

# The UNESCO Convention on Cultural Diversity: An Appraisal Five Years after Its Entry into Force

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**Abstract:** The Convention on the Protection and Promotion of the Diversity of Cultural Expressions was agreed upon with an overwhelming majority and after the swiftest ratification process in the history of the UNESCO entered into force on 18 March 2007. Now, five years later and with some 130 Members committed to implementing the convention, not only observers with a particular interest in the topic but also the broader public may be eager to know what has happened and in how far has the implementation progress advanced. This is the question that animates this article. It seeks to answer it by giving a brief background to the UNESCO Convention, clarifying its legal status and impact, as well as by looking at the current implementation activities in domestic and international contexts. The article sets this analysis in the frame of international regime complexity insights.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted in 2005 the first legally binding international instrument on culture. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions<sup>1</sup> was agreed upon with an overwhelming majority of 148 states, with only the United States and Israel voting against it.<sup>2</sup> After the swiftest ratification process in the history of UNESCO, the convention entered into force on 18 March 2007, and more than 120 countries have now ratified it.<sup>3</sup> This incredible success in international law making, and on an issue as controversial as culture, makes not only observers with a particular interest in the topic but also the broader public eager to know what has happened five years since the convention's entry into force—now that the rhetorical elation of the early days has settled and the ratifying members should have moved on with the implementation. This is the question that animates this article and that it seeks to answer by giving a brief background to the UNESCO Convention, clarifying its legal and political status and impact, and looking at the current progress made in its implementation.

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## 1. PUTTING THE UNESCO CONVENTION ON CULTURAL DIVERSITY INTO CONTEXT

The UNESCO Convention on Cultural Diversity can be seen as the culmination of some previous, mostly exhortatory acts<sup>4</sup> in the fields of culture and trade,<sup>5</sup> and of cultural heritage.<sup>6</sup> More broadly and also more pertinently, the convention should be perceived as a reaction to the process of economic globalization and in particular to the emergence of enforceable multilateral trade rules through the World Trade Organization (WTO). The UNESCO Convention was intended to provide a counterbalance to this high level of institutionalization of economic regulation and to cater to noneconomic objectives that states might wish to pursue, in particular in the field of culture.<sup>7</sup>

The actual text of the convention hardly lives up to this ambitious goal. The convention's drawbacks can be grouped into three categories, relating to (1) the lack of binding obligations, (2) its substantive incompleteness, and (3) its ambiguous relation towards other international instruments.

(1) Although the UNESCO Convention was meant to be a legally binding instrument, in fact, it has precious few obligations, and these are formulated as mere stimuli for the parties to adopt measures protecting cultural diversity at the national<sup>8</sup> and international<sup>9</sup> levels. There are only two provisions that can be said to be of a binding nature. The first resembles the WTO's enabling clause<sup>10</sup> and relates to the preferential treatment that developed countries must grant to cultural workers and cultural goods of developing countries.<sup>11</sup> The second, formulated in Article 17, creates an obligation for international cooperation in situations of serious threat to cultural expressions, construed in particular as assistance from developed to developing countries. Even this pair of "real" obligations is vague and unlikely to bring about radical change; they also appear somewhat marginal to the proclaimed goal of cultural diversity.

Despite the limited obligations on the parties to take action to protect and promote cultural diversity, the UNESCO Convention formulates an extensive block of rights to that end. Article 6(2) provides a nonexhaustive list of measures that the parties may adopt.<sup>12</sup> The list is virtually all encompassing, ranging from the generic "regulatory measures aimed at protecting and promoting diversity of cultural expressions"<sup>13</sup> to the concrete example of public service broadcasting.<sup>14</sup> This all-inclusive approach, adding up to the UNESCO Convention's broad and fuzzy definition of "cultural diversity"<sup>15</sup> and the lack of proportionality or efficiency tests, opens the door to state activism in a wide range of economic sectors that affect culture in one way or another. This situation has been criticized both by prominent negotiating parties, notably the United States,<sup>16</sup> and a host of scholars,<sup>17</sup> who warn against protectionism and the potential harm to the free flow of information. The value added by the convention's Operational Guidelines in assisting efforts to concretize targeted action and ensure balanced choices can be deemed minimal.<sup>18</sup> The guidelines have remained very general; despite some useful

clarifications, they are framed as recommendations and are ultimately unlikely to strongly influence the actual implementation by the ratifying members.

(2) As well as the missing obligations and implementation criteria, one should note that the framework of the UNESCO Convention is not comprehensive enough to secure the protection and promotion of cultural diversity, as it leaves some critical elements outside its otherwise generously defined scope of application. Some of these missing pieces are related to the centrality of state sovereignty, which is intrinsic to the UNESCO Convention, as all rights and obligations stemming from the convention are attributed to states.<sup>19</sup> While this is understandable for an inter-governmental treaty, cultural rights do not correspond to national boundaries.<sup>20</sup> Quite the contrary, it needs to be acknowledged that many of the processes of cultural homogenization have occurred precisely because of state-led policies aimed at cultural standardization and an overlap between state and culture, whereby the goal has frequently been to impose the culture of dominant elites on the rest of the citizenry.<sup>21</sup>

The fact that the UNESCO Convention subscribes to respecting and safeguarding human rights and fundamental freedoms<sup>22</sup> may partly remedy this situation. Still, it is somewhat disappointing that specific cultural rights—such as access to education or use of language of choice—did not make it into the text,<sup>23</sup> in particular since they were acknowledged by the earlier but nonbinding UNESCO Declaration on Cultural Diversity.<sup>24</sup> Neither are the specific rights of indigenous peoples<sup>25</sup> nor those of media organizations, journalists, or individuals appropriately safeguarded.

