2003. By that time the initiative, which had already been under discussion informally for several years, had been formally placed on the UNESCO agenda.

In the UNESCO setting, the U.S. response focused on the Convention's implications for both human rights and international trade. While the U.S. responded to the possible human rights implications of the Convention in broad generic terms, its objections to the Convention's trade implications were far more specific and legalistic, indicating serious concern with the Convention's possible impact on current and future trade negotiations, both bilateral and multilateral.

Reflecting concern that the Convention could have an effect in multiple policy settings, the United States pursued its campaign on the Convention in both UNESCO and in the WTO. Negotiations in UNESCO were led by the State Department, which took the lead in developing talking points on human rights; negotiations in the WTO were led by the Office of the U.S. Trade Representative (USTR), which took the lead in developing talking points on trade. In the final months before the Convention's adoption, the National Security Council (NSC) took over interagency policy coordination and strategy development for the Convention.<sup>77</sup>

Whether emphasizing human rights or trade, most U.S. statements on the Convention shared several themes:

1. The United States was careful to avow support for the concept of "cultural diversity," recognizing that the term resonated favorably with most UNESCO delegations. U.S. statements usually began with some variation on the statement that "the United States is among the most culturally diverse countries in the world,"<sup>78</sup> or that the United States is the most "open country in the world to the diversity of the world's cultures, people, and products."<sup>79</sup>

2. U.S. statements often included examples of U.S. programs providing support to diverse cultures in the United States, such as the National Heritage Fellowships, one of which was awarded to a Navajo weaver, another of which was awarded to an Italian American who created the San Francisco Opera House.<sup>80</sup>

3. The United States, wishing to appear "cooperative" in negotiating the Convention, carefully avoided outright criticism of the Convention or its objectives. Instead, U.S. comments focused on requests for specific language changes to the draft, of which there were many. Pointing to UNESCO's tradition as a consensus organization, the United States said that it would eventually support the Convention if the clarifications requested by the United States to the "hastily drafted" language could be made. "The U.S. wanted to see a successful outcome to the negotiations," said Jane Cowley who, as Deputy Director for the State Department's Office of UNESCO Affairs, managed the U.S. delegation to UNESCO. "We honestly wanted to end up with something to support."<sup>81</sup>

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## B. Human Rights Implications of the Convention

In addressing the Convention's human rights implications, the United States focused on the possibility that the Convention's vague language could easily justify government-imposed restrictions on freedom of expression, including censorship and limitations on press freedom, and suppression of minority rights. If the Convention were, for example, to be used to restrict access to foreign or minority views in the name of protecting cultural diversity, then, the United States pointed out, the Convention could "undermine UNESCO's constitutional obligation' to promote the free flow of ideas by word and image."<sup>82</sup>

Underlying U.S. comments on the Convention's human rights implications was the message that the Convention was, in fact, more likely to restrict cultural diversity than promote it. Speaking to the General Conference Plenary after the Convention's adoption, Ambassador Louise Oliver stated: "The Convention as now drafted, is aimed at reaffirming the rights of states to put in place policies that could be used or abused to control the cultural lives of their citizens – policies that a state might use to control what its citizen can see; what they can read; what they can listen to; and what they can do. We believe that all people have the right to make these decisions for themselves."<sup>83</sup>

The United States also linked the Convention's potential for human rights abuses to the Convention's unstated trade agenda. In her address to the General Conference Plenary, Ambassador Oliver referred to "disturbing statements by some government leaders who have indicated a clear intention to use this Convention to control – not facilitate – the flow of goods, services, and ideas..." By attempting "to block the import of agricultural and other products from the developing world and others," said Ambassador Oliver, "those leaders would extend the Convention's reach into trade matters, for which there is no justification... The goal of the United States is to ensure the free flow of diversity in all its forms – cultural, informational, and trade."<sup>84</sup>

## C. Trade Implications of the Convention

As expressed in various statements by U.S. officials, U.S. concerns over the Convention's possible impact on trade centered on the Convention's broad and vaguely defined scope, sweeping operational mandates, and ambiguous provisions outlining the relationship between the Convention and other international agreements.<sup>85</sup>

U.S. officials recognized that supporters of the Convention were motivated in large part by the dominant position of American motion picture exports in most markets. They were concerned, however, that because the scope of the Convention was broad and ill-defined, its provisions could be interpreted to extend far beyond motion pictures, touching on any service, good, or agricultural product that might be viewed as being related to cultural expression.<sup>86</sup>

Concerns over the broad and undefined scope of the Convention were heightened by the Convention's sweeping provisions concerning implementation. Paragraph 1 of the Convention's Article 6, "Right of parties at the

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national level,” reads that “each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.”<sup>87</sup> So broadly cast was this language, some argued, that it could be misread as providing countries with broad authorization to impose an unlimited range of trade restrictive measures in the name of “protecting” cultural diversity.

In an effort to explicate the broad, unintended consequences of the Diversity Convention to foreign officials, U.S. negotiators emphasized that the document could function as a double-edged sword. They pointed out that while the Convention could give Country A the right to restrict imports in the name of “diversity of cultural expression,” using the same justification, the Convention could be used by other countries to restrict exports from Country A. To drive home this point, U.S. negotiators compiled a broad listing of goods, services and agricultural products that could be considered to represent “cultural expressions.” The listing included textiles, magazines, books written in a foreign language, coffee, foie gras,<sup>88</sup> new world wines,<sup>89</sup> geographical indications (GIs), and a traditional farming way of life.

The United States refrained from publicly addressing the anti-Hollywood sentiments that animated so much of the support for the Convention, a position paralleling MPAA’s decision to avoid making its high-profile member companies a target of recrimination (see discussion below, p. 25). In addition to maintaining a common front with its domestic film industry, the United States had additional reasons for avoiding any reference to Hollywood in its public statements: In the WTO, for example, Australia, Argentina and Chile were attracted to the U.S. position on the Convention because, as New World wine exporters, they were concerned that the Convention could be misread to give a country, e.g., France, the right to restrict wine imports in the name of cultural diversity.<sup>90</sup> These same countries would have been unlikely to support the United States in opposing the Convention, however, had U.S. negotiators linked opposition to the Convention with a defense of the American motion picture industry.

