



## **Comments by the Coalition for Cultural Diversity (Canada) with respect to UNESCO's Draft Text for the Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions**

### **Introduction:**

This document represents formal comments from the Canadian Coalition for Cultural Diversity with respect to UNESCO's draft text for the Convention on the Protection of Diversity of Cultural Contents and Artistic Expressions.

These comments represent the result of a day-long discussion held on August 30, 2004, involving the CCD's board of directors—on which all CCD member organizations are represented. The document was then discussed at a November 2 executive committee meeting of the CCD prior to being finalized.

Many of the issues raised in this paper, and the proposals made for addressing them, were discussed in the course of the August 31, 2004, roundtable discussion on the draft UNESCO Convention that was convened by federal Minister of Canadian Heritage Liza Frulla and Quebec Minister of Culture and Communications Line Beauchamp.

The Canadian Coalition's views were also reflected in comments delivered by the International Liaison Committee of Coalitions for Cultural Diversity (ILC-CCD) during UNESCO's first inter-governmental experts' meeting, held September 20-24 in Paris. The ILC-CCD consensus was developed over the course of a day-long meeting held September 13 that brought together delegates of 14 established coalitions as well as observers from two coalitions that have since been established (Ireland and Spain).

While the CCD has informally circulated the discussion paper its Secretariat prepared for use by its board members at its August 30 meeting, this document constitutes the formal comments with respect to the draft Convention text released by UNESCO on July 15.

In this regard, it will be noted that this document accords greater emphasis to the need to revise Article 19—using Option A as a starting point—in order to provide greater latitude to take policy measures to ensure cultural diversity in situations where states have previously taken liberalization commitments on culture in the context of international trade agreements.

The question of the appropriate dispute settlement mechanism for the Convention is also explored in greater detail, and in this context a number of principles have been proposed for ensuring that whatever mechanism is ultimately adopted supports the overarching objective of ensuring that the UNESCO Convention is equivalent in weight to other international agreements, and is clearly established as the definitive instrument for addressing issues arising from cultural policies.

Our comments follow.

<b>Title of the Convention:</b>
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We propose that the Convention be renamed ‘The Convention on the protection, promotion *and development* of the diversity of cultural contents and artistic expressions’.

<b>Objectives:</b>
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## Chapter I: Objectives and Guiding Principles

### Objectives:

Our principal concern with respect to this section is that the core objective of affirming in an international legal instrument the sovereign right of countries to take cultural measures to ensure a space for domestic cultural goods and services is absent.

We recommend that the Objectives section of the Convention begin with an unequivocal affirmation of the sovereign right of states to develop, implement and maintain cultural policies designed to ensure a space for domestic cultural production and access to a genuine diversity of culture from a wide variety of countries at both the national and international level.

This affirmation in the Objectives would reinforce the assertion of the right contained in Article 6 of Chapter III (although we propose refinements to the wording of this article to ensure that right remains a general one and is not unduly circumscribed).

<b>Principles:</b>
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<b>2. Principle of fundamental freedoms</b>
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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.
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We strongly support this Principle and would recommend that ‘freedom of the media’ be explicitly referenced in this list of fundamental freedoms that must be respected when a State devises and implements any cultural policy with the objective of protecting and promoting cultural diversity. Freedom of the media plays a fundamental role in the development of true cultural diversity within a society.

**8. Principle of balance, openness and proportionality**

When States adopt measures which they deem relevant to support the diversity of cultural expressions at the national level, they commit themselves to guaranteeing, in an appropriate manner, openness to the other cultures of the world, and to ensuring that such measures are geared to the objectives pursued under the present Convention.

This principle addresses the objective of States being able to ensure a space for domestic cultural content while being open to a diversity of content coming from many other countries around the world.

Our first comment concerns the terms ‘balance, and ‘proportionality’ which appear in the title of Principle 8. Given that they appear nowhere in the body of the principle, we propose that they be deleted. We also believe these terms should be removed because they risk imposing concepts unsuited for determining whether cultural policies are appropriate.

‘Proportionality’ is particularly problematic as it would impose an explicitly trade-based approach to assessing whether a given cultural policy was acceptable. The resulting approach—in essence limiting cultural policies to minimal measures that would have to be strictly in proportion to the problem being addressed at a given moment in time—would deprive states of the flexibility to maintain or introduce cultural policies, and adjust them in response to their effect on the cultural sector in question or in response to changing circumstances.

