

Stellungnahme zu Handen der Schweizer Unesco-Kommission

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1. Vorbemerkungen

Wenn wir nachfolgend Empfehlungen für eine Schweizer Position – also zu Handen der Schweizer Delegation bei den Verhandlungen bei der UNESCO – abgeben, leiten uns die folgenden Überlegungen:

Die Schweizer Delegation muss in erster Linie die Grundsätze im Auge haben, die in den Verhandlungen zu verfolgen bzw. zu verteidigen sind. Unsere Detailvorschläge dienen dazu, bei den Verhandlungen über einzelne Artikel ggf. im Sinne der Vorschläge Vorstösse anderer Länder zu unterstützen oder zurückzuweisen, und eigene Vorstösse der Schweizer Delegation anzuregen.

Die nachfolgenden Änderungsvorschläge basieren auf den jahrelangen Vorarbeiten des INCD (Réseau International pour la Diversité Culturelle), an denen Suisseculture teilgenommen hat.

2. Grundsätze

1. Das Abkommen muss **in erster Linie völkerrechtlich gültige Normen definieren**, die den Staaten das Recht geben, überall dort, wo sie zur Förderung, Entwicklung und Sicherung der kulturellen Vielfalt Handlungsbedarf sehen, zu legiferieren, zu fördern oder Vorschriften zu erlassen.

Das Abkommen muss verpflichtend sein und muss effiziente Methoden für die Differenzbereinigung und für die Durchsetzung enthalten.

Wir haben berechtigte Hoffnungen, dass die Schweiz diese Grundhaltung vertreten wird:

»Unseres Erachtens ist es keineswegs an der WTO, Kulturpolitik zu formulieren – aber es geht um Schnittstellen. Aber mittelfristig wird es darum gehen, *dass die WTO nicht nur die nationalen Gesundheits-, Sozial- und Umweltpolitiken zu respektieren hat, wie das heute festgeschrieben ist, sondern auch die Politiken zur Förderung der kulturellen Vielfalt*. Eine zeitlich beschränkte Ausnahmeregelung, wie das GATS sie heute vorsieht, wird den Bedürfnissen einer dynamischen Kulturpolitik nicht gerecht. Die internationalen Grundsätze der kulturellen Vielfalt sollen in der UNESCO-Konvention verankert werden, und dabei wird auf geeignete Weise sicherzustellen sein, dass die internationalen Handelspolitiken an diesen Grundsätzen Halt machen. Kulturelle Vielfalt ist kein blosses kulturpoli-

tisches Anliegen, es ist ein gesellschaftspolitischer Parameter für die Zivilisation.«

Marc Wehrlin, Stellvertretender Direktor und Leiter der Sektion Film im Bundesamt für Kultur. – Nach: Sonderdruck SSA 3. www.ssa.ch]

Analog zu bestehenden generellen Ausnahmen in WTO/GATS¹ zB. betreffend den militärischen Bereich müssen die Staaten ihre volle Souveränität bei der Gestaltung ihrer Kulturpolitik behalten.

2. Das Abkommen muss *klarstellen, dass kulturelle Güter nicht Handelswaren im üblichen Sinn sind.*

Schutz der Kulturellen Diversität bedeutet auch *Schutz der Kunstfreiheit vor den Kräften des Marktes* – sowohl im Bereich der Produktion wie jenem der Konsumtion.²

3. Die *zentrale Rolle der Künstler/innen* muss in der Konvention festgehalten sein; die Respektierung des geistigen Eigentums gehört zu deren Festigung.

4. Die entwickelten Länder müssen verpflichtet werden, in ihrem Bereich der Kunst- und Kulturproduktion unterentwickelter Ländern die Präsenz und den Marktzugang zu sichern.

5. Aufzählungen von Anwendungsbereichen und Methoden dürfen keinen abschließenden Charakter haben, sondern nur Richtungen andeuten.