In crafting a trade response, U.S. negotiators were especially concerned by the so-called “Saving’s Clause” of the Convention (Article 20),<sup>91</sup> a section that conveyed mixed signals about the relationship of the Convention to other international agreements.<sup>92</sup> Article 20 first provides that the Convention should not be interpreted as modifying rights and obligations under any other treaties. Confusing the situation, however, Article 20 also states that the Convention is not subordinated to those other treaties and must be taken into account when interpreting and applying the provisions of other treaties. So unclear was Article 20 that the interpretation of the section “was disputed even among EU members, with the UK saying the provision ‘did not permit the exclusion of cultural goods and services’ and France saying that it did.”<sup>93</sup>

According to statements by U.S. officials, Article 20’s message on the relationship between the Convention and other international agreements could “be misinterpreted as support for...major world markets to shut out goods and services from developing and other markets.”<sup>94</sup> Further, the ambiguity of Article 20 could “impair rights and obligations under other international agreements [including the WTO] and adversely impact prospects for successful completion of the Doha Development Round of negotiations.”<sup>95</sup>

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Trade officials also expressed concerns about Article 21 of the Convention, which obligates Parties to “promote the principles and objectives of this Convention in other international forums.” By making “consultation and coordination ‘with other international forums’ a key element in the application of Article 20,” the article could be widely misunderstood as further justification for Parties to block or limit progress in future trade talks on any matters bearing on cultural goods and services.<sup>96</sup>

Finally, U.S. negotiators worried that the EU and Canada were rushing the Convention through the UNESCO process in order to create justification for WTO members to demand that the WTO ministerial declaration at the forthcoming Hong Kong Ministerial (December 2005) include references to culture and the special nature of cultural goods and services in the WTO.<sup>97</sup> Should such an effort succeed, a foundation would be established for the introduction of protectionist “culture” arguments across a range of negotiating groups, i.e., agriculture, services, intellectual property, complicating any hope for a successful outcome to the Doha Round.

## IV. Reactions to the U.S. Position on the Cultural Diversity Convention

### A. Background

When it became clear, in the summer of 2005, that Cultural Diversity Convention advocates had assembled an irreversible network of supporting delegations, U.S. strategy shifted gears. In the final weeks before the UNESCO General Conference voted in October 2005 to adopt the Cultural Diversity Convention, the United States undertook a series of high level efforts to persuade member delegations to delay adopting the Convention until the Convention’s vague and misleading language could be clarified, thereby permitting the Convention to be adopted by consensus. Secretary of State Condoleezza Rice sent a letter to all the Foreign Ministers of the Member States of UNESCO on October 4, urging them to prolong discussion of the draft convention, and expressing concern that this convention “could be misused by governments to legitimize . . .controls over the flow of information, . . .suppress minority cultural practices (for example, the wearing of head scarves)” and, if adopted, “could also have a chilling effect on on-going negotiations at the WTO.”<sup>98</sup>

Despite such high-level communication, and the strenuous efforts of U.S. negotiators in both UNESCO and the WTO to delay the Convention’s adoption, the United States remained almost totally isolated in both its opposition to the Convention and its desire to postpone a final vote. On October 20, by a vote of 148 to 2, the General Conference adopted the Convention. Out of 154 members voting on the Convention, only four – Australia, Nicaragua, Honduras and Liberia – abstained from voting, and Israel alone joined the United States in opposition to the Convention. The lopsided outcome of the vote provides a measurable indication of the serious challenges that U.S. negotiators faced in UNESCO and the WTO throughout the negotiating process.

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## B. UNESCO Negotiating Dynamics

### 1. *Limited appeal of the U.S. message*

Most UNESCO delegates were not trade specialists, but were instead drawn from their respective countries' ministries of culture. These delegates, aware of the difficulties faced by their domestic motion picture producers when attempting to enter the U.S. market, especially resented the dominance of U.S. motion picture imports in their home market. As such, they were favorably predisposed to the Convention's vague language supporting "cultural diversity," "national identity" and "cultural sovereignty."

Non-U.S. cultural leaders had no reason to be sympathetic to the United States in the matter of trade in media in general, and film in particular. "Since the mid-1990s," writes David Waterman, American films "routinely account[ed] for more than half the box office in ... France, Germany, Italy, the United Kingdom, and Japan,..." while domestic filmmakers in these countries saw "an inverse pattern of decline in the market share of domestically produced movies,..., a trade pattern repeated in most countries worldwide."<sup>99</sup> In consequence, the United States was a ready target for the cultural aspirations and frustrations of many UNESCO delegates.

In contrast to the broad appeal of the Convention's vaguely defined "cultural diversity" message, the U.S. position on the Convention – often couched in legalistic trade terminology – was of little interest to most UNESCO delegates.<sup>100</sup> Trade arguments did not resonate with cultural leaders, a disconnect that was especially apparent in debate over the import of the Convention's Article 20, an issue (noted above, p. 17) of particular concern to the U.S. delegation.

While some UNESCO delegations included trade officials who were impressed with trade arguments presented by the U.S., these officials were in the minority, and in the UNESCO setting were unable to prevail in disagreements with their colleagues from the culture ministries. Other delegations, including close allies of the United States, discounted the trade implications of the Convention, believing that U.S. concerns over Article 20 were exaggerated.<sup>101</sup> Still others stood off to the side, having been encouraged to believe that the Cultural Diversity Convention was really *only* about trade, and so was essentially a French-U.S. issue that had little to do with them.

In addition to the limited appeal of the trade arguments that formed the core of the U.S. position, U.S. introductory remarks avowing support for "cultural diversity" appeared self-serving to countries resentful of the overwhelming presence of American films in their market. Rhetorical examples selected to illustrate U.S. appreciation for minority cultures in the United States failed to address concerns of delegations interested mostly in how the United States might assist them to foster their own cultural development, not in how the United States was supporting cultural diversity at home. In addition, references to U.S. openness to the diversity of the world's "people" rang hollow in light of visa problems that an increasing number of foreign artists encountered in attempting to come to the United States.

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Rather than winning the allegiance of delegations to the U.S. position on the Cultural Diversity Convention, U.S. statements on cultural diversity instead largely served to reinforce the impression that the United States was indifferent to, or incapable of, understanding, the pent up frustrations that animated so much of the discussion on the Convention.<sup>102</sup> The difficulty the U.S. encountered in formulating a message on culture to win advocates for its position suggests the need to consider developing policies better designed to engage culture on its own terms in international forums.

## *2. Absence of financial incentives*

In contrast to the financial pledges offered by Canada and France to support the Convention's Cultural Diversity Fund, the United States made no effort to counterbalance such offers with incentives of its own, either in the form of direct funding of specific cultural projects to promote cultural diversity or technical training in such areas as preservation of indigenous cultures, marketing, or the use of communication technologies to promote cultural diversity.

The absence of U.S. financial incentives was not the result of a failure to appreciate the financial challenges facing developing countries in the cultural area. "We are of course aware of the particular problems faced by developing countries as they try to modernize their countries while maintaining their traditional cultures," said Ambassador Oliver, speaking to the UNESCO Executive Board in September 2005, adding that "we are pitching in to help."<sup>103</sup> The United States, however, was already in the position of funding 22% of UNESCO's budget,<sup>104</sup> and was not prepared to devote additional resources to the voluntary Cultural Fund: "As we all know," continued Ambassador Oliver, "the United States is by far the largest donor of public and private funds to developing countries. In 2004 the United States contributed \$19 billion in official government assistance, and approximately \$50 billion in private grants, remittances, and private investment from U.S. citizens."<sup>105</sup>

Continuing to emphasize that trade was the best way to achieve cultural diversity, Ambassador Oliver extended her statement to point out that "In addition to being the largest donor in the world, the United States is also the largest consumer of exports from the developing world with approximately \$393 billion last year in net imports, more than 70% of the combined G7 balance." Linking trade to economic development as the solution for developing countries, Ambassador Oliver concluded that "Stronger economies will enable developing countries to nurture and promote their own unique cultures, thereby increasing cultural diversity."<sup>106</sup> Left unaddressed, however, was the plight of developing countries not yet at a level to take advantage of the benefits that trade could offer to their cultural sector.