Similarly, it is important to ensure that the concept of ‘openness’ in this Principle does not equate to the concept of ‘market access’ as defined in international trade agreements. A ‘market access’ approach rooted in trade principles could be satisfied by situations in which a given domestic market could be overwhelmingly dominated by a single foreign country. Very little cultural diversity would result from such an approach, but the letter of the law of trade agreements would be respected.

Further, the concept of ‘openness’ must not be defined or interpreted such that it could provide a foundation from which to attack the right of States to establish and uphold regulatory frameworks—for example, for the broadcasting sector—designed to ensure a strong national cultural sector through an array of measures that may include, among others, limitations on access to that country’s domestic market by foreign services, programming and products.

A preferable approach towards establishing criteria for cultural policies is suggested by Principle 3 of the UNESCO draft Convention:

**3. Principle of free access and participation**

The right of access of all people to a rich and diversified range of cultural expressions from all over the world, and the possibility for all cultures to have access to the means of cultural expression and dissemination are essential guarantees of cultural diversity.

Clearly, some set of criteria will be necessary in order for the UNESCO Convention to provide a rules-based framework for addressing issues related to cultural policies. In articulating such criteria, and in applying them to determine whether a given cultural policy is, or is not, justifiable under the Convention, we believe the key consideration should be whether or not a state maintains a demonstrable openness to cultural goods and services originating from other countries.

For example, a country such as Korea might justify a 40% screen quota for domestic feature films by demonstrating that more than half its domestic market remains open to foreign films. In fact, the screen quota could be defended as an essential measure for countering the relentless pressure from distributors to accord all of the prime theatre space to foreign films.

Similarly, a state such as Canada should be able to justify a 65% French-language quota for music on French-language radio stations as follows: 1) the quota focuses on language, and so radio stations to which the quota applies are in fact encouraged to play music in that language originating from many other countries, in addition to a sub-quota of French-language music created in Canada; 2) other radio services exist which broadcast in English, so this music remains readily available; 3) the quota serves to balance intense exposure accorded to foreign English-language music via a variety of other sources—music video specialty channels, mainstream entertainment magazine shows, magazines, newspapers, etc. and is therefore essential to ensuring citizens have genuine access to music produced in their first language. Viewed from this prism, the fact that French-language music accounts for 25% of music sales in Quebec should be viewed as proof of the both the effectiveness and appropriateness of the 65% quota in ensuring a vibrant French-language music culture amidst a population of seven million Francophones while also maintaining access to the immense quantities of cultural goods and services produced for the more than 300 million English-speakers living in North America.

**Chapter II: Definitions and Scope**

**Article 3—Scope of the Convention**

This article states that the Convention “shall apply to the cultural policies and measures that States Parties take for the protection and promotion of the diversity of cultural expressions.”

As indicated later in our comments on the Convention’s Definitions, we note that the title of the Convention refers to the ‘diversity of cultural *contents* and artistic *expressions* (emphasis added).’ We believe this wording more clearly focuses the Convention, and would propose that this wording be returned to throughout the text.

Further, to underscore the importance of fostering increased cultural diversity both within individual countries at the international level, we would propose that the title of the Convention be expanded to ‘The Convention on the protection, promotion and *development* of the diversity of cultural contents and artistic expressions.’

Keeping the Convention clearly focused on diversity of cultural contents and artistic expressions—meaning diversity of books, films, television, music, live performance, visual arts and new media—will be key to ensuring that the end result of this process is a strong convention that clearly affirms the sovereign right of countries to have cultural policies. Excessively broad or unclear descriptions of the scope of the Convention carry the risk of precipitating debates on a range of issues extending well beyond the strictly cultural arena, greatly reducing the potential for a truly effective convention while greatly increasing the likely timeframe required to reach agreement among a sufficiently large number of UNESCO member states to ensure its adoption and ultimate ratification.

That said, the Coalition also has concerns with respect to how the range of policies and measures that States Parties might take is set out in the ‘non-exhaustive list’ included as Annex II.

As many UNESCO Member States noted during the September intergovernmental experts meeting, the Annex II list is seriously flawed. Rather than being a non-binding list of specific examples of policies (domestic content quotas, foreign ownership rules, etc.), the list focuses on a range of sprawling objectives.

Of more specific concern, cultural industries are not referred to until well down the list and the measures focused on—“training schemes for national specialists, cultural administrators and managers; assisting artists, designers and craftspeople by safeguarding and improving the rights of creators.”—do not include much more central policies such as domestic content quotas, funding supports, or foreign ownership limits, to name just a few key measures.

