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Study on the Implementation of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions for the European Parliament

BACKGROUND INFORMATION

Introduction

The Geneva based law firm Germann Avocats and its interdisciplinary research team is completing a study for the European Parliament's Committee on Culture and Education (CULT) whose overall objective is to provide a summary of the state of implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005, in particular in fields where the European Community would be expected to provide leadership or coordination.

This study shall give assistance and long-term guidance to the EU on implementing the UNESCO Convention by carrying out a detailed analysis of the obligations set out by this international treaty. In particular, we shall gather information on the various practices in implementing the UNESCO Convention, from a legal and practical viewpoint, and identify challenges and measures to help achieve the objectives of this instrument.

For these purposes, we drafted three sets of questionnaires. The first questionnaire shall allow us to gather legal data. The second questionnaire shall inform us about the implementation of the UNESCO Convention from the perspective of representatives of civil society. Eventually, the third questionnaire shall cover the situation from the angle of a selection of regional and international organizations (the ASEAN, the African Union, the Association of Carribean States, the Commonwealth, the International Organisation of La Francophonie, the Council of Europe, the European Union, UNESCO, WTO and WIPO).

Expected results from the surveys

We expect to collect valuable information on the public measures that are specifically undertaken to protect and promote cultural diversity on the national level in different jurisdictions. We shall obtain insights to compare regulatory practice in a variety of economic and political situations that characterize the selection of countries located in different geographical area. We will obtain rich data which will allow us to compare regulatory practice in varying economic and political situations. We shall use and compare this information in our subsequent analysis that will eventually provide the basis of our conclusions and recommendations to the European Parliament.

Civil society survey

This questionnaire addresses the implementation of the UNESCO Convention from the perspective of the civil society. For this purpose, we invite 14 National Coalitions for Cultural Diversity to reply to our survey. The sample of Coalitions shall reflect geographical, economic and political diversity. The objective of this questionnaire is to clarify the perception and evaluation by representatives of civil society of the achievements of the UNESCO Convention in their respective countries. The main goal of this survey, beyond an inventory of the current factual situation, shall reside in understanding the various national civil societies' expectations and their demands vis-à-vis regulators.

We will attach the replies to this questionnaire to our study that will be available over the internet.

For the text of the Convention and other useful documents, please consult:

www.unesco.org/culture/en/diversity/convention

CIVIL SOCIETY QUESTIONNAIRE

A General questions

1 Do you need **assistance** in providing the information requested in this questionnaire?

() Yes (x) No

If "Yes", please send a request for assistance to info@germann-avocats.com

2 When did the UNESCO Convention enter into force in your country?

Canada was the first country to ratify the 2005 Convention in November of 2005.

3 **Representativity and independence** of your umbrella organization:

3.1 What approximate percentage of all non-governmental individuals and/or organizations professionally engaged in cultural activities, including cultural policies, does your umbrella organization represent in your country?

() Less than 25%

() Between 25% and 50%

() Between 50% and 75%

(x) More than 75%

3.2 Does your umbrella organization represent a large part of civil society of your country regarding cultural diversity concerns?

(x) Yes () No

3.3 Are there other organizations than yours in your country that are not members of your umbrella organization and that represent a large part of civil society in your country regarding cultural diversity concerns?

() Yes (x) No

If "Yes", please list these organizations:

PLEASE INSERT YOUR ANSWER HERE:

3.4 How do you assess the independence of your umbrella organization and its non-

governmental members engaged in cultural activities, including cultural policies, vis-à-vis the government of your country?

Full independence

Substantial independence

Fair independence

Little independence

No independence

No comment

3.5 Does the government of your country influence the activities of your umbrella organization and its non-governmental members related to their cultural policies?

Yes No

If "Yes", please describe this influence:

PLEASE INSERT YOUR ANSWER HERE:

If "No", please indicate how these activities are protected from governmental influence.