Behind the official rhetoric and economic justification for the U.S. refusal to offer financial incentives specifically targeted to promote cultural diversity were more fundamental issues: Some U.S. delegates considered that Canada and the EU were engaged in "buying votes" to gain support for the Convention and objected to asking the U.S. delegation to "stoop" to such a tactic.<sup>107</sup> More generally, cultural issues were historically not high priority issues for the U.S. government, and UNESCO was, at best, considered only a marginal international

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organization as a forum for representing and advancing U.S. interests. *The Wall Street Journal* described UNESCO as “once a byword for corruption and anti-Americanism,” and greeted the U.S. decision to return to membership with the comment that “It’s hardly a new dawn for the United Nations Education, Scientific and Cultural Organization and we hope the Bush Administration is prepared to pull out again if the troubled agency reverts to its bad habits.”<sup>108</sup>

The U.S. private sector, too, having decided to adopt a low public profile on the Convention (see below, p. 25), showed no interest in influencing the outcome on the Convention by funding UNESCO cultural projects. MPAA representatives, when approached with the suggestion that they help to fund a UNESCO cultural development program, replied in the negative.

It is unclear if the U.S. decision to not compete with Canada or the EU in offering financial initiatives for cultural development was justified or prudent; Ambassador Oliver’s use of trade references and issues in a statement to an audience composed primarily of officials from culture ministries is also of questionable value. And culture ministers concerned with developing their film sector might have wondered why the country whose movie industry dominated foreign markets worldwide was unwilling to provide the same level of assistance to their film sector as that offered by Canada and France.

### *3. Institutional Challenges of the UNESCO Negotiations*

The timing of debate over the Cultural Diversity Convention did not serve U.S. interests, and U.S. negotiators, arriving late to the formal negotiations in UNESCO, encountered an ambivalent reception and an intractable process. Under President Reagan in 1983, the United States withdrew from UNESCO in protest over UNESCO’s promotion of a New World Information Order, viewed as a threat to freedom of the press, and to express concern over charges of corruption and mismanagement of UNESCO funds.

When the United States rejoined UNESCO in 2003, after a nineteen-year absence, a number of delegations were uncertain of U.S. “loyalty” to the institution and looked with suspicion on U.S. motives in opposing the Convention. A number of countries dismissed U.S. concerns over the human rights and trade implications of the Convention, believing that even if requested language changes were made, at the end of the day the United States would not sign on to the Convention.<sup>109</sup> In their view, the U.S. position was not really about refining the language of the Convention, but represented a mere tactic designed to delay the Convention’s adoption until after the Hong Kong Ministerial.

Suspicions about U.S. motives contributed to what several U.S. negotiators described as an atmosphere of “unveiled anti-U.S. hostility,” in which several U.S. interventions were met with jeers in the meeting room.<sup>110</sup> In a stinging rebuke to the Intergovernmental Committee, U.S. delegation Co-chair Robert S. Martin, delivering the U.S. delegation’s final statement at the conclusion of the meeting, said: “The manner in which the Intergovernmental Meetings have been conducted has inhibited rather than encouraged negotiation and deliberation. The rules of procedure – as well as UNESCO’s normal practices – have been inconsistently

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applied and at time completely ignored... What we have done here in the past week has undermined the spirit of consensus that normally characterizes the work of UNESCO. It will surely weaken UNESCO's reputation as a responsible, thoughtful international organization.”<sup>111</sup>

It is important to remember that Canada launched its diversity strategy in 1998, and negotiation of the Convention within UNESCO was under way before the United States returned to UNESCO in October 2003; the late arrival of the United States to the Convention negotiating scene “compounded” the procedural irregularities the U.S. delegation encountered. According to Ambassador Oliver, the United States was confronted with a text of the Cultural Diversity Convention whose “fundamental, underlying ideas “were [already] agreed upon...”<sup>112</sup> Explaining U.S. opposition to the Convention to the General Conference after the October vote for adoption, Ambassador Oliver referred to the “flawed process that produced this Convention,” pointing specifically to the fact that the U.S. delegation had “not been afforded either the time or the opportunity for a serious negotiation of this draft text, which was subsequently adopted by vote at the end of the May intergovernmental meeting.”<sup>113</sup>

## C. WTO Negotiating Dynamics

### *1. Procedural Challenges*

Unlike UNESCO, the major challenges the United States encountered in building support for its position on the Convention in the WTO, and with trade officials in general, did not stem from the content of its message or procedural irregularities. In the WTO, the U.S. perspective on the possible trade implications of the Convention resounded effectively with an audience knowledgeable about, and interested in, trade. Countries such as Australia, Argentina and Chile were alarmed by the U.S. argument that the undefined scope of the Convention could extend its reach to agricultural products, in particular wine. They, and other countries, were also sympathetic to U.S. concerns about the unpredictable effects of the Convention's Article 20.

Eleventh-hour efforts by U.S. officials to stop or delay adoption of the Cultural Diversity Convention failed in the UNESCO context – a setting dominated by cultural concerns and a deep resentment of the global hegemony of U.S. arts industries. Engagement with the WTO, an entity devoted to trade issues, proved equally challenging, but for different reasons. Here, the United States faced largely procedural issues: How were the views of some, but not all, WTO members to be transmitted to UNESCO by the WTO and, if transmitted, how to ensure that those views would in fact be taken into account in the drafting of the Convention? Further, on an individual-country basis, how could the reservations held by trade officials and expressed in the WTO context be meaningfully communicated to the cultural specialists who made up the same nation's UNESCO delegation? The absence of agreed-upon procedures for developing these views and communicating them from one international organization to another effectively prevented the concerns of trade officials from influencing the course of events in UNESCO.

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## 2. *Informal Meeting of November 11, 2004*

In November 2003, at U.S. insistence, the UNESCO General Conference adopted a resolution (32C/Resolution 34) directing its Director General to consult with the WTO in the matter of drafting the Cultural Diversity Convention.<sup>114</sup> On the basis of that resolution, UNESCO's Director General Matsura invited the WTO to provide comments on the Convention. WTO Director General Supachai responded that, because the WTO defined itself as a member driven organization, he "understood that consultations with the WTO meant consultations with the WTO membership, which were distinct from consultations between the Secretariats of two international organizations..."<sup>115</sup> To this end Supachai called an informal consultative session for November 11, 2004, to exchange the views of various delegations on the draft Convention.<sup>116</sup> He then sent to Matsura, without attribution to specific delegations, a summary reflecting the different views expressed at the November 11 meeting.

The summary report that Supachai conveyed to Matsura indicated there was no consensus on the Convention among trade officials. According to the summary, "Many underscored the importance of cultural diversity in reflecting national identity and values, and highlighted its contribution to the development process as well as international peace and social cohesion. For many, cultural diversity was a national attribute, and its promotion was a key objective. Several delegations also indicated that they supported, in principle, the concept of a Convention on cultural diversity at UNESCO. Many believed that cultural and trade objectives were mutually supportive and that both trade agreements and the proposed Convention could and should complement each other."<sup>117</sup>

The summary went on to state that "Most delegations expressed concerns of varying degrees regarding the contents of the preliminary draft." Of particular concern was that the draft carried the potential for conflict or inconsistencies with WTO obligations and ongoing negotiations in various areas (goods, services, intellectual property, development). However, the report also noted that "other delegations...attached importance to the recognition of the special nature...of cultural goods and services, which... should be subject to special treatment and could not be treated, under WTO law, as other goods and services,"<sup>118</sup> i.e. the cultural exception.