The objective in the list labelled “Enhancing and supporting new and traditional media” actually comes closer to encompassing the cultural policies which are critical to ensuring healthy creation, production, distribution and access of books, film, television, music, live productions, visual arts and media.

On balance, however, we would favour eliminating Annex II in favour of a more comprehensive definition of cultural policies included directly within the Convention’s definitions section.

#### **Article 4—Definitions**

We have comments with respect to the following definitions:

**3. Cultural Expressions.** This term compresses together ‘cultural contents’ and ‘artistic expressions’ While the text states that both terms are encompassed by ‘cultural expressions’, in the interest of clarity and certainty we believe it would be preferable to retain both terms, as reflected in the Convention’s title.

**4. Cultural Goods and Services.** Defined here and supported by a ‘non-exhaustive list’ as an annex to the Convention (Annex I). We would favour replacing Annex I with a more comprehensive definition of cultural goods and services.

**5. Cultural Industries.** This definition focuses only on industries ‘producing’ cultural goods and services. There is an obvious need to incorporate references to creating, distributing, exhibiting and otherwise providing these cultural goods and services to the public. It is also somewhat of a concern that this is the only direct reference to cultural industries within the core body of the Convention—other references are relegated to the annexes. It should also be made clear that the term ‘cultural industries’ encompasses not merely the cultural enterprises themselves but the creators, actors, artists, composers, craftspeople, technicians and other individuals essential to the creation, production and distribution of the cultural goods and services originating from this sector.

**7. Cultural Policies.** On balance, we consider this to be a good definition—although, as already indicated, we would propose eliminating the accompanying Annex II. One question does arise in reviewing this list, however: what provision will there be for policies initiated by countries on a regional, or linguistic, basis—for example, in the event that countries in Latin America, or the Caribbean, or Africa, should come together to agree on regional content quotas, much as the European Union has done for television with its Television Without Frontiers directive? The reference in this definition to policies at the ‘local, regional, national or international level’ raises this issue, but only indirectly. Beyond this reference, the right to pursue such a regional approach to developing joint cultural policies—and similarly, for policies developed by countries on linguistic lines (e.g. Francophonie, Ibero-American)—should be clearly affirmed in the Convention.

## Rights and Obligations of States Parties

### Article 5 – General rules on rights and obligations

1. The States Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, affirm their sovereign right to adopt measures to protect and promote the diversity of cultural expressions within their territory, and recognize their obligations to protect and promote it both within their territory and at the global level.

2. When a State Party takes a measure to protect and promote the diversity of cultural expressions within its territory, it shall ensure that such measure is in conformity with this Convention, its objectives, principles and scope.

Article 5.1 represents a strong affirmation of the sovereign right of countries to have cultural policies.

Article 5.2 sets out criteria for determining whether a given cultural policy is appropriate under the Convention, and it is in this context that the Convention's objectives, principles and scope come into play. The changes previously proposed in this document concerning the Convention's objectives and principles have been made in this light.

**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.

Article 6 is one of the key clauses in the entire Convention, and on balance it constitutes a strong affirmation of the range of measures a state may take to encourage diversity of cultural contents and artistic expressions. However, there are some concerns:

- Section 1 affirms the right of State Parties to take measures, especially regulatory and financial measures, aimed at protecting and promoting cultural diversity, but risk undermining this somewhat by adding the qualifier 'particularly in cases where such expressions are threatened or in a situation of vulnerability'. We see no benefit to including this qualifier—the right to act in such situations of threat or vulnerability would clearly be included in the overall right to take measures to protect and promote cultural diversity. Our concern is that keeping such language in the Convention might, in its application and interpretation, have the unintended consequence of restricting the right of states to take cultural measures only in such situations 'where expressions are threatened or in a situation of vulnerability.' For one thing, countries should not be placed in the situation of having to demonstrate that a given cultural sector is under threat, vulnerable or otherwise in a crisis situation before it is permitted to introduce a cultural policy. For another, a consequence of success—of a cultural policy achieving its objectives and fostering an active, popular book, film, television or music sector—should not be

- to call the policy into question, to argue for its removal on the grounds it is no longer necessary.
- Section 2. The description of appropriate measures in this section is good, but we would propose language to clarify that quotas may not only consist of time requirements (broadcast time, screen time) but may take the form of a financial equivalent in the form of expenditure requirements. For example, a broadcast regulator could specify that a percentage of revenues—from broadcasters, from cable/satellite distributors—be allocated towards the support of domestic production.
  - We would also propose incorporating language to clearly assert the right to reserve incentives and supports for independent domestically-owned cultural enterprises; this could be achieved by adding the wording ‘notably independent domestically-owned cultural enterprises’ to sub-article (c).
  - Finally, we would propose adding a sub-clause (possibly between the current (b) and (c)) specifying that the measures countries might take to encourage cultural creation, production and distribution of cultural goods and services from a diversity of sources—including a strong sector of nationally-owned cultural enterprises— could take the form of limits on acceptable levels of foreign ownership in the cultural industries.