3. Einzelnes

3.1. Beziehungen zur bestehenden Abkommen

3.1.1. Artikel 19

Article 19 – Relationship to other instruments [Draft]

Option A

1. Nothing in this Convention may be interpreted as affecting the rights and obligations of the States Parties under any existing international instrument relating to intellectual property rights to which they are parties.

2. The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.

Option B

Nothing in this Convention shall affect the rights and obligations of the States Parties under any other existing international instruments.

Aus den oben unter 2.1 genannten Gründen muss den im Entwurf stehende Option B dezidiert zurückgewiesen werden.

Die Option A sollte in nachfolgendem Sinne geändert werden:

“The provisions of this Convention shall not derogate from existing rights and obligations of any State Party deriving from any other international agreement, except where the exercise of those rights and obligations would damage or threaten the diversity of cultural expressions, or where State Parties explicitly

¹ »Maßnahmen, die erforderlich sind um die guten Sitten oder die öffentliche Ordnung aufrechtzuerhalten ... das Leben oder die Gesundheit von Menschen, Tieren oder Pflanzen zu schützen (Art. XIV), sowie »Die Bestimmungen ... hindern ein Mitglied nicht daran: ... Massnahmen zu treffen, die nach seiner Auffassung zum Schutz seiner wesentlichen Sicherheitsinteressen notwendig sind... « (Art. XIVbis, Abkommen zur Errichtung der Welthandelsorganisation SR 0.632.20).

² In den entwickelten Ländern ist die Kunstfreiheit oft nicht so sehr von der politischen oder moralischen Zensur bedroht, vielmehr von der Zensur des Marktes.

agree that the provisions of this Convention shall apply in a dispute between them.”

3.1.2. Artikel 13

Article 13 – International consultation and coordination

States Parties shall **bear in mind** the objectives of this Convention when making any international commitments. They undertake, as appropriate, to promote its principles and objectives in other international fora. ■ For these purposes, States Parties shall consult each other within UNESCO in order to develop common approaches.

Die Signatarstaaten müssen Verpflichtungen, die sie in Handelsabkommen (wie WTO, GATS) eingegangen sind, ändern können, sofern sie die Kulturelle Vielfalt bedrohen. Aus diesem Grunde sollte im Art. 13 das unverbindliche «bear in mind»/«gardent à l'esprit» durch «give priority to» ersetzt, sowie zwischen den 2. und 3. Satz die folgende Ergänzung eingefügt werden:

"In particular, State Parties shall co-operate to develop a mechanism through which a State Party may, without penalty or requirements for compensation, modify or qualify a commitment or undertaking it has made for purposes of the General Agreement on Trade in Services or other international trade agreements, to the extent that the exercise of such an obligation has a negative consequence for the objectives and principles of this Convention."

3.1.3. Artikel 21

Article 21 – Intergovernmental Committee

1. An Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter referred to as "the Intergovernmental Committee") shall be established within UNESCO. It shall be composed of representatives of 18 States Parties, elected by the General Assembly of States Parties upon the entry into force of this Convention pursuant to Article 28. The Committee shall meet once a year.

2. The number of States Members of the Intergovernmental Committee shall be increased to 24 once the number of States Parties to the Convention reaches 50.

3. Without prejudice to the other responsibilities conferred upon it by this Convention, the functions of the Committee shall be:

- (a) to promote the objectives of this Convention, and to encourage and monitor the implementation thereof;
- (b) to prepare and submit for approval by the General Assembly operational guidelines for the implementation and application of the provisions of the Convention in different situations;
- (c) to transmit to the General Assembly summary reports from States Parties, together with general comments;
- (d) to establish the Cultural Diversity Observatory as defined in Article 15;
- (e) to draw up criteria, rules and operational guidelines aimed at supporting the establishment of partnerships;
- (f) to propose appropriate actions to be taken in situations brought to its attention by States Parties in accordance with Article 8;

(g) to establish procedures and other mechanisms for consultation aimed at promoting the principles and objectives of this Convention in other international arenas;

(h) to determine, in consultation with international financial institutions and development banks, mechanisms for allocating a share of international financing to international cooperation in favour of the diversity of cultural expressions;

(i) to establish such subsidiary bodies as may be useful for the efficient implementation of the Convention;

(j) to consult the Advisory Group on a regular basis in order to ensure the promotion of the objectives of this Convention and its implementation.

Es sollte gesichert werden, dass künftige zwischenstaatliche Abkommen die vorliegende Konvention berücksichtigen. Daher wäre der Bst. g folgendermassen zu verbessern:

"to establish procedures and other mechanisms for consultation aimed at promoting the principles and objectives of this Convention in other international arenas and to ensure coherence between the rights and obligations of this Convention and any other international convention or treaty entered into or amended after this Convention comes into force."

3.2. Rolle der Künstlerinnen und Künstler

Im Zentrum einer nationalen und regionalen Kultur stehen die Künstler/innen. Deren Rolle muss im Abkommen unbedingt verdeutlicht werden. Nur die Künstler schöpfen, was »kultureller Ausdruck« ist, ohne Kreativität gibt es keinen »cultural content«. In der Konvention fehlt bisher jede Erwähnung dieser fundamentalen Rolle.

In den Artikel 6 (Rights of States Parties at the national level) wäre als (f) neu einzuführen:

"f) measures that recognize the fundamental role and importance of the artist and creator in societies and that promote their economic well being and social status in conformity with UNESCO's Recommendations concerning the Status of the Artist."

Die Kreativität der Menschen kann aber nur ausgeschöpft werden, wenn deren künstlerische Äusserungen einen angemessenen Schutz erhalten. Das geeignete Mittel dazu ist das Geistige Eigentum. Die Kreativität und deren Schutz durch das Geistige Eigentum werden in der Präambel erwähnt. Das ist zu begrüßen, ist aber unseres Erachtens nicht ausreichend.

Wir schlagen deshalb vor, den Respekt vor der Kreativität und den Schutz des Geistigen Eigentum als eigenständigen Grundsatz zu formulieren und in Art. 2 zu verankern. Dies ist umso mehr gerechtfertigt, als die Staaten durch Art. 7 Ziff. 2 lit. b des VE zur Respektierung der Immaterialgüterrechte und zur Anwendung der diesbezüglichen internationalen Abkommen verpflichtet sind.

Artikel 2, neuer Absatz:

«10. **Principe du respect de la créativité et des droits de propriété intellectuelle**
Etant donné le rôle vital de l'acte créateur, les droits de propriété intellectuelle doivent être respectés et appliqués, de sorte que les intérêts patrimoniaux et moraux des créateurs soient sauvegardés.»

Art 7 - 2. States Parties shall also ensure:

(a) that the legal and social status of artists and creators is fully recognized, in conformity with international existing instruments, so that their central role in nurturing the diversity of cultural expressions is enhanced;

(b) that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy.

Artikel 7 – 2 [Obligation de promotion de la diversité des expressions culturelles]

«(b) que les droits de propriété intellectuelle soient pleinement respectés et appliqués en vertu des accords internationaux existants, cas échéant sans porter atteinte à un plus haut niveau de protection instauré par la législation nationale, en particulier par le développement ou le renforcement de mesures de lutte contre la piraterie.»

3.3. Service Public

Der Service Public und seine Institutionen sind in vielen Ländern ein zentrales Element zur Sicherung und Förderung der Kulturellen Vielfalt.

Section III.1 – Rights and obligations at the national level

Article 6 – Rights of States Parties at the national level

1. Within the framework of its cultural policies as defined in Article 4.7, and taking into account its own particular circumstances and needs, each State Party may adopt measures, especially regulatory and financial measures, aimed at protecting and promoting the diversity of cultural expressions within its territory, particularly in cases where such expressions are threatened or in a situation of vulnerability.