It was clear that the Convention raised serious trade concerns among a number of WTO members, but in the absence of a consensus on the issue, the summary made no recommendations. While UNESCO was under no obligation to take the WTO report into account in negotiating the Cultural Diversity Convention (32C/Resolution 34 directed the Director General only to "consult" with the WTO) the report's absence of specific recommendations made the non-attributed concerns expressed by some WTO members easier to ignore. In fact, there is no record that Matsura ever responded to the summary Supachai provided, nor that the WTO summary was ever formally considered in the UNESCO discussions of the Convention. The UNESCO Director General evidently believed that, having requested WTO views on the Convention, and having received a non-specific response, his responsibility to consult with the WTO had been fully discharged.

From the WTO side, too, no further communication was transmitted to UNESCO in the matter of the Convention. Pascal Lamy, a Frenchman and former EC Commissioner of Trade who succeeded Supachai to

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the post of WTO Director General in September 2005, made it clear that he had no intention of initiating any further communication to UNESCO on the matter. French Minister of Culture Renaud Donnedieu de Vabres, for example, in a meeting with Lamy in September 2005, asked the World Trade Organization to stay out of the current UNESCO debate on the adoption of the Convention, stating that the “WTO has no place imposing rules in the drafting of a UNESCO document.” Lamy responded that, since there was no consensus within the WTO on the issue of cultural diversity, “he was therefore unable to take a position on the matter.”<sup>119</sup>

While it is tempting to attribute the apparent differences between Supachai and Lamy on the issue of communicating with UNESCO to Lamy's views on culture,<sup>120</sup> it is useful to consider the procedural differences in the two situations: Supachai's decision to transmit the Summary Report to UNESCO was based on agreement among WTO members that the WTO should respond to UNESCO's request for their views on the subject. For Lamy, no such consensus among WTO members existed, for UNESCO had made no second request for WTO views on the Convention. In the absence of consensus on the procedural issue, it is not clear on what basis Lamy could have undertaken a communication to UNESCO in the name of WTO Members.

### *3. Relationship between WTO and UNESCO Delegations*

The problems the United States encountered in attempting to have concerns with the Convention of some WTO Members transmitted to UNESCO and taken into account in drafting the text of the Convention were replicated in the relationship between trade delegates to the WTO and their cultural counterparts assigned to UNESCO.

We have already seen that members of Friends of Audiovisual Services – Singapore, Japan, Chinese Taipei, Mexico, Hong Kong China – and wine-exporting countries – Australia, New Zealand, Chile, and Argentina – supported the U.S. position on the Convention in whole or in part.<sup>121</sup> Putting aside Chinese Taipei, Hong Kong China, and Singapore, who were not UNESCO members, not one of the countries indicating support for the U.S. position on the Convention at the WTO – Japan, Mexico, Australia, New Zealand, Chile, and Argentina – supported the United States in voting to oppose the Convention (although among these countries Australia did abstain in the final vote). Only Israel joined the United States in actually voting against adoption.

Trade officials explained this apparent inconsistency in their country's position by pointing out to their U.S. colleagues that, in the area of culture, they had no authority to override colleagues from the Ministry of Culture. In the October 20, 2004, WTO meeting to discuss the UNESCO Convention, for example, the Australian delegate highlighted the multilateral environmental agreement as an example of how “negotiations of this nature sometimes failed to adequately take account of the need for coherence and complementarity in Members' endeavors.” He spoke of the need to ensure an “appropriate inter-agency coordination to guarantee a whole-of-government approach on the draft Convention and its relationship to the WTO.”<sup>122</sup> It is apparent that, in the matter of the Cultural Diversity Convention, no such coordination took place. And, as we have seen, culture officials, suspicious of U.S. motives in objecting to the Convention, overrode the trade concerns of their colleagues on the grounds that trade issues were outside the domain of UNESCO.

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The problems the United States encountered in having its trade concerns transmitted to UNESCO, or to individual country culture officials, underscore the double bind in which the United States found itself in opposing provisions of the Convention: its criticism of the Convention in UNESCO was suspect on numerous grounds and the justification of its position in terms of trade was ill-suited to the task of gaining the support of culture officials. Within the WTO, where the trade message of the United States found a more receptive audience, trade officials, whether working through the WTO structure or on an individual basis, were unable or unwilling to convince their culture counterparts to take their concerns into account in drafting and voting on the Convention.

## V. Assessment and Recommendation

### A. Assessment

#### 1. *The U.S. Response*

In the initial period of the Convention's development (1998-2003), efforts by Canada and France to win support for the proposal did not attract a high-level attention within the U.S. Government. Lacking a Minister of Culture or Secretary of Cultural Affairs, U.S. officials who attended these meetings, including the Chairman of the National Endowment for the Arts (NEA), were granted only observer status. Their meeting reports to the State Department of growing support for the Cultural Diversity Convention were largely ignored.<sup>123</sup>

The Cultural Diversity Convention received high-level political attention only after the UNESCO Intergovernmental Committee meeting in June 2005, when it became apparent that the Convention would be adopted at the October meeting of the UNESCO General Conference. When the Convention did receive high-level attention, with Secretary of State Rice writing (but, significantly, not telephoning) her counterparts to urge delay, her objections focused on trade and human rights implications of the Convention.

MPAA staff had closely followed development of the diversity agenda beginning in 1998. Lacking a representative voice in the early meetings, however, they were not positioned to affect the movement's progress directly, though they maintained regular contacts on the issue with officials at State and USTR. After the June 2005 Intergovernmental Committee vote, they concluded that adoption of the Convention was inevitable.

While MPAA member companies worried that the Convention could affect their commercial interests, they remained determined to maintain a low profile in debate on the issue to avoid emerging as an unwilling rallying point for Convention supporters. Given the power of movies as a symbol of U.S. domination, it would have been far too easy for proponents of the Convention to claim that their case was validated by objections from those they viewed as the very embodiment of "cultural imperialism."<sup>124</sup> The industry's position complemented the U.S. government's decision to focus objections to the Convention on its trade and human rights implications, avoiding any specific mention of motion picture issues.

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The Convention was formally ratified in March 2006. Though it is too early to draw any definitive conclusions about its impact, as of the writing of this report (March 2008), the Convention's practical effect appears to be minimal. Canada and France have satisfied their political constituencies that the two countries have finally created a de facto *exception culturelle*, but neither has shown signs of invoking the Convention to justify further trade restrictions on American film (and television) imports. In the ongoing WTO Doha Round services negotiations, some countries have linked absence of audiovisual commitments to discussions on cultural diversity, though under GATS rules they did not need the Convention to do so.