### Section III.2—Rights and obligations relating to international cooperation

<b>Article 13 — International consultation and coordination</b>
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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.
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We consider Article 13 a key article in terms of establishing the Convention as the definitive instrument for addressing issues relating to cultural policies, and in terms of clearly establishing the Convention as equal in weight to other international instruments.

To this end, we would propose that Article 13 incorporate language categorically committing States to refrain from making commitments in other fora—including international trade negotiations—that run contrary to the objectives of the Convention.

Viewed from this perspective, we believe there is a need to strengthen the wording of Article 13: wording such as ‘States Parties shall bear in mind’ and ‘They undertake, as appropriate’ does not add up to a clear commitment. We would propose the wording used in Article 21 of the original draft (Johannesburg, 2002) of the draft international instrument prepared by the International Network on Cultural policy, in particular the last sentence (underlined):

**Article 21: Promoting cultural diversity in other international fora**

Members pay particular attention to the need to sustain and promote cultural diversity in other international foras where it may be directly or indirectly called into question. When they are called upon to make commitments that could put at risk the preservation of cultural diversity, they consult for the purpose of developing a common approach in that regard. Members refrain from making commitments contrary to the objectives of the present Convention.

**Article 14—Aid for co-production and dissemination**

States Parties shall encourage, as needed, the conclusion of cinematographic and other audiovisual co-production and co-distribution agreements, thereby enabling foreign productions to be considered as national and, as such, facilitating their access to national aid, devoting particular attention to developing countries and countries in transition.

We support the spirit underlying Article 14—of encouraging States to foster cooperative projects that bring together the creative, artistic, production, technical and other resources of two or more States, with particular emphasis on projects involving developing countries and countries in transition. However, we recommend that this objective be expressed in more general language rather than focusing exclusively on ‘audiovisual co-production and co-distribution agreements’—which carry specific legal definitions and as such tend to give rise to very particular questions governing how such agreements would be applied. Such a specific emphasis strikes us as inappropriate to a convention.

**Article 16—Cooperation for development**

This article commits developed countries to undertake various measures to support the development of cultural capacity building among developing nations, and to accord greater access to their markets to cultural goods and services from these countries.

Clause (e), addresses a desire expressed by many developing nations to see a special International Fund for Cultural Diversity established. However, the commitment appears far from firm, and the fund seems to be proposed as one option among an array that could also include low-interest loans and grants.

We believe there is a need for a stronger commitment from developed countries to support the creation of a dedicated fund to support the projects that would nurture the growth and development of genuine cultural industries within the developing nations.

We would also urge developed countries to ensure that their own international development funds allow projects geared to encouraging the emergence and growth of cultural industries within developing nations to qualify for funding.

## Chapter IV—Relationship to Other Instruments

This chapter consists of Article 19, with its two options:

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.

We consider it critical that the UNESCO Convention be equal in legal weight to other international instruments—and that it in no way be subordinated to such agreements.

We further believe that the Convention should serve as the definitive instrument with respect to the measures states may take for the protection, promotion and development of a genuine diversity of cultural contents and artistic expressions.

Consistent with these goals, we consider it of critical importance that the Convention not result in a two-tiered hierarchy of countries whose ability to take measures to protect, promote and develop cultural diversity would diverge greatly based on whether they have, or have not, previously taken liberalization commitments on culture in trade agreements.

Such a scenario would be particularly negative for developing countries that have taken liberalization commitments on culture in trade agreements. Many of these countries have lacked the means to introduce extensive cultural policies on a scale comparable to those in place in richer developed countries, and the net result of this approach would mean that they would be forever deprived of any option to introduce such policies in the future.

As worded, we believe that Option B would entrench such a divide among countries, and as a consequence greatly weaken the interest of many countries in adopting or ratifying the convention, thereby seriously diminishing the potential impact of the Convention itself.

Option A is better, but only in relative terms. Point 2 of Option A states that the Convention shall not affect the rights and obligations of any State 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.’ In essence, this is a safeguard clause and would continue to place a heavy burden on states to demonstrate ‘serious damage or threat to the diversity of cultural expressions.’