2. Such measures may include the following:

(a) measures which in an appropriate manner reserve a certain space for domestic cultural goods and services among all those available within the national territory, in order to ensure opportunities for their production, distribution, dissemination and consumption, and include, where appropriate, provisions relating to the language used for the above-mentioned goods and services;

(b) measures which guarantee independent cultural industries effective access to the means of producing, disseminating and distributing cultural goods and services;

(c) measures which grant public financial aid; in granting such aid, States Parties may determine the nature, amount and beneficiaries thereof;

(d) measures which promote the free exchange and circulation of ideas, cultural expressions, and cultural goods and services, encourage non-profit organizations, and stimulate the entrepreneurial spirit;

(e) measures which encourage and support public service institutions.

Die Konvention muss in diesem Punkt expliziter sein. In den Artikel 6 sollte die folgende, verbesserte Version des Abschnitts (e) aufgenommen werden:

"e) measures which establish public service institutions, including public service broadcasters, libraries, archives, galleries, museums and such other institutions that a State Party deems to be an institution that performs a public function; define their remit; provide for their funding in whole or in part; and facilitate and encourage public access to them."

Entsprechend im Anhang II.1.4:

Annexe II 1.4

Promoting pluralism, cultural and linguistic diversity in and for the information society: policies that enhance media pluralism and develop community, linguistic and minority services in public radio and television and on the World Wide Web; policies to digitalize archives, museums and libraries and facilitate access to that content; policies that educate and train children in the use of new media technologies; develop research on the relationship between culture and its dissemination in the media and through new communication services; promote cultural contents in formal and non formal education and the learning of mother tongues as well as of foreign languages (see Article 5 of the UNESCO Universal Declaration on Cultural Diversity);

Die zu enge Fassung des Bereichs zulässiger öffentlicher Politiken muss korrigiert werden:

"Promoting pluralism, cultural and linguistic diversity in and for the information society: policies that enhance media pluralism and develop and promote content relevant for the democratic, social and cultural needs of society, including, but not limited to, community, linguistic and minority services and provided, for example, by public service content providers on traditional or new platforms, storage devices and networks, including the Internet ..." (Balance as in proposed draft).

3.4. Entwicklung / Austausch

Die Konvention muss die Massnahmen zu Gunsten der Entwicklungsländer sehr viel deutlicher herausarbeiten.

Die in Art. 16 (e)³ angesprochenen Massnahmen sind wirkungsvoll umzusetzen. Die entwickelten Länder müssen konkreter verpflichtet werden, die Präsenz der Kulturgüter wenig entwickelter Ländern zu erhöhen.

Article 17 – Preferential treatment for developing countries

Developed countries shall facilitate cultural exchanges with developing countries and least developed countries by granting appropriate preferential treatment to their professionals, artists and other creators as well as to their cultural goods and services.

"1. Developed countries shall facilitate cultural exchanges with and the development of creative capacity and cultural industries within developing countries and least developed countries by granting preferential treatment to their creators, professionals, artists and cultural goods and services.

2. Each developed country shall commit to increasing the share of its domestic market that is occupied by creators, professionals, artists and cultural goods and services from developing countries and least developed countries. The Intergovernmental Committee, on the advice of the Advisory Group, shall establish within two years of the coming into force of this Convention, the appropriate targets and definitions necessary to implement this obligation and the measurements, tests and benchmarks to ensure adherence. Each developed country shall have five years from the establishment of such targets or from its accession to the Convention, whichever is the latter, to implement such targets. "

3.5. Weitere Verbesserungsvorschläge zu verschiedenen Themen

Art.2.2. Principle of fundamental freedoms

Cultural diversity can be protected and promoted only if fundamental freedoms such as freedom of expression, information and communication as well as the ability of individuals to choose cultural expressions are guaranteed.

"Cultural diversity can be protected and promoted only if fundamental freedoms such as freedom of expression, information and their corollary, pluralism of the media, as well as the ability of individuals to choose cultural expressions, are guaranteed."

Art. 4.5. Cultural industries

The term "Cultural industries" refers to industries producing cultural goods and services as defined above.