Perhaps the most significant impact of the Convention to date is seen in efforts to incorporate references to the Cultural Diversity Convention in international agreements pending in other fora. A specific reference to the Convention was included, for example, in the draft treaty under consideration at the World Intellectual Property Organization (cf. Article 3 on the Protection and Promotion of Cultural Diversity in the Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations). In addition, references to diverse cultural content and expressions have been incorporated into the United Nations World Summit on the Information Society documents. The jury is still out, however, on the practical impact of such rhetorical references to the Convention in international instruments.

In terms of trade and human rights objectives, the decision of U.S. government officials to first go on record stating reasons for opposing the Convention, but to then not belabor the issue publicly once the Convention was passed, appears to have had the positive effect of minimizing political fallout. The same may be said of the private sector's decision to sustain the low profile adopted from the outset of the negotiations – a low-key posture that was validated when it became clear that adoption of the Convention could be neither halted nor delayed.

Reflecting the absence of serious attention to cultural issues that characterized the U.S. position on the Cultural Diversity Convention, neither U.S. government officials nor the U.S. private sector has yet to consider the deeper, underlying issues that galvanized support for the Convention – charges of U.S. “cultural hegemony” and complaints that the U.S. market was unreceptive to foreign films. Although difficult to design and implement, programs that address the deep resentment attendant to the power of U.S. film exports can have positive results that influence perceptions of America *vis a vis* the outside world.

## 2. *Unaddressed Issues*

American movies owe much of their global success to sophisticated technology and internationally recognized movie stars, combined with stories that possess cross-cultural appeal. But U.S. films also owe much to American film distributors, who possess a worldwide distribution network and well-honed marketing skills that ensure the movies they distribute reach movie theaters worldwide. The role of U.S. film distributors is well understood by foreign filmmakers, many of whom are eager to have their own work distributed by one of the major U.S. distributors, or the subsidiaries that some U.S. distributors have created for independent and foreign films better suited for the art house circuit. The North American industry has distribution down to “an art form,”

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commented an Antiguan film producer discussing the “huge” challenge of distributing his films, domestically as well as internationally.<sup>125</sup>

The issue of foreign filmmakers seeking to obtain distribution by U.S. film distributors is not new.<sup>126</sup> In the 1980's, when motion picture trade issues were first addressed in the nascent GATS, members of the U.S. delegation were queried by the French on why, with American films dominating French movie theaters, it was so difficult for French films to obtain distribution in the United States. The response that Americans are resistant to subtitled or dubbed films, and are unacquainted with most French movie stars (because the French do not spend as much advertising and marketing their films as do their American counterparts) did little to assuage the suspicion that hidden trade barriers were responsible for keeping French films out of the American marketplace.<sup>127</sup>

After the conclusion of the Uruguay Round in 1994, Jack Valenti, then President of the MPAA met with French Government officials and producers in an effort to dampen some of the hostility that the audiovisual issues had generated in the final days of the negotiations. French officials asked Valenti to have his member companies agree to distribute a certain number of French films in the United States. Valenti refused, explaining that his member companies had a responsibility to their shareholders to make decisions solely on the basis of commercial considerations.<sup>128</sup>

The importance of film distribution and marketing to foreign filmmakers was by no means limited to French producers. “Europe has traditionally concentrated nearly all of its energies on one part of the industry – production – and largely ignored changes to the marketing, distribution and exhibition networks which could possibly have put more foreign films on the screens, and achieved a higher level of box office popularity,” writes David Puttnam.<sup>129</sup> “As a producer, I can make the most thrilling or challenging movie imaginable,” he continues, “but unless I have a well-thought-out arrangement with an effective worldwide distribution resource, one which understands how to market a film in different countries and when necessary to different audiences, I am, to a great extent, wasting my time.”<sup>130</sup>

Developing countries too, have expressed concern over their limited ability to distribute the movies they create. At a 2004 World Bank Workshop on Broadcasting and Development, sponsored in conjunction with the Discovery Channel and the American Film Institute (AFI), one of the most important issues that emerged for developing country participants was to learn how to distribute and market their artistic product. As one film producer explained, “There is no lack of creative talent in our countries, but we have no idea how to market the product we have created.”<sup>131</sup>

Effective distribution and marketing of a film is closely tied to both its initial financing and to its commercial and artistic success. Because the economics of the movie business are such that even low-budget films have difficulty in recouping their initial investment if distribution is limited to the domestic market, a wider, even a global, audience provides local movie producers, often heavily dependent on government subsidies, with an increased degree of financial independence. Financial independence in turn affords filmmakers the means to

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introduce the advanced technology so much admired in American movies.<sup>132</sup> More broadly, assisting producers to maximize market opportunities, going beyond film festivals to include the full chain of distribution – from theatrical exhibition to DVD and television exhibition -- will increase the potential for a return on investment and help the film sector to generate employment and revenue for the economy as a whole.

Beyond the economics of film distribution, however, lie the broader issues of cultural diversity, cultural identity, and cultural sovereignty, as reflected in the UNESCO Convention negotiations. The worldwide popularity of motion pictures has made them an important vehicle to express the filmmaker's story, which often reflects his culture, to both domestic and international markets. "You have to come from somewhere," says Taiwan-born director Ang Lee, speaking of the role his films play in preserving periods of China's history for the next generation. "Whether it's in the elite culture or pop culture, you just need to come from somewhere."<sup>133</sup>

Ang Lee's statement underscores that when foreigners object to the dominant presence of U.S. films in their market, and question what they suspect are hidden trade barriers keeping their movies out of the United States, they are expressing far more than commercial concerns. They are expressing resentment at being denied the opportunity to express their culture through the medium of movies they have created, as American films are able to do in their country. To many, the issue becomes one of cultural disrespect.

## B. Recommendation: Focus on Film Distribution

A number of current professional development programs for foreign filmmakers focus on the production, or creative, aspects of filmmaking – screen writing, acting, directing, filming and editing. MPAA's Latin America offices, for example, have organized a series of programs, including a Film Production and Screenwriting Training Program. The AFI, in alliance with several U.S. government agencies, currently sponsors the "20/20" project, under the Global Cultural Initiative, designed to bring foreign film directors in contact with their American counterparts.<sup>134</sup>

Left largely unaddressed by public and private sector programs, however, is the distribution and marketing of motion pictures, the very skills necessary to ensure a film's commercial and artistic success. Effective distribution of a film includes developing a marketing strategy to maximize a film's earning potential in different available media and mounting an advertising campaign to support the film's marketing strategy. MPAA provides some briefing materials on film distribution to foreign filmmakers, but these materials are general in nature and focus largely on the absence of U.S. government-imposed trade restrictions. They are of little practical benefit to filmmakers with scant understanding of the U.S. market.

Given the importance of film distribution to foreign filmmakers, and the fact that various professional development programs have paid little attention to the issue, a film distribution program, carried out in conjunction with film experts to assist filmmakers in formulating a comprehensive market strategy in the international marketplace, constitutes a programmatic intervention that will produce significant positive policy outcomes.

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The film distribution program will adopt a two-pronged approach: It will explain the realities of the international market place, with a special focus on the structure and challenges of the U.S. market. Attention will be given to the normal release sequence in the United States, which starts with theatrical distribution and then moves to pay-per-view or video-on-demand, home video/DVD sales, pay TV, cable and satellite distribution, foreign TV, U.S. network TV, and syndication. The program will also discuss different distribution options available to filmmakers worldwide, including, but not limited to, distribution in the United States.

Participants in the program, in addition to filmmakers, will include concerned government officials (e.g., from culture, communications, trade, and foreign affairs ministries, among others) and leading local and regional opinion makers. To establish credibility with participants, the program must be led by experienced film distributors, either currently active in the industry or teaching at leading film schools in the United States.

## VI. Proposal: How to Navigate the World of Media Distribution<sup>135</sup>

### A. Realities of the international marketplace

Many foreign filmmakers, inspired by success stories of such films as *The Full Monty* (1997), *Life is Beautiful* (1998), *Crouching Tiger, Hidden Dragon* (2000), and *Amelie* (2001), hope to have their film picked up by an American distributor for theatrical distribution in the United States and abroad. They understand that while theatrical release is not the most profitable window, it “is considered the most important stage in the lifecycle of a film – how well it does in the theaters has a great impact on how it does in all of the other ancillary markets”<sup>136</sup>

In reality, however, such success stories are few and far between: In the U.S. market today, foreign-language films are usually not able to generate large enough audiences to support the huge expenses of theatrical distribution, which in turn severely limits their eventual distribution in other media. “Americans have always had a notorious distaste for foreign movies, but their lack of interest appears to have become even more pronounced in recent years...,” writes David Waterman, pointing out “that since at least 1990, no foreign movie has made it onto the list of top ten American box office films.”<sup>137</sup>

To avoid creating unfulfilled expectations about the possibilities for achieving theatrical distribution in the United States (and undermining the program’s objective of improving the image of the United States abroad), the film distribution program, while explaining to filmmakers how they might obtain theatrical distribution in the United States, should also explain the challenges of the American marketplace.

In the United States, distribution of a motion picture is costly, and chances of commercial success uncertain. According to Bonnie Richardson, MPAA’s Former Vice President for Trade and Federal Affairs, “Jack Valenti used to estimate that only about twenty percent of the films of MPAA member companies earned a profit after theatrical release. About forty percent of films returned a profit after distribution in all media.”<sup>138</sup>

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Movie studios, that have a responsibility to their stockholders, are not risk takers, and to minimize the chances of failure they select films that offer a proven track record of success. Most foreign films do not possess “star power” (a Javier Bardem or Penelope Cruz) or well-known director (Ang Lee) or “high production values” that drive audiences to see the film, and so are unable to provide such a track record unless they are made by a team that has produced a recent hit or won several prizes at major film festivals.

To fill the gap between film festival showcasing and desired U.S. theatrical distribution, the film distribution program should, in addition to discussing possibilities for theatrical distribution in the United States, also present to foreign filmmakers a series of alternative distribution options on which to develop a marketing strategy for their film. Such alternative distribution options, which are discussed below, may serve a dual purpose: In the short term they would offer foreign filmmakers strategies to identify local or regional distribution opportunities; in the long term, by solidifying local and regional markets, they may also offer strategies to develop a track record for the film's box office prospects, and to obtain U.S. distribution.

## B. Distribution Options

### *The Film Festival and Film Market Route to Distribution*

Today, film festivals, which are held world wide, offer an important venue for foreign and independent filmmakers to showcase their films to distributors. Film markets, too, attended by buyers and sellers worldwide, offer an important opportunity for filmmakers to sell uncommitted rights to their films. Film markets are also key to preselling the rights to a film before the film is made, based on its script, director, and other key elements. Obtaining financing and securing distribution rights at a film market not only makes the film more commercially viable, but assists the filmmaker to establish a track record for the financing and distribution of his next production.

For filmmakers following the film festival or film market route to find a distributor, the film distribution program will:

1. Assist the filmmaker to appraise realistically the film he has made (mainstream or “art”), a necessary starting point for finding an appropriate film distributor;
2. Provide information on the numerous film festivals and markets where a filmmaker may submit his film, indicating which may offer the most receptive venue for the type of film he has made;
3. (For film festivals only) Explain the importance of garnering positive critical acclaim for a film from the print media; suggest strategies on how to garner such acclaim, especially from local newspapers covering a film's opening. Even after finding a distributor, a film festival award becomes critical to a film's success;

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4. Provide guidance by U.S. professionals that most foreign producers and even distributors lack on how to find and approach a distributor specializing in a given type of film;
5. Inform the filmmaker of the technical details required (separate music and sound effects tracks, production photos, underlying contracts) to make the final sale, i.e., the licensing agreement, to a distributor;
6. Explain the major piracy issues facing filmmakers worldwide today and the means available to ensure intellectual property protection; also provide information on the numerous U.S. government and private sector intellectual property training programs that currently exist; and
7. Explain the challenges of developing and implementing an economically effective marketing and advertising strategy for the film in different markets domestically and worldwide, assisting the filmmaker to work effectively with a distributor, once one is found.

## Alternative Distribution Opportunities

For filmmakers unsuccessful in finding a distributor on the international film festival or film market circuit, the film distribution program will suggest the following alternative approaches:

1. DVD distribution. An increasing number of foreign film producers are looking to the “direct to DVD” market as the foundation to their distribution strategies. A DVD release, which is relatively inexpensive, can provide the filmmaker a return on his investment, once he has made a run through the film festival circuit. “You don’t have to sell a lot of DVDs to break even on lower budget movies,” says film consultant Peter Broderick. “If filmmakers can figure out a way to sell ten or fifteen thousand DVDs over time, over the world that can be enough to get them into the black. Once they’ve got those names and email addresses they can take that to other projects.”<sup>139</sup>
2. Direct negotiation with small movie theaters. Small production companies may have their own distribution arm to deal directly with distributors in each market or may hire a sales agent, such as a member of the Independent Film and Television Alliance (IFTA), who has specialized marketplace knowledge and relationships with producers and buyers worldwide. Mexican film producer Pablo Cruz, for example, formed his own distribution company, Canana, which negotiates directly with small “mom and pop” movie theaters found in Hispanic communities spread out in California, Texas and Florida. (Canana also has a deal with Focus Films, the specialty film unit of Universal Pictures distributing primarily independent and foreign films.)<sup>140</sup>
3. Self-distribution. In this model, the filmmaker bypasses the traditional distribution model and assumes direct responsibility for the marketing and distribution of his film. One example of self-distribution is “four-walling,” where the film-maker rents a movie theater to exhibit his film. The goal is not only to “find the audience” for his film, but to garner favorable press reviews in targeted markets. This model was successfully utilized by “My Big Fat Greek Wedding,” targeting Greek communities throughout the United States.

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4. Establish and operate a Satellite Distribution Channel. The film distribution program could consider establishment and operation of a Satellite Distribution Channel (SDC) to showcase foreign films in the United States.<sup>141</sup> As envisioned, the SDC would be available for a fee to all multi-channel video distribution platforms – e.g., cable and direct broadcast satellite (DBS). Such a channel, which might be called “Voice of the World,” could serve as an analogue to the Voice of America (U.S. government-based) or CSPAN (private sector-based), providing “the world” access to U.S. viewers.

The suggested SDC could showcase foreign films on a country-specific, regional, or multiple-country basis. Reactions by viewers and film critics to films exhibited on “Voice of the World” could be incorporated into the channel’s film program, helping foreign filmmakers to establish their reputation. Because showing films on a “free to air” channel will impact sales in other media, particularly theatrical and DVD distribution, the SCD, with its showcase potential, is likely to be especially useful for film festival winners who have exhausted other exhibition opportunities.

In fact, the suggestion to develop a foreign film Satellite Distribution Channel has been foreshadowed by the recent announcement of an undertaking by the Global Perspective Project to exhibit documentaries made by foreign filmmakers for the purpose of “bring[ing] more foreign perspectives to Americans....”<sup>142</sup> Funding for Global Perspective Project’s showing of foreign documentaries, which serves public diplomacy purposes, is currently being provided by grants from three foundations.

While the economics of the documentary film market differ significantly from those for feature-length films in terms of cost, job-creation, and expression of a country’s “cultural identity,” because fees paid to the SDC by cable and DBS distributors may not be sufficient to fund the enterprise fully, at least initially, it will be of interest to explore whether the Global Perspective Project could be expanded to include feature-length foreign films.

5. Develop regional distribution networks. A number of Latin America filmmakers have expressed interest in creating a Latin American distribution network that, at a minimum, would distribute Latin American films to art houses and alternative theaters throughout the region. While many Latin American films are showcased in Latin American film festivals, these films are rarely picked up by distributors for distribution outside the home country, despite the fact that “The ‘natural market’ for many developing country films may well be regional markets rather than US or Europe.”<sup>143</sup>

A program focused on the development of regional distribution networks represents a promising distribution alternative for film distribution. “The cultural distance within regional markets is likely to be smaller, thus their films are likely to be more popular with regional audiences” suggests Bonnie Richardson, and so “it is likely to be much easier to gain success in regional distribution first and then work on distributing to the U.S.” With the assurance of success in the region, “the distributor of a very successful regional film might then take the time and money to seek wider distribution.”<sup>144</sup> Currently, there is no distribution network that distributes films within Latin America, and both filmmakers and their governments are seeking ways to reach a wider audience in the region.

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Development of a regional distribution network would require that technical assistance be provided to filmmakers, many of whom lack the business experience required to make a regional network successful. Taken in this direction, the film distribution program will need to address strategies to maximize the earning potential of a film, evaluation of various platforms, negotiation of contracts with exhibitors, and the development and implementation of an advertising campaign. Tactics for approaching Latin distributors, many of whom are now based in Miami, or reaching out to a network of art house theatres, will also need to be addressed.

6. Partner with American studios investing in local language film production. U.S. motion picture studios have recently announced partnership agreements with film studios in India, Hong Kong, Germany, France, and Abu Dhabi, among others. These partnership agreements represent an alternative to U.S. film exports: instead of distributing American films in an effort to compete with locally produced product, U.S. film studios are currently partnering with local filmmakers to create indigenous films, in the local language, designed to appeal primarily to citizenry of the country of origin.

To date, working within the stated intention of producing an “authentic” indigenous product (which has shown to have greater appeal on both the domestic and foreign markets than, for example, an “India-lite” production), U.S. studios have reportedly left artistic freedom to local film producers. Indian director Sanjay Leela Bhansali, the director of *Saawariya*, has reported, for example, his “surprise” that “There was no compromise asked of the film.”<sup>145</sup> Some skeptical commentators, however, such as Tyler Cowen, author of “Creative Destruction: How Globalization is Changing the World’s Cultures,” note that it is unusual for Hollywood “to try to copy the native style so exactly,” suggesting “That [it] is unusual for a reason. It usually doesn’t work.”<sup>146</sup>

Examples of local language film production are not limited to India, though that country’s enormous market for local productions has been a magnet for U.S. studios. Dramatic examples of non-U.S. content in films financed by American companies abound “Harry Potter,” reports Bonnie Richardson, “is completely British – author, actors, location of the filming, and probably the vast majority of technical staff as well. The only thing that was American was the company that funded and distributed the production internationally.”<sup>147</sup> Similarly, *Un Long Dimanche de Fiancailles* (A Very Long Engagement) is a one hundred percent French film, although released by Warner Pictures.

Filmmakers outside the United States, in addition to benefiting from the infusion of foreign capital and technical expertise through local language film production, also benefit from distribution opportunities to audiences worldwide. While the details of each production agreement vary, in general the Hollywood studio finances the production and shares in the profits accruing from local distribution while retaining the rights to global distribution of the film. Because the U.S. company has a vested interest in the widest possible audience, the film will be distributed regionally and even globally if it shows promise.

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## 7. Internet Distribution of Motion Pictures.

Streaming and direct downloading of digital content are considered by many to be the most important technical advance to confront the film and video industries in recent years. These technologies provide an efficient global reach, offering a broad and inexpensive range of video distribution opportunities accessible literally anywhere on earth by a growing number of people with broadband capability.

Major U.S. studios, for example, have pursued online distribution options by offering feature-length films already available on DVD for video-streaming and legal downloading through MovieLink, a joint venture of MGM, Paramount, Sony, Universal and Warner Bros. (Movieline has since been sold to Blockbusters.)<sup>148</sup> For small filmmakers, Internet distribution is heralded as the one form of media where the small producer “can compete on the same level as a major studio... Creating an effective Internet presence does not necessitate having an immense staff or a mammoth budget. The greatest advantage of the Internet is that a single individual can create the same footprint as a Fortune 500 company with a cleverly designed and executed site. ...”.<sup>149</sup> Filmmakers who have already exploited DVD opportunities, for example, find the Internet a low cost and useful “calling card” to bring attention to their film.

These new technologies have, however, raised questions covering a range of technical, legal, and economic issues. “Concerns about piracy and counterfeiting have meant that many of the online distribution models must use DRM [Digital Rights Management],... requiring consumers to use digital content in ways that appear more restrictive than DVD purchases or rentals. ...”<sup>150</sup> reports a soon-to-be-released OECD study on the Internet, while Mark Litwak, for the Entertainment Law Resources, notes that “traditional distributors perform an important marketing function that an Internet distributor may not be able to fulfill. It’s wonderful to be able to put your film up on the Internet, but how do you get consumers to visit your site and view your film?” he asks.<sup>151</sup> And, pointing out that internet distributors do not at this time provide a revenue stream for filmmakers, Carol Bidault of MediaFusion asks “how do you get consumers to pay for the films that they watch?.”

While in the short to medium term the Internet does not appear to offer a panacea to the financial and distribution challenges that filmmakers face in today’s market,<sup>152</sup> the proposed film distribution program is nonetheless designed to provide technical and legal support to assist filmmakers in making use of the Internet’s current worldwide showcase potential. Use of the Internet has the further appeal of challenging countries who voted for the Cultural Diversity Convention to allow their citizens Internet access to the cultural expressions of other countries.<sup>153</sup>

## C. Implementation of the Proposal

Implementation of the film distribution program can be carried out through a voluntary private/public partnership. NEA and the National Endowment for the Humanities or the Agency for International Development could provide administrative support for funding from the U.S. government side, with representatives from MPAA, IFTA, the National Cable and Telecommunications Association (NCTA), and

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DirecTV and Echostar cooperating within the private sector. The growing number of foundations concerned with improving America's image abroad could be another source to help fund the film distribution program.