Clearly, the proposed UNESCO Convention is intended to fill a void in international law by affirming the sovereign right of countries to have cultural policies to protect, promote and develop cultural diversity, and by establishing principles to be observed by States when they are establishing or adjusting such policies. Consistent with the objective of establishing the Convention as the definitive reference point on these questions, we recommend that Option A be used as a starting point to develop new wording, broader than the very limiting criteria of ‘serious damage or threat’, that would afford States greater latitude to take measures to pursue cultural policies in favour of cultural diversity in situations where countries have previously taken liberalization commitments on culture in other international instruments.

## **Chapter V. Follow-up Bodies and Mechanisms**

### **Article 24—Settlement of Disputes**

This section provides for States involved in a dispute to attempt to resolve the dispute first through negotiation, then provides for them to request ‘good offices’ or third party mediation. Beyond this, binding arbitration is proposed (detailed in Annex III) or, alternatively, submission of the dispute to the International Court of Justice but, in both cases, only at the joint request of both parties.

The issue of what type of dispute settlement mechanism would be appropriate for this Convention is one that the CCD has discussed extensively in the weeks since the first intergovernmental experts’ meeting in September.

Fundamentally, we believe the approach taken towards designing the dispute settlement mechanism should be governed by the following principles:

- That the Convention be equal in legal weight to other international agreements, including international trade agreements.
- That the criteria set out for adjudicating a dispute with respect to whether a specific cultural measure is, or is not, consistent with the principles and objectives of the Convention, be cultural rather than based on criteria rooted in trade agreements.
- That any country whose cultural policy is attacked must have a full opportunity to defend its policy.
- That the individuals charged with ruling on the dispute bring, and apply, a fundamentally cultural perspective to adjudicating the dispute.

After extensive discussion, we have concluded that the first principle—that the Convention be equal in weight to other international agreements—argues strongly for a

binding dispute settlement mechanism. If the UNESCO Convention is to have a legal status equal to other international agreements, including trade agreements, then it stands to reason that its dispute settlement mechanism must similarly be equal in weight to those found in other international agreements. Specifically, it should be a mechanism that can be activated unilaterally by one State Party, and both parties should be bound to abide by the terms of the ruling that results.

Without such a binding mechanism, we foresee significant difficulties in establishing the UNESCO Convention as the definitive instrument for resolving disputes arising among states with respect to cultural policies. Given the strong dispute settlement provisions contained within WTO and other international trade agreements, the probability is high that states would continue to pursue rulings through this route with respect to disputed cultural policies. And if binding rulings defining what are, and are not, acceptable cultural policies continue to be made predominantly within a trade context, the ultimate legal value of the UNESCO Convention becomes questionable.

At the same time, it should be noted that adopting a binding dispute settlement mechanism in the UNESCO Convention will not immediately resolve the question of the articulation between it and other international instruments. There are two reasons for this:

- Some signatory parties might nonetheless elect to pursue complaints related to cultural policies through dispute settlement mechanisms contained in trade agreements.
- Certain states may elect not to ratify the Convention, and continue to bring complaints about another country's cultural policies to tribunals provided for in trade agreements.

To preclude the first option, we believe the UNESCO Convention should incorporate a commitment by States Parties to use the mechanisms provided by the Convention for resolving such disputes and not undermine the Convention by seeking rulings in other venues. This would be consistent with the commitments articulated in Article 13 to uphold the principles of the Convention in other fora.

In the second scenario, where a state that has not signed the Convention chooses to bring a complaint against another signatory state with respect to a given cultural policy by triggering the dispute settlement provisions of a trade agreement, we consider it essential that the state whose policy is attacked have the prerogative of simultaneously activating the dispute settlement mechanisms of the UNESCO Convention in order to obtain a decision on the dispute via this channel—an opinion that, to have an impact, must be made public.

This will ensure that, whatever the outcome of the process that takes place within the tribunal of the trade agreement, there will be a ruling on the dispute that has been reached using cultural criteria.

As a number of legal scholars have observed, defining the relationships between international agreements in situations of judicial overlap will be one of the principal legal challenges of this century. It is unrealistic to expect that the question of the ultimate articulation between the UNESCO Convention and other international agreements, notably trade agreements, will be resolved immediately. But we consider it critical that the rulings arising from the UNESCO Convention carry genuine legal weight in the international arena, and one measure for ensuring this should be the incorporation of a binding dispute mechanism within the Convention that is as strong as those found in WTO and other trade agreements.