We are accountable to our board members, who are representatives designated by each of our member organizations. To be clear, the mandate accorded to the Canadian Coalition is a very focused one: to advocate for the right of Canada and other countries to maintain the right to apply policies and other measures in support of their domestic cultural sectors. For this reason, we have strongly supported the 2005 UNESCO Convention on the Diversity of Cultural Expressions, as well as Canada's longstanding policy of incorporating a broad general exemption of cultural goods and services from trade agreements it negotiates.

3.6 Do you qualify your umbrella organization as a "non-governmental organization" in your country?

Yes No

3.7 How do you assess the independence of your umbrella organization and its members engaged in cultural activities vis-à-vis private corporations that have a dominant position in the market of cultural goods and services of your country?

Full independence

Substantial independence

Fair independence

Little independence

No independence

No comment

3.8 Do private corporations that have a dominant position in the market of cultural goods and services of your country influence the activities of your umbrella organization and/or its members related to their cultural policies?

Yes No

If "Yes", please describe this influence:

PLEASE INSERT YOUR ANSWER HERE:

If "No", please indicate how these activities are protected from such influence.

Our membership consists of national organizations that represent English- and French- language artists and cultural practitioners, as well as organizations representing independent producers, presenters and publishers in the sectors of books, film, television, music, new media and performing arts.

3.9 Are there organizations other than yours that deal with cultural diversity concerns and that represent private corporations having a dominant position in the market of cultural goods and services of your country?

Yes No

If "Yes", please list these organizations:

PLEASE INSERT YOUR ANSWER HERE:

3.10 Did your organization or another organization recently assess the situation of cultural diversity in your country?

Yes No

If "Yes", please indicate the author, title, scope, place and date of this assessment and specify where written documentation on this assessment, if any, can be consulted:

No comprehensive, over-arching assessment of the state of cultural diversity has yet been undertaken by our organization. While the Convention has been in force since March of 2007, we are still in early stages of making it operational, and we note that operational guidelines for Articles 9 and 19, which touch on this question, are still

being developed.

At the same time, on a sectoral basis, cultural organizations are continually evaluating the impacts federal and provincial policies and other measures are having in terms of their impact on the availability of domestic books, films, television programs, music and other cultural works to Canadians.

B Questions on the implementation of the UNESCO Convention so far

For the purpose of this questionnaire, "national law" includes national legislation, regulations, administrative practice and case law that entered into force before or after the entry into force of the UNESCO Convention in your country.

4 Does your country have national law implementing the UNESCO Convention as of 1 January 2010?

() Yes (x) No

If the answer is "No", please explain the absence of national law implementing the UNESCO Convention and how this treaty is implemented in your jurisdiction as of 1 January 2010:

Canada already has an extensive array of cultural policies in place focusing on the various sectors—books, film, television, music, performing and visual arts, new media, etc. Moreover, in many cases complementary policies are in place at the provincial level; Quebec, for example, which has strongly supported the Convention, has an extensive range of policies and programs focusing on the cultural sector.

Enabling legislation for the Convention itself was not considered to be necessary.

If the answer is "Yes":

Please reply to the questions as follows that refer to the legal situation as of 1 January 2010, and specify for each of your replies, where applicable, whether the relevant national law existed already prior to the entry into force of the UNESCO Convention in your country:

4.1 What **measures** in the sense of articles 6, 7 and 8 of the 2005 UNESCO Convention, including but not limited to measures aimed at protecting and promoting linguistic diversity, were adopted in your country by the implementing national law?

PLEASE INSERT YOUR ANSWER HERE:

4.2 How is article 11 of the 2005 UNESCO Convention ("**participation of civil society**") regulated in the implementing national law?

PLEASE INSERT YOUR ANSWER HERE:

4.3 How does your organization assess your country's compliance with **human rights obligations** when implementing the UNESCO Convention?

PLEASE INSERT YOUR ANSWER HERE:

*As a complement to your replies to questions 4.1 to 4.3, please provide a copy of, or references to, your country's implementing **national law**, if any, together with related commentaries and web site addresses where such national law and related documentation may be found.*

5 Does your country or your organization or any of its members intend to ask for a contribution to one or more own projects from the **international fund** for cultural diversity according to article 18 of the UNESCO Convention for the purpose of implementing the UNESCO Convention on the national level?

() Yes (x) No () Confidential

If "Yes", please describe the project(s) for which your country or your organization will ask for funding:

The Canadian Coalition has no plans to seek project funding support from the International Fund for Cultural Diversity.

6 Is your country affected by **special situations** contemplated under articles 8, 12 para. 1, 17 and 23, point 1 of the UNESCO Convention ("special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding")?

Yes (x) / No ()

If yes, please describe these special situations, and the measures that your country adopts to address these situations?

It is possible that the cultural expressions of certain First Nations peoples might be considered to qualify as such special situations.

7 From the perspective of your organization, how do you assess your country's contribution to meet the objectives of the UNESCO Convention on the **regional and international levels** (e.g. coordination and collaboration with regional organizations, promotion of exchanges between National UNESCO Commissions, involvement in negotiating the operational Guidelines of the UNESCO Convention, activities within the Intergovernmental Committee)?

We are very largely satisfied with the role Canada has played in supporting the UNESCO Convention on the Diversity of Cultural Expressions. It was very actively involved in the negotiations for the Convention and was the first country to ratify it. After being elected to the Convention's Intergovernmental Committee, Canada hosted the first meeting of the Committee, and has been actively involved throughout the early phases of implementation work. It was re-elected to the Committee at the Second Conference of Parties in June of 2009. Canada also made an early and significant contribution to the International Fund for Cultural Diversity

(CDN\$500,000), a contribution complemented by the Government of Quebec's own contribution of CDN\$100,000.

8 From the perspective of your organization, which **major problems**, if any, related to the implementation of the UNESCO Convention do you identify so far for your country?

In our view, the major challenge associated with bringing the 2005 UNESCO Convention to life relates to how its vision—its principles and objectives—will be asserted in other international forums, notably trade agreements.

From the perspective of our members, the fundamental question relating to the Convention is to what degree it becomes an effective beachhead in international law for supporting the right of countries to apply cultural policies. Not just maintain existing ones, but to be able to adjust or replace these in response to changing needs and circumstances.

Fundamentally, it is critical that countries observe coherence, and not renounce or constrain, through commitments in trade negotiations, the right they have so clearly affirmed through the Convention: the right to apply policies and other measures in support of their domestic cultures.

This is why we consider it important that the Convention's Intergovernmental Committee, consistent with its mandate in Article 23 6 e) pursue work with respect to promoting the principles and objectives of the Convention in other international forums, and that the Conference of Parties confer a mandate on the Committee to develop operational guidelines for Article 21, through which all States that ratify the Convention undertake to do this and to consult each other for this purpose.

We think the position of individual countries, Canada included, can be significantly strengthened if this work is pursued, thereby reinforcing the strong consensus that developed among States during the negotiations on the Convention regarding the distinctive nature of cultural goods and services and the need to affirm the sovereign of States to support their domestic cultural sectors with policies and other measures.

9 From the perspective of your organization, which **best practices** related to the implementation of the UNESCO Convention do you identify so far for your country?

First, Canada has observed coherence by continuing to incorporate a broad general exemption of cultural goods and services from the trade agreements it negotiates with other countries.

Second, it has demonstrated its commitment to the international cooperation dimension of the Convention by contributing to the International Fund for Cultural Diversity.

As previously noted, Canada already has an extensive array of policies and programs designed to ensure Canadians have access to a meaningful range of books, films, television programs, music, theatre and other cultural content rooted in their own experience. Many provinces also have policies in place—Quebec in particular has an extensive range of measures to support local culture.

10 From the perspective of your organization, what are civil society's **expectations** in your country regarding the further implementation of the UNESCO Convention

10.1 in the best case scenario?

The 2005 UNESCO Convention becomes the definitive reference in international law on matters relating to cultural policy. Its vision that cultural goods and services cannot be reduced solely to their commercial dimension due to their role as transmitters of values, identity and meaning, and that countries therefore have the right to apply policies and other measures in support of their domestic cultural sectors becomes the focus of a broadly-shared international consensus. Countries are coherent in their actions, and refrain from liberalization commitments affecting culture in trade negotiations. Countries exercise the right they have affirmed in the Convention, maintain policies and measures that are effective in furthering cultural diversity, engage civil society in recurring discussions with respect to the state of diversity, the effectiveness of existing policies and the need to revise or replace these with new ones, and take action reflecting these perspectives. Countries contribute in a significant and recurring manner to the International Fund for Cultural Diversity, and the Fund, complemented by other international cooperation initiatives consistent with Articles 12 through 18 of the Convention, effectively supports developing countries in nurturing the emergence of their own domestic cultural sectors.

10.2 in the worst case scenario?

Countries fail to observe coherence, give up or sharply constrain their right to apply cultural policies due to liberalization commitments in trade negotiations, and the Convention's field of influence is reduced to modest international cooperation initiatives. Ratification stalls, and the Convention fails to secure broad-based and regionally balanced ratification.

10.3 in the most likely scenario?

It is too early to tell.

There has been significant progress in securing broad ratification—106 States to date—but challenges remain in terms of securing regional balance. Work to promote ratification must continue.

With respect to implementation, one concern we have is that the Conference of Parties and the Intergovernmental Committee have yet to address the question of how states can work together to promote the principles and objectives in other international forums.

We have addressed this question at length in an editorial in our electronic newsletter, Coalition Currents:

http://culturaldiversity.ca/coalition_currents/09-sept/CC_Vol7No3_Sept09_en.pdf

There is also the challenge of ensuring the International Fund for Cultural Diversity is properly resourced. To date, a relatively small number of states have contributed to it. Now that the operational guidelines are in place, and a plans for initial pilot phases developed, States need to step forward and contribute to the Fund in a significant and recurring manner.

11 From the perspective of your organization, what should be the **priorities** when implementing the UNESCO Convention in your country in the near future?

From the perspective of our organization, the priority is for Canada to continue to observe the coherence that it has demonstrated for some 20 years by incorporating a broad-based general exemption of cultural goods and services from trade agreements.

The Canadian Coalition is not mandated by its members to take positions on specific sectoral policy debates—our members have vested us with the mission of defending the right of Canada to apply cultural policies, so that they can then engage in dialogue, with government and among themselves, as to what policy action is desirable.

As a Coalition, we continue to ensure that members are aware of the Convention's principles, objectives and operational provisions—so that they can reference these in their discussions with governments as they deem appropriate.

12 From the perspective of your organization, which concrete actions in terms of **legal and policy measures** should your country's government take in order to implement the UNESCO Convention in the near future?

Please see response to Question 11.

Again, as a Coalition, our mission is to defend the policy space for specific debates to take place. Specific policy proposals with respect to particular sectors, or particular cultural actors, are the preserve of our individual member organizations.

13 From the perspective of your organization, what is the **degree of satisfaction** regarding the implementation of the UNESCO Convention by your country as of 1 January 2010?

Full satisfaction

Limited satisfaction

No satisfaction

No comment

If your answer is "Limited satisfaction" or "No satisfaction", please summarize your critique:

Again, we are very largely satisfied with the role Canada has played in supporting the Convention throughout its negotiation and implementation. We remain very satisfied with Canada's continuing position of exempting cultural goods and services from trade negotiations. With respect to the intergovernmental implementation process, however, we consider it important that the Intergovernmental Committee jointly address the question, consistent with its mandate in Article 23 6 e) of how to promote the principles and objectives of the Convention in other international forums. Ultimately, we believe the Conference of Parties should mandate the Committee to develop operational guidelines for Article 21. Our reservation with respect to implementation, therefore, has to do with the fact that so far there has been no discussion of this question by the Committee. We believe that pursuing this work is important not only to realizing the Convention's potential as an international legal instrument for upholding the right of States to apply cultural policies, but also to realizing the international cooperation objectives of the Convention, including Articles 13 (integrating culture into international development strategies) and 16 (preferential treatment).

14 From the perspective of your organization, how do you evaluate the **UNESCO Convention's Guidelines addressing the civil society's participation** that were contemplated and/or adopted as of 1 January 2010?

- Very satisfactory
- Satisfactory
- Not satisfactory
- No comment

If your answer is "Not satisfactory", please summarize your critique:

PLEASE INSERT YOUR ANSWER HERE:

15 From the perspective of your organization, how do you evaluate the **quality of the collaboration between civil society and government** aiming at the implementation of the UNESCO Convention in your country during the relevant period?

- Very satisfactory
- Satisfactory
- Not satisfactory
- No comment

If your answer is "Not satisfactory", please summarize your critique and indicate how this collaboration could be improved:

PLEASE INSERT YOUR ANSWER HERE:

16 From the perspective of your organization, how do you evaluate the **degree of**

the civil society's interest in your country in contributing to the implementation of the UNESCO Convention during the relevant period?

Very satisfactory

Satisfactory

Not satisfactory

No comment

If your answer is "Not satisfactory", please summarize your critique and indicate how this interest could be improved:

PLEASE INSERT YOUR ANSWER HERE:

17 From the perspective of your organization, how do you assess the **quality of the UNESCO Convention** as a policy instrument in terms of

17.1 its strengths?

The strength of the Convention lies in its clear recognition of the distinctive nature of cultural goods and services, and its strong affirmation of the right of States to apply polices and other measures in support of their domestic cultural sectors.

Moreover, the Convention is not a static, defensive instrument. By its name, it is a forward-looking Convention—it establishes a framework within which States, on their own and together, can work to both protect and promote the diversity of cultural expressions.

The Convention's explicit recognition of the role that civil society can play in the protection and promotion of the diversity of cultural expressions is unique, and represents an opportunity for States to work in a dynamic fashion with civil society to this end. Combined with the information exchange and reporting provisions set out in Articles 9 and 19, Article 11 sets the stage for an ongoing dialogue between governments and civil society as to the current state of cultural diversity in their country, the effectiveness of cultural policies and measures currently in place, and new actions that might be taken to strengthen cultural diversity.

The strong emphasis on international cooperation, as set out in Articles 12 through 18, is also a strength.

Finally, the clear affirmation that the Convention is equal in weight to other international agreements, and is not subordinated to these, is also a strength. Of particular importance is the commitment in Article 20 by States to takes its provisions into account not only when entering into other international agreements, but also when interpreting and applying existing agreements to which they are party. This is reinforced by the commitment contained in Article 21 for States to work together to promote the provisions of the Convention in other international forums.

17.2 its weaknesses?

The Convention does not exist in a vacuum. Its ultimate strength will depend on its effective implementation, and on the resolve of the States that ratify it to be coherent and to not undermine it through liberalization commitments affecting culture in trade negotiations.

The Convention is strong in its affirmation of national sovereignty—of the right of States to apply policies and other measures in support of their domestic cultural sectors. At the same time, it is not heavily prescriptive: it affirms a broad range of possible policies and measures that States may apply, but leaves to each State the decision as to which it may choose to exercise.

Nonetheless, for the Convention to be effective, States must not simply affirm this right to apply policies—they must actively exercise it.

17.3 its threats?

Trade negotiations remain a continuing challenge. States must be coherent in their actions, and resist pressures to forego or sharply constrain their right to apply cultural policies by making liberalization commitments affecting culture in such negotiations.

At a time when technologies are evolving extremely rapidly, it is also essential that countries be forward-looking and 'future-proof' their policy space—that is, that they make sure they retain the right to apply policies in the digital environment.

17.4 its opportunities?

By its conception, the Convention is a future-oriented instrument. It is not static. Its information sharing and reporting processes provided for in Articles 9 and 19 create a framework for States to assess the impact their policies are having in terms of furthering diversity. Article 11 sets the stage for an ongoing dialogue with civil society in terms of the state of cultural diversity, and actions that can be taken to strengthen it. The Convention's international cooperation provisions set out in Articles 12 through 18 provide a framework for developed and developing countries to work together to nurture the emergence of the cultural industries of developing countries. During the negotiations, a strong consensus was forged among States that cultural goods and services have a distinctive nature as transmitters of values, identity and meaning, and that States must therefore affirm their sovereign right to apply policies and other measures in support of their domestic cultures; ongoing work by the Convention's Intergovernmental Committee to promote its principles and objectives in other international forums, and the development of operational guidelines for Article 21, could consolidate and expand this consensus, as well as helping to fully realize the international cooperation objectives of the Convention.

18 From the perspective of your organization, how do you assess the **strength and influence of non-governmental organizations lobbying for cultural interests** in comparison to non-governmental interest groups lobbying for trade interest in your country in matters affecting cultural policies?

- Cultural interest groups are more effective than trade interest groups
- Cultural interest groups are less effective than trade interest groups
- Cultural interest groups and trade interest groups are equally effective
- The respective effectiveness depend on the concrete matters at stake
- Other

If your answer is "Other", please explain:

The objective of securing an international legal instrument that would recognize the distinctive nature of cultural goods and services and affirm the right of States to apply policies and other measures in support of their domestic cultural sectors has been the subject of a long-standing consensus in Canada.

19 From the perspective of your organization, how do you rank the priority given **by the civil society** of your country to policies aimed at protecting and promoting cultural diversity?

- High priority
- Medium priority
- Low priority
- No priority

If your answer is "Low priority" or "No priority", please explain:

PLEASE INSERT YOUR ANSWER HERE:

20 From the perspective of your organization, how should the **degree of cultural diversity** according to the UNESCO Convention be measured in your country?

- Based on data regarding the supply of cultural goods and services
- Based on data regarding the consumption of cultural goods and services, for example market shares
- Based on other approaches

If your answer is "Based on other approaches", please explain:

PLEASE INSERT YOUR ANSWER HERE:

21 Does your organization and/or its member organizations have **new ideas** to implement the UNESCO Convention in your country in the near future?

(x) Yes () No

If your answer is "Yes", please summarize these new ideas:

Again, this will be a continuing conversation between Government, the Coalition, and our member organizations. Now that operational guidelines are in place for several articles, we will be discussing with the Government of Canada actions it can consistent with these, including Articles 13 and 16.

22 Does your organization and/or its member organizations plan to take **specific actions** to implement the UNESCO Convention in your country in the near future?

(x) Yes () No

If your answer is "Yes", please summarize the action plan:

As a Coalition, we will continue to work with our member organizations to ensure they are aware of the intergovernmental process for implementing the Convention, and they are knowledgeable as to the principles and objectives of the Convention, so that they can reference these as they consider appropriate in their continuing discussions with federal and provincial governments as to desirable policy action.

We will also continue to undertake activities to raise the visibility of the Convention, and what is at stake in the campaign for cultural diversity, within the broader cultural milieu and, where possible, with the general public.

23 Does your organization and/or its member organizations expect **specific actions** from your government, from regional organizations and/or from the UNESCO in order to implement the UNESCO Convention in your country in the near future?

(x) Yes () No

If your answer is "Yes", please summarize these expectations:

Please see response to Question 21.

24 If you have **further comments** on the questions of this survey or **additional information** that is useful for assessing the implementation of the UNESCO Convention in your country, please state them here:

PLEASE INSERT YOUR ANSWER HERE:

D Identification of respondent to this questionnaire

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