To ensure that a U.S.-sponsored film distribution program has a maximum impact in improving foreigners' image of the United States, careful thought needs to be given to how to "brand" the program. To what extent should the film distribution program be presented as an initiative of the U.S. government, as one offered by a partnership between the U.S. government and the U.S. film community, solely by the U.S. film community, or by some quasi-private film organizations such as the American Film Institute?

It might well be preferable, for instance, that "branding" of such a program concentrate on publicizing participation by the U.S. private sector, whose film production and distribution expertise is the subject of worldwide admiration. To maximize the impact of the film distribution program, consideration may also be given to including in such branding the current film development programs (mostly on the production side) currently being carried out on an individual basis by some U.S. film studios.

## D. A "Win-Win" Situation

In order for a U.S.-sponsored film distribution program to maintain credibility with its foreign participants, it will be important that neither the U.S. government nor its private sector participants appear to have a vested interest in the program's success, beyond quantifying the successful deployment of film distribution expertise to non-U.S. filmmakers around the world. Improving film distribution opportunities for foreigners and educating them about market realities will, however, offer benefits to both the U.S. private sector and, from the public diplomacy perspective, to the U.S. government, creating a "win-win" situation for all involved.

The proposed film distribution program, including its "alternative distribution opportunities," will, for example, benefit U.S. film distributors by providing more ready access to a larger pool of market-tested new ideas and fresh talent often found in foreign films. U.S. viewers, too, would benefit from greater access to a variety of foreign films. The inclusion of intellectual property protection on the program's agenda helps to engage foreign filmmakers in support of the antipiracy campaign so important to the U.S. film industry today. As foreign filmmakers learn of available opportunities to distribute their films, they come to have a vested interest in intellectual property enforcement to protect their own creative product.

More broadly speaking, helping foreign filmmakers find appropriate distribution for their films translates into increased export activity, improving, as a consequence, the negotiating climate for audiovisual services in both bilateral and multilateral trade negotiations. Increased export activity, such as that which can be achieved through a regional film distribution network, may also result in some filmmakers directly encountering regional trade barriers, an experience likely to foster a greater interest on their part in removing restrictions through trade negotiations.

In the Doha Round negotiations, for example, active support for liberalization of audiovisual services came only

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from those countries that already possessed strong motion picture export interests – the United States, Japan, Mexico, Chinese Taipei, Hong Kong China, Singapore. Increasing opportunities for more countries to become film exporters through expanded distribution opportunities would increase the circle of players with a vested interest in open markets for motion picture exports.

Finally, providing professional development in film distribution will also advance trade liberalization for the sector by educating trade officials about the business of film distribution and its broader economic implications. One of the challenges of negotiating audiovisual services at the WTO is that most trade officials do not understand the commercial activities involved in film distribution, and thus are wary of making commitments – even those that would likely benefit their own film community. For example, local movie directors may benefit from the artistic and technical stimulation provided by film imports, movie theater owners often benefit from an audience attracted by U.S. film imports and, as discussed in the WTO Council on Trade in Services, “market access commitments in the sector [have] benefited the domestic industry by introducing new technologies, which increased network use and encouraged investment in digital networks.”<sup>154</sup>

The U.S. cable and satellite industry might benefit from the proposed Satellite Distribution Channel proposal by serving the significant American niche audience interested in foreign films. Following appropriate conversation with regulators, cable and satellite transmission of foreign films might also serve as a way for cable/DBS to meet public interest obligations, such as FCC DBS requirement to set aside 4% capacity for educational programming, and cable public access requirements.

In addition, creation of a foreign Satellite Distribution Channel would benefit U.S. motion picture distributors by bringing to their attention talented directors and movie stars. This would be especially the case if the foreign film channel were to include comments by film critics and viewers that gauge public reaction to the film.

From the public diplomacy perspective, our film distribution program reflects a new approach to the use of U.S. motion picture expertise for public diplomacy purposes. Past programs, such as those sponsored by the USIA, have relied largely on using selected motion pictures to tell our story as a means of improving foreigners’ perception of the United States. Such programs have been part of what may be termed an “outreach” approach, aimed at delivering a specific message about the United States to foreigners.

In contrast to public diplomacy programs designed to “send” a message, the film distribution program proposed here is about *listening*, offering foreigners the opportunity to tell their story. The approach conveys respect for different cultures and at the same time provides support for local artists and business leaders to take greater control over their cultural policies, an issue whose importance was clearly manifest in references to “cultural sovereignty” that appeared repeatedly during negotiation of the Cultural Diversity Convention.

At a time when so many nations fear a loss of cultural identity, and couple that fear with resentment of what is perceived to be self-serving, unilateral U.S. action, a professional training in film distribution that provides foreigners opportunities to make their story known may be a small, but constructive, first step in mitigating the perception that the United States is unconcerned with the views and sentiments of other nations.

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## APPENDIX

### Issues Requiring Further Discussion

This report and its recommendations raise a number of issues that warrant further discussion, some of which are outlined below.

#### A. Trade in Motion Pictures: National and International Markets

1. Would it be helpful to carry out a study detailing film distribution and marketing activities and pointing to current trends in the U.S. marketplace? In particular, would it be useful to look at changes in film distribution that have occurred as a result of new technologies? How do these changes affect relative newcomers to the film distribution scene?
2. Would a study of cultural subsidies around the world, perhaps focusing on film distribution, be a useful complement to this report? Should such a study be carried out by a university or by an international organization, such as the WTO or OECD? A study on subsidies could, for example, consider the general issues of the economic rationale for subsidies and whether it is justifiable to use subsidies to address the issue of market failure. It could also be useful if a study on film subsidies were to address the question of whether such subsidies are GATS consistent.
3. Would it be useful to develop general principles on audiovisual services trade? If so, where should these principles be developed? In the GATS? Through the proposed film distribution program? Through a group of likeminded countries that includes those who joined with the United States in the GATS Friends of Audiovisual Services?

#### B. Public Diplomacy/Cultural Diplomacy

1. Requests for the United States to provide cultural assistance funding are considered by many to have little chance for success. How should such requests be formulated to have greater prospects for approval? Should the U.S. government allocate more funds for cultural assistance?
2. To whom should cultural assistance funds be targeted? If aimed at film distribution, for example, should they target big producers such as India, Egypt, or China, or can they make it on their own? Should Latin America be targeted, since the U.S. sub-market is fairly large? To the extent that several U.S. companies are already investing in local language film production and distribution, is there a role for a U.S. government-sponsored program, and, if so, what should that role be?
3. Might the Cultural Diversity Convention negotiation have played out differently had there been better coordinated public diplomacy efforts or the equivalent of a Ministry of Culture? What are examples of issues that are currently not being adequately addressed because the U.S. does not have the equivalent of a Ministry of Culture? If the United States were to create an office devoted to cultural policy issues, what should be its mandate?

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## Endnotes

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