

Statement of Ambassador Louise V. Oliver

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Committee on Culture and Education

At the Forum on

Cultural Diversity: Encounters between the European Union and the United States

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Thank you very much, Madame Chairman. It is a real pleasure for me to be with you this afternoon, as I'd like to give you an American perspective on the issues being discussed today at this Forum entitled "Cultural Diversity: Encounters between the European Union and the United States." Let me start by first saying that I am not an expert on U.S. cultural policies, and second, by affirming that the United States does not have national cultural policies in the manner that one typically finds within European Union Member States. However, that does not mean that the U.S. does not have national, state, and local policies and initiatives that sustain and promote culture and cultural diversity, because we do. Nor does the absence of a national "culture" policy mean that the U.S. is not interested in culture, because clearly we are, as most of you would agree.

It simply means that the United States, as a society, has chosen a different way of approaching how we generate and disseminate cultural expressions. This fundamental difference in approach begins with the fact that, as you all know, we do not have a Minister of Culture, or any other central authority responsible for culture. Instead, we have a variety of federal governmental agencies that, in their diverse and yet complementary ways, actively promote culture. These agencies include the National Endowment for the Arts, the National Endowment for the Humanities, the Institute of Museum and Library Services, the President's Committee on the Arts and the Humanities, the Smithsonian Institution, and the Library of Congress. I am sure that many of you are familiar with a number of these agencies.

I am also sure that you are aware that the U.S. has numerous NGOs, philanthropists, corporations, and universities—at the national, regional, and local levels—that provide resources and other forms of assistance that result in a rich diversity of cultural initiatives all over the United States.

This somewhat unique American approach reflects the fact that we are a large and extraordinarily diverse and dynamic country, with fifty very different states. Although these states share the essential, overarching American ideals, at the regional and sub-regional levels, these same fifty states also reflect the enormous variety of values, traditions, and cultural expressions of their inhabitants, who come from all parts of the world. And this, to an important degree, explains why culture is so alive and well in the United States. It is a vibrant area that involves almost all of our citizens. In fact, there are no values that we Americans cherish more passionately than freedom of expression and cultural diversity.

Having made these general introductory observations regarding American perspectives on culture, let me now comment on an issue that I do in fact know a great deal about, which is the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. That instrument proved to be the most complicated and difficult negotiating challenge that I have had to face since my arrival at UNESCO in March, 2004, as the first U.S. Ambassador to UNESCO in twenty years.

In fact, this is the first time that I have accepted an invitation to speak publicly on that Convention since it was adopted in a vote that was 148 in favor, 2 against, with 4 abstentions. I chose this instance to speak because it seemed to me that there was a real interest in this Forum in trying to understand why a country like the United States, that is one of if not perhaps the most culturally diverse country in the world, would find itself unable to support an international convention on cultural diversity. My presentation will be a little longer than I had originally planned, but I hope that by the time I finish, you will all have a better understanding of what happened during the negotiating process at UNESCO, from the U.S. point of view, and why we are still unable to embrace this Convention.

I will speak on this topic in the spirit of a historian, with as much objectivity as possible. And if you detect any emotion in me, I hope it will be that of disappointment, as there was no need for so important a convention to have been adopted without a consensus that included the United States, and instead to have been adopted by a sharply divisive vote with the U.S. opposing it. By contrast, it bears noting that, at the same time that the United States was actively seeking to negotiate the content of the Cultural Diversity Convention, the United States was also actively and successfully engaged in negotiating two other UNESCO normative instruments. One was the Declaration on Bioethics and Human Rights, and the other was the International Convention against Doping in Sport. Not only did the U.S. join in the consensus adoption of both of those instruments, we have already ratified the anti-doping convention.

Unfortunately, the primary promoters of the Cultural Diversity Convention decided that its speedy adoption was more important than its substantive quality and clarity; more important than ensuring it received an in-depth review; and more important than its adoption on a truly consensual basis. Even though the Convention involved very complicated issues, some of which had direct bearing on the interests of other international organizations such as the WTO and WIPO, the prime movers of the Convention were determined to have it negotiated and adopted in record time, two years from start to finish, so that it could be adopted at UNESCO's General Conference in October 2005. Portraying the United States as opposed to the convention, which included misrepresenting our positions, became an expedient and effective way to mobilize the large coalition of countries needed to ensure its adoption by a vote— over U.S. objection, if necessary.

Despite the fact that I had stated on numerous occasions that the U.S. supported many of the ideas, objectives, and principles embodied in the proposed convention, claims continued to be made that the U.S. cared only about trade, not culture, and that our sole preoccupation was protecting the U.S. audiovisual industry. That simply was not—let me repeat—not true. While indeed that was one of our concerns, Hollywood did not drive our opposition to the Convention.

The real problem was that the U.S. Government could not accept an international legally-binding document with such vague and ambiguous language, and especially one that could have the perverse effect of actually undermining the values it purported to advance.

Before discussing some of the flaws in the document itself, I would like to talk about what happened procedurally during the negotiations, for in fact, the flawed process was largely responsible for the end result. The first session of the Intergovernmental Committee that negotiated the draft convention was held in September 2004. It was described as a “brain-storming” meeting that would provide an opportunity for countries to express their ideas and opinions for the document. Because many good suggestions were made during that meeting, which had an open and collegial atmosphere, the U.S. was at that point fairly optimistic about the prospect of the proposed convention.

The second session of the Intergovernmental Committee took place in February 2005, after a drafting group, which included the U.S., had redrafted the September 2004 document to make it more focused and manageable. Unfortunately, by that time, word was already being circulated throughout UNESCO, on the basis of certain textual clarifications that we were seeking, that the U.S. was trying to prevent the proposed convention from being adopted in October, and that our ideas and suggestions were simply delaying tactics and should not be taken seriously. In addition, the EU countries began to insist that the European Commission (EC) needed to be involved in the negotiations as a co-equal player, since the EC had competence on trade issues for the EU, something that all of you here are very familiar with. The tension between the cultural goals of the draft convention and its impact on trade matters was already becoming clear.

The U.S. responded by noting that UNESCO was not a trade organization, and therefore that UNESCO had no business discussing trade issues. Of course that began a debate about the so-called dual nature of cultural goods and services, and the respective competencies of EU countries and the European Commission.

The EU countries said that they would negotiate the cultural aspects of the draft convention, and that the EC would negotiate the trade aspects. The U.S. did not support this approach, or the idea that trade should play a role in the convention.

By the end of the Intergovernmental Committee's February 2005 session, eleven of thirty-five proposed articles had been negotiated in a reasonably positive atmosphere, with bracketed language identifying specific areas of disagreements. Most of the comments and proposed edits made by the U.S. delegation focused on the need for textual clarification, including the need to define key words and clauses being used in the draft text.

At the time, however, we did not fully appreciate the fact that our demands for clarity were ringing alarm bells in the minds of the Convention's proponents, who seemed to believe that clarity had the potential to threaten the cohesiveness of the broad coalition of States that had been carefully put together. It was in fact the vague language of the draft convention that enabled different regions and countries to assume that their interests and needs were being taken care of.

For example, developing countries wanted the convention to affirm the central role played by culture in development, and interpreted the word "protect" as meaning "nurture", which they believed would help strengthen their small cultural industries so that they could compete more effectively in the world market. The U.S. supported this interpretation.

However, many developed countries, particularly EU countries and Canada, saw the proposed convention as a tool for strengthening their governments' ability to "protect" the integrity of their cultures, by which they meant their identities, and in some case, their commercial products. They wanted to counter what they considered was uncontrolled globalization that they felt was leading to homogenization and a reduction of cultural diversity. As we all know, the audio-visual area was an issue of particular concern. Although these countries said that their efforts to "protect" their cultures was not intended to lead to protectionist measures, they refused to even consider language that would have allayed U.S. concerns in this regard. And here it is important to underscore that the U.S. did

not just express its concerns in general terms, but in each instance offered specific, reasonable language suggestions that were both consistent with the presumed goals of the Convention, and that could have alleviated our concerns.

After the February 2005 meeting, the promoters of the proposed convention realized that because of the relatively slow pace of the negotiations, it was possible that the document might not be ready for adoption in October. At that point, all desire to continue negotiating with the U.S. abruptly ended. Anti-U.S. articles began to appear in the press attacking the U.S. for opposing the draft convention, and closed meetings were held at UNESCO that urged countries to ignore U.S. concerns. In addition, the EU countries demanded that the European Commission be allowed to negotiate in its own name with its own plaque, as opposed to participating within one of the EU delegations, as is customary for Observer delegations at UNESCO. Moreover, there was intense high-level lobbying in capitals by the promoters of the convention and also efforts to encourage public officials, especially Ministers of Culture, to make statements supporting the convention.

Because the U.S. understood the complicated situation of the EU and the EC relationship, we ultimately decided not to make an issue of the EC's negotiating role, and instead worked with the Europeans to achieve a *modus vivendi* arrangement. Despite the fact that this had never been done before at UNESCO, we agreed to go along with what was described as "enhanced participation" for the EC, subject to very strict agreed conditions. We did this in good faith because we wanted to maintain our focus on the convention's substantive issues in the hope that by working together, we would be able to draft a mutually acceptable document.

We also thought that the proponents of the convention would not want to have a major disagreement with the U.S. so soon after its return to UNESCO. However, when a completely new text appeared at the end of April, 2005, it became obvious that our hope and assumptions in this instance had been misplaced.

This new text was submitted by the Chairman of the Intergovernmental Committee in response to a request made at the Committee's February session which asked him to take primary responsibility in suggesting language for articles in the draft convention that had not yet been negotiated. However, in addition to doing that, the Chairman also rewrote the eleven articles that had already been negotiated, and in doing so, removed all the bracketed language, much of which was aimed at possibly resolving U.S. concerns. Countries were given less than four weeks to examine this new "Chairman's" text before negotiating it at the final session of the Intergovernmental Committee in late May 2005.

By then, it had become clear that for some, trade was indeed a primary— and apparently for others, the primary— purpose of the proposed convention, as various public officials, particularly European and Canadian, began to talk more openly about the relationship between the UNESCO convention and trade in cultural goods and services. Although the U.S. tried to keep the convention focused on culture, and expressed its concern that, as drafted, the proposed convention might end up restricting rather than promoting the free flow of goods, services and ideas, our efforts were generally ignored.

From the U.S. point of view, the third and final Intergovernmental Committee meeting in late May and early June 2005 was the most challenging and difficult. Regional group discipline was maintained, and articles were adopted in rapid succession with minimal real discussion and debate. Thanks to a rather inhospitable and even intimidating atmosphere, few countries dared to openly support, or even consider, U.S. suggestions.

At the end of the meeting, the draft text was adopted over strong U.S. objections. For the next four months, all U.S. efforts to continue negotiations to help resolve our concerns were rebuffed. We were repeatedly told that not a word, not a comma, could be changed, despite the fact that we continued to say that with a few changes in the text, we might still be able to join consensus, or at the very least not block consensus, in order to avoid a vote at the October General Conference where the final text would be adopted. Unfortunately, language that

we felt strongly should be included, such as “*consistent with their international obligations*”, would not even be discussed. It seemed that the promoters wanted to make sure that there was absolutely no possibility of a delay in the adoption of the convention, which they were afraid might happen if any new language was introduced into the text.

Although a number of countries privately expressed to us their discomfort about the way we had been treated, as well as their concerns about the text of the document, they said that they were trapped, and had to support the document as drafted, even though they thought that many of our proposed edits seemed reasonable. They also said that they were under great pressure to support the rapid timetable. In fact, the actual decision that had been made by the 32nd General Conference in 2003 had simply invited the Director General to submit to the 33rd General Conference in October 2005 a “*preliminary report setting out the situation to be regulated and the possible scope of the regulating action proposed, accompanied by the preliminary draft of a convention on the protection of the diversity of cultural contents and artistic expressions.*” However, as with everything else that related to this convention, it was a case of the end justifying the means. The original General Conference decision could be ignored, consensus redefined, and deadlines waived.

On September 29th the Executive Board voted, over U.S. objections, to drop the word “*preliminary*” and to recommend that “*the General Conference at its 33rd session consider the said preliminary text as a draft convention and adopt it as a UNESCO convention.*” Then, at the beginning of the General Conference, UNESCO’s Legal Committee waived the rule that required a draft convention text to be ready seven months before the start of the General Conference in order for it to be considered for adoption. The U.S. was faced with a take it or leave it situation. Because we felt that the draft convention text was an inherently flawed document that did not address our concerns, we were forced to vote against it.

So what exactly were our major concerns? The first was that many terms and concepts used in the convention were never properly defined or clarified. For

example, what does the word “protection” mean, within the scope of this Convention? And equally important, what does it not mean? What are cultural expressions? Who would decide what constitutes “equitable access” and “balance”, and how they would be achieved? What is meant by “regulatory measures”, and how would those measures be made consistent with the free flow of ideas guaranteed in UNESCO’s Constitution? What does “preferential treatment” mean, and to whom does this obligation apply? In fact, some of these issues will be discussed in Paris next week during a meeting of the Convention’s Intergovernmental Committee.

Another important area of substantive concern is the ambiguous language that describes the Convention’s relationship to other international agreements. For example, what does “complementarity” with other treaties mean, within the scope of settled international law concerning the law of treaties? Although we know that there are those who disagree with us, we believe that the two paragraphs in article 20 on this topic contradict themselves, and go dangerously beyond the clarity and certainty required under contemporary international law with regard to treaties. In order for the U.S. to accept the Convention, the text, in all relevant respects, should have clearly recognized the need for it to be interpreted taking due account of other international treaties and legal obligations, as required under international treaty law. This did not occur.

Article 2, paragraph 1 constitutes a general declaration against using the Convention “to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law.” However, we believe, and so asserted during the negotiations, that vague language found in other parts of the Convention text offers far too many opportunities for misinterpretation and abuse, including with regard to the duty to respect universally recognized human rights. In fact, we have already heard certain countries that are parties to the Convention openly question the universality of human rights protections by suggesting that the application of human rights principles should take local cultural differences into consideration.

Recently several countries have quietly begun saying to us that our concerns in this regard might end up being correct, and that great care must be taken to avoid having the Convention used in ways that do not reflect the original intent of the framers. Of course that brings me back to where I started. What was the original intent of the framers?

At this point, I simply want to state once more that the United States is firmly committed to the principle of cultural diversity, but the lack of clarity in the Convention's text made it impossible for the U.S., in good conscience, to accept it as currently worded. The long and standing tradition of the United States is that we sign treaties only when we fully understand what they mean and what they commit us to do internationally. This Convention is no exception to that rule.

Let me add that most of the individuals who were the strongest proponents of the convention are no longer active at UNESCO, or even in public office, and that three years later, some of the countries that were among our fiercest opponents during the negotiation of this Convention are now our closest friends and allies at UNESCO.

I want to end my remarks by saying that it is unfortunate that there are those who would like to make support for this Convention the litmus test of a country's commitment to cultural diversity. At issue is not the principle of support for cultural diversity, which we all share, but rather the means by which one secures and promotes that diversity.

The EU obviously believes that a legal document, in other words the UNESCO Convention, is the best way to achieve that goal. The U.S., on the other hand, believes that cultural diversity will flourish in an open environment of tolerance, freedom of expression, and the broadest possible diversity of access and choice for citizens and consumers to cultural goods and services. Our track record in this regard seems to suggest that our approach also offers an important contribution toward promoting the goal of cultural diversity.

Therefore, we continue to have a profound U.S.-EU disagreement on the centrality of this UNESCO Convention as a means for achieving the goals of diversity in cultural expressions. Moreover, we cannot accept the assertion, as stated in the brochure of this panel, that the Convention itself symbolizes some sort of agreement between the U.S. and the EU on the importance of cultural diversity. Instead, it would be more accurate to say that, despite clear U.S.-EU agreement on certain ideas, objectives, and principles embodied in the Convention, the EU and the U.S. have chosen to follow different paths to advance the goal of cultural diversity—one of us within the framework of the Convention, and one of us without. So in that spirit, let us just celebrate our different approaches on how best to both promote and help sustain the diversity of cultural expressions.

Finally let me say that despite our different views on the Convention, we welcome the opportunity to work closely with the EU on cultural initiatives, and to foster cultural programs and exchanges in our respective ways in order to enrich the lives of all of us.