A vital element omitted from the regulatory domain of the UNESCO Convention, except for the brief remark in the preamble,<sup>26</sup> is intellectual property rights (IPRs). This omission is odd, since IPRs have as their core objective the protection and promotion of creativity and innovation, and are thus an indispensable element of all processes related to the creation of, distribution of, and access to cultural content.<sup>27</sup>

(3) A significant drawback of the convention in terms of the critical role it was supposed to play as a counterforce to economic globalization (as epitomized by the WTO) is its “conflict of laws” provision.<sup>28</sup> This crucial norm, as provided by Article 20 of the UNESCO Convention, fails to ensure any meaningful interface with the rules of the WTO (or any of the other existing international agreements) in case of a conflict between them.<sup>29</sup> Article 20 provides simultaneously that “[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties,”<sup>30</sup> and that “without subordinating this Convention to any other treaty,” Parties shall foster mutual supportiveness between the convention and the other treaties to which they are parties.<sup>31</sup> Even without lengthy deliberations on the possible implementation and interpretation scenarios,<sup>32</sup> it is evident that this rather paradoxical formulation involves no modification of rights and obligations of the parties under other existing treaties.<sup>33</sup> For some of them, such as notably the harmonized enforceable IPRs

under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), any modification appears outright impossible.

To sum up the critique of the UNESCO Convention's text, one can maintain that it is an instrument of soft rather than hard law,<sup>34</sup> which largely evades controversies and while affirming state sovereignty in cultural policy matters, fails to provide adequate guidance on how to design appropriate, future-oriented instruments capable of protecting and promoting cultural diversity in a world of profound rule fragmentation and complexity and of rapid technological change.<sup>35</sup> Alternatively, one might venture to suggest that what made the adoption of the UNESCO Convention possible emptied it of some of its stronger and more valuable content. This is proof of the complexity of the issues that arise whenever cultural diversity is to be addressed. The convention's less than bold text is also the result of the starkly different sensibilities and motivation of the parties when drafting an international instrument on cultural matters.<sup>36</sup> In practical terms, the role of the United States in diluting the substance of the UNESCO Convention by ingeniously making it broader, fuzzier, and less binding has also to be acknowledged.

## 2. THE IMPACT OF THE UNESCO CONVENTION

Thinking beyond the convention's textual basis, it is important to ask what its impact is. This question must be addressed through careful consideration of the record of implementation activities so far, but also more crucially, against the backdrop of the international regime complexity,<sup>37</sup> to which the UNESCO Convention was a reaction and in which it is now embedded. It is important to note in the latter context that although the negotiation processes, which lead to an agreement, are certainly critical for the agreement's clout, "political deals often get redefined during implementation because the actors who implement agreements have different priorities and are subject to different pressures than are the policymakers who designed the deal in the first place."<sup>38</sup> This could be particularly true for the UNESCO Convention on Cultural Diversity, as international regime complexity has in effect reduced the clarity of its legal obligations and introduced overlapping sets of rules that govern, among others, issues of culture and trade, culture and intellectual property, or culture and human rights, as already observed in the preceding section. We find the theoretical framework of international regime complexity, which examines the existing multiple, overlapping, and nonhierarchical regimes, as particularly fitting to capture the many facets and directions of the UNESCO Convention's effects. This framework would suggest that "where state preferences are similar, lawyers overcome fragmentation by crafting agreements that resolve conflicts across regimes, and thus legal ambiguity is transitory. Where preferences diverge, states block attempts to clarify the rules, and thus ambiguity persists, allowing countries to select their preferred rule or interpretation."<sup>39</sup>

In the following, we test whether the latter conjecture has been proven in the past five years. We also look at the effect the UNESCO Convention on Cultural

Diversity has had on other regimes, notably the international trade regime, as it is here that the major impact was intended at the time that the cultural proponents changed the venue from the WTO to UNESCO.<sup>40</sup> We also look at some concrete implementation initiatives under the auspices of the convention itself and in its ratifying members, and try to assess them in context.

## *2.1. The UNESCO Convention's Impact Vis-à-Vis the WTO*

Despite the impressive number of states that have ratified the convention, and thus have arguably committed themselves to the objective of protecting and promoting cultural diversity, the impact of the UNESCO Convention on the WTO regime is to be judged as minimal. What is observable above all is an affirmation of the status quo,<sup>41</sup> which has been characterized by the legacy line of separation between the European Union (EU) and the United States with their respective proculture and protrade positions, if we are to describe them in a typified manner,<sup>42</sup> and the existence of diverse smaller clusters of countries with less strongly voiced opinions.

The success of the adoption of the UNESCO Convention cannot mask the political economy behind it and the fact that different states have ratified it for very different reasons.<sup>43</sup> Although the Canadian and French delegations,<sup>44</sup> assisted by a number of NGOs, were fairly efficient during the convention's negotiation,<sup>45</sup> this mobilization is not strong enough to go beyond the weak regulatory charge of the UNESCO Convention and to matter when "real" trade interests are at stake. At present, it is highly unlikely that a negotiating bloc will form within the WTO to push for more culture-oriented solutions—such as including some sort of "cultural exception,"<sup>46</sup> an express clause for culture in the general exception provisions of the General Agreement on Tariffs and Trade (GATT) (Article XX) and the General Agreement on Trade in Services (GATS) (Article XIV), or including cultural diversity as one of the objectives of the WTO in the Preamble of the WTO Agreement.<sup>47</sup> This is evident from the current state of trade talks, as launched under the Doha Development Agenda in 2001.<sup>48</sup>

Although Doha has not stalled because of the trade-versus-culture debate, the requests and offers tabled so far reveal precious few new commitments and no future-oriented rules design that could address cultural matters at their intersection with economic interