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**FRENCH GOVERNMENT PAPER ARGUES FOR RECONSIDERATION OF EU CULTURAL COOPERATION PROTOCOL MODEL**

A strategy paper just released by the French Foreign and European Affairs Department argues for a rethinking of the cultural cooperation protocol recently incorporated by the European Union (EU) into its trade agreements. The document also makes the case for coordinated work among States to promote the principles and objectives of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in trade agreements and at the WTO consistent with Articles 20 and 21 of the Convention.

The document, entitled "For a new European Union external cultural strategy - Communication by France" focuses on two main themes.

First, it asserts that the UNESCO Convention must remain the spine of the entire European strategy in cultural matters. Then, it argues for the systematic and explicit exclusion of audiovisual services for any negotiation of a trade agreement between the EU and third countries.

So far, according to the document, the first two examples of cultural cooperation protocols attached to trade agreements by the EU—first with CARIFORUM states and most recently with South Korea—carry "the risk of allowing a de facto reintroduction of audiovisual services into trade negotiations, which is reflected in an excessive focus on access for audiovisual co-productions to European television broadcast quotas (...)".

The paper further warns that including provisions along the lines of 'market access' commitments in protocols linked to bilateral and regional trade negotiations carries the risk that the European Union could come under pressure to make similar commitments in a multilateral context—specifically, at the World Trade Organization.

Instead, the document argues for a strategy that is both comprehensive and adapted to the specific realities of each partner.

First and foremost, the approach must be comprehensive since any cultural cooperation initiative must have as its goal the effective implementation of the 2005 UNESCO Convention. The document underscores the importance of clearly establishing and maintaining a clear distinction between the cultural cooperation protocol or agreement and the economic or trade agreement. This distinction is essential in order to avoid the cultural sector becoming a bargaining chip in trade negotiations—and to ensure that any such agreement is not subordinated to trade-based rules and mechanisms.

Second, within this overarching approach, the content and type cooperation framework must be tailored to the particular circumstances of each partner. Fundamentally, two principal distinctions must be considered. The first involves the level of development of the cultural industries in the partner country. A determination can be made to resort to preferential treatment (implementation of Article 16 of the Convention) only if the partner has relatively under-developed industries.

The second key distinction hinges on whether or not the partner country has exercised exemptions from the most-favoured nation (MFN) clause in terms of its commitments at the World Trade Organization (WTO).

If the country has exercised such exemptions regarding culture, the cultural cooperation framework could then be legally divorced from the trade agreement and included in the cooperation segment of the comprehensive agreement.

The French paper argues that it is only in cases where such exemptions have not been established by a prospective partner that it is useful to attach the cultural cooperation framework to the trade agreement in order to accord the party certain preferential arrangements. Even in such situations, the paper emphasizes the importance of separating the negotiation of the content of the cooperation pact, and its subsequent application, from the trade processes.

Again, with the objective of avoiding any subordination of the cultural cooperation framework to the trade agreement, the document suggests incorporating specific safeguards, including specifically:

- during negotiations, having teams focused on the concerns of the cultural sector, with culture authorities having the lead role, and a negotiation timetable that is completely independent of the trade timetable.
- for the monitoring and implementation of the cultural cooperation frameworks, establishing a separate cultural cooperation committee and a specific dispute resolution mechanism.

Finally, the French document suggests that the EU bilateral and regional strategy ought to be part of a multilateral strategy. This should include actions by the EU to promote the UNESCO Convention at the WTO. To this end, it is crucial to implement Articles 20 and 21 of the Convention regarding the relationship to other international instruments. It is also important to closely follow the multilateral negotiations currently underway and to explain to new members of the WTO the risks inherent in making commitments in the cultural sector. Finally, the document states that it would be useful to develop a strategy for disputes arising at the WTO over the cultural sector.

The paper concludes by recommending that the EU continue to actively promote the implementation of the UNESCO Convention and its visibility.

The document has been circulated to relevant bodies of the European Commission, the European Parliament, to the offices of the incumbent and future Chairperson of the EU as well as to various European partners.

Its content was developed by a working group of representatives from various French government departments and cultural stakeholders, including the French Coalition for Cultural Diversity.