"The term 'cultural industries' refers to industries creating, producing, publishing, distributing, exhibiting, collecting, storing, preserving, providing, selling or otherwise dealing with cultural goods and services as defined above.

³ (e) other forms of financial and technical assistance, such as the establishment of an International Fund for Cultural Diversity, the modalities of which would be determined by the Intergovernmental Committee, or the provision of low-interest loans and grants to stimulate and support creativity;

Article 6

2. Such measures may include the following:

(a) measures which in an appropriate manner reserve a certain space for domestic cultural goods and services among all those available within the national territory, in order to ensure opportunities for their production, distribution, dissemination and consumption, and include, where appropriate, provisions relating to the language used for the above-mentioned goods and services;

(b) measures which guarantee independent cultural industries effective access to the means of producing, disseminating and distributing cultural goods and services;

(c) measures which grant public financial aid; in granting such aid, States Parties may determine the nature, amount and beneficiaries thereof;

(d) measures which promote the free exchange and circulation of ideas, cultural expressions, and cultural goods and services, encourage non-profit organizations, and stimulate the entrepreneurial spirit;

(e) measures which encourage and support public service institutions.

"(a) measures which in an appropriate manner reserve sufficient space for domestic cultural goods and services among all those available within the national territory, in order to ensure opportunities across all media, platforms, networks and devices, and independent of the technologies used for their production, distribution, dissemination and consumption, and include, where appropriate, provisions relating to the language used for such goods and services;"

"(b) measures which guarantee independent cultural industries effective access to the means of producing, disseminating and distributing cultural goods and services; State Parties may implement measures that provide advantages or favour firms or businesses that are owned and controlled by its nationals;"

"(c) measures which grant direct or indirect public financial aid; in granting such aid, State Parties may determine the nature, amount and beneficiaries therefore, and may limit access exclusively to its nationals."

7.2 (c) (neuer Absatz betreffend Kulturverträglichkeit aller Gesetze)

Art 7 - 2. States Parties shall also ensure:

(a) that the legal and social status of artists and creators is fully recognized, in conformity with international existing instruments, so that their central role in nurturing the diversity of cultural expressions is enhanced;

(b) that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy.

"(c) that cultural rights and policies are taken into due account in all of their other policy areas."

Appendix I (Audiovisual and new media)

Audiovisual and new media: film, video recording, radio and television programmes, entertainment software (video games, educational programmes, etc.), Internet creativity sites, virtual reality, broadband video broadcasting (videostreaming), etc.; radio and television services, radio broadcasting service, services for the production, distribution, operation, dissemination and promotion of film, video recording, and radio and television programmes; royalties and licence fees;

"film, video recording and digital storage, music, radio and television programmes independent of the technical means of their production, delivery or dissemination; entertainment software (video games, etc.) and educational content; new media; Internet content relating to the cultural, social and democratic needs of society; virtual reality; broadband video broadcasting (video streaming); radio and television programmes and services, including broadcasting, services for the

production, distribution, operation, dissemination and promotion of film, video recording and digital storage; royalties and licence fees."

Appendix II.1, Absätze 6 und 7

Strengthening cultural industries: training schemes for national specialists, cultural administrators and managers; assisting artists, designers and craftspeople by safeguarding and improving the rights of creators;

Enhancing and supporting new and traditional media: support local/national production and distribution; develop innovative funding systems and foster the complementarity between public and private initiatives; support access to the new technologies;

ersetzen durch:

"Enhancing and supporting new and traditional media and strengthening cultural industries: support local and national production and distribution on all platforms, networks and devices; ensure plurality of the media through rules on ownership, including rules that prohibit or limit foreign ownership; strengthen existing funding systems and develop innovative new ones; foster complementarity between public and private initiatives; support access to new technologies and new media; training schemes for national specialists, cultural administrators and managers; assisting creators, artists, designers and craftspeople by safeguarding and improving the status of the artist."