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## **VISIBILITY OF UNESCO CONVENTION, ONGOING RATIFICATION CHALLENGES, ON AGENDA OF DECEMBER INTERGOVERNMENTAL COMMITTEE SESSION**

The [third ordinary session](#) of the Intergovernmental Committee was held at UNESCO Headquarters in Paris from December 7-9, 2009. It was the first meeting of the Committee since the second phase of implementation of the Convention on the Diversity of Cultural Expressions was launched at the Conference of the Parties in June 2009.

The Committee discussed and approved proposed operational guidelines on measures intended to increase the visibility and the promotion of the Convention. They also launched work to develop operational guidelines for Articles 9 and 19, which focus on information-sharing and reporting processes among States and the UNESCO Secretariat regarding policies and measures taken to further diversity and the impact of these have had, and exchanges regarding best practices in this field.

Based on these exchanges, the Secretariat of the Convention will submit to the next meeting of the Committee preliminary drafts of operational guidelines for these two articles.

The Committee also adopted a strategy to encourage new ratifications, and approved a plan and schedule for launching the pilot phase of the International Fund for Cultural Diversity. So far, 104 States have ratified the Convention out of a total of 193 Member States of UNESCO. The strategy to foster new ratifications identifies two priority underrepresented regions, namely: Asia-Pacific and Arab States.

The International Federation of Coalitions for Cultural Diversity (IFCCD) was represented at this meeting of the Committee and addressed the main themes of the session. IFCCD President Rasmané Ouedraogo spoke on behalf of the Federation as well the United Cities and Local Governments, the NGO-UNESCO Liaison Committee, the International Music Council, the International Theatre Institute, the International Network for Cultural Diversity, Traditions for Tomorrow and the European Radio-Television Union.

Mr. Ouedraogo called on all Member States to contribute to the International Fund for Cultural Diversity on a recurring basis, noting that the number of contributing governments as well as the amount collected is so far clearly insufficient.

He also underscored the commitment of civil society to work towards urging more States to ratify the Convention, as well as increasing its visibility. He also recalled the duty incumbent on Member States to foster the active participation of civil society, as set out in Article 11—noting that this includes supporting civil society with the resources to meaningfully engage in this process.

Regarding articles 9 and 19 of the Convention, Mr. Ouedraogo stated that an open dialogue between the States and civil society was essential to effectively assessing measures taken by States to furthers cultural diversity and the exchange of best practices at the international level.

One noteworthy decision at the end of the December IGC session was the addition of an item to the agenda for its next meeting, which will take place in December of 2010: a stock-taking of the state of implementation and follow-up to the Convention by the Committee.

The IFCCD welcomes the addition of this agenda item. It opens the door to a discussion one important dimension of implementing the Convention that has not yet been addressed: the question of promoting the principles and objectives of the Convention in other international forums. This work is crucial to ensuring that the Convention becomes a touchstone when culture is discussed in other international forums—as was previously detailed in the October 2009 issue of Coalition Currents.

All the decisions made at the third session of the Committee, as well as the opening address by the new Director General of UNESCO, Mrs. Irina Bokova, in which she renews her commitment to the implementation of the Convention, are available online at the address below:

[http://portal.unesco.org/culture/en/ev.php-URL\\_ID=39859&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=39859&URL_DO=DO_TOPIC&URL_SECTION=201.html)

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## **JURISTS' NETWORK ROUNDTABLE FOCUSES ON IMPACT OF REFERENCES TO UNESCO CONVENTION IN OTHER INTERNATIONAL FORUMS**

In opening the second meeting of the International network of lawyers for the diversity of cultural expressions (RIJDEC), Professor Ivan Bernier emphasized that references to the UNESCO Convention on the Diversity of Cultural Expressions in other national and international forums will be an essential element of its life as a legal instrument.

For this reason, the RIJDEC decided to concentrate on this theme at a roundtable held December 5, 2009 in Paris on the eve of the meeting of the Intergovernmental Committee of the Convention.

Experts were invited to analyze two recent decisions by international legal bodies that make reference to the Convention: one handed down by the Court of Justice of the European Communities (CJEC); the other by the dispute resolution body of the World Trade Organization (WTO).

The first decision, namely *In the Matter of Unión de televisiones comerciales asociadas (UTECA)* (C-222/07, 2009), was presented by Gianpaolo Scacco from the Directorate General Information Society and Media of the European Commission.

In order to justify the fact that the objective of promotion of a language need not necessarily be accompanied by other cultural criteria in order to legitimize a restriction to the fundamental liberty of the internal market of the European Community, the judge relied on the UNESCO Convention to demonstrate the intrinsic link between language and culture. Specifically, he referred to the 14<sup>th</sup> paragraph of the preamble which states that "linguistic diversity is a fundamental element of cultural diversity".

According to the experts at the RIJDEC roundtable, this reference to the Convention in a decision of the Court, even if only to its preamble, is of considerable significance.

According to Jean-Christophe Barbato, Senior Lecturer in Public Law at the Université de Rouen and at the IEP of Paris, this reference has symbolic usefulness, since the European Union judge thereby underscores the importance he accords the Convention, demonstrating that the European Union's legal framework is taking the UNESCO Convention into account in its decisions.

According to Hélène Ruiz Fabri, Professor in Public Law at the Université de Paris 1 Panthéon-Sorbonne, this external reference (in international law) reinforces the positive legal influence of the Convention. The European Community ratified the Convention and its various bodies are taking this fact into account in their deliberations.

The second decision analyzed was that of the panel of the WTO with respect to the dispute between the *United States and China with respect to publications and audiovisual products*.

It is important to note that, at the time of the meeting of the RIJDEC, the appellate body of the WTO had not yet published its report dated December 21, 2009, in which it upheld most of the findings of the panel.

In this matter, the United States was challenging regulations in China with respect to trading rights and distribution services for certain publications and audiovisual entertainment products. In its arguments, China explained that its intent was to preserve public morality and it defended the unique nature of the cultural goods and services by citing the 2001 Universal Declaration of UNESCO on Cultural Diversity and the 2005 Convention on the Diversity of Cultural Expressions.

The WTO panel, in its report handed down on August 12, 2009, accepted the linkage between public morality and cultural property and referred to the UNESCO Declaration on Cultural Diversity.

In her comments, Professor H el ene Ruiz Fabri considered the possibility that bridges between WTO and the Convention could be developed through the concept of public morality.

This avenue could be explored, however with some precautions, since the concept of “public morality” still has negative connotations, particularly as it is applied by China as justification with control of content and censorship.

However, according to Professor Ruiz Fabri, the meaning of the notion of “public morality” could evolve and include concerns with respect to cultural diversity if, internationally, certain limits are recognized, for instance the duty not to impinge on human rights. Such an approach would be consistent with Principle 1 of the 2005 UNESCO Convention.

In brief, despite the difficulties associated with the concept of public morality, the decision handed down by the WTO in the matter of *United States – China with respect to publications and audiovisual products* demonstrates that the door is not closed consideration of the Convention in deliberations by bodies of the WTO.

Other avenues for introducing the Convention’s vision into the WTO’s legal decisions were also explored. One considered was Article 31.3(c) of the Vienna Convention on the Law of Treaties which enables a judge to take into account “any relevant rules of international law applicable in relations between the parties”.

Another point of entry could be sustainable development, which is considered a fundamental principle in the Treaty establishing the WTO—this is the framework treaty establishing the WTO as an institution and to which are appended the other trade agreements with respect to goods, services, intellectual property, etc.

Sustainable development as an avenue for introducing the Convention’s approach to cultural goods and services holds promise because it is both a central principle of the WTO itself, as well as a key concept of the 2005 Convention, as reflected in its Article 13.

The RIJDEC roundtable, which brought together over 20 participants, came to a close with proposals for upcoming themes that could be analyzed in depth by the Network. Possible topics included approaches to developing eventual operational guidelines for implementing Article 21 of the Convention, as well as the cultural cooperation protocol model recently introduced by the European Union as an appendix to its trade agreements.

While this meeting of the jurists’ network focused on two recent decisions of international tribunals, it is important to emphasize that references to the UNESCO Convention have been made a number of other legal and political contexts. For this reason, RIJDEC announced it has created an on-line catalog of such references, consisting of several , announced the posting online of a list of references to the Convention consisting of political statements by States, as

well as legislative and regulatory measures taken by governments that are Parties to the Convention. The RIJDEC will rely on the participation of its members other interested parties to furnish information for this databank.

The network's coordinators also announced an on-line forum through which members and civil society, notably from the field of culture, can pose questions to the RIJDEC experts. The questions submitted must be of a legal nature and relate to the interpretation, construction or enforcement of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Answers will then be provided to the individual or organization originally asking the question, and may also be published on the RIJDEC site and distributed to RIJDEC members. This form is available in French, in English or in Spanish by [clicking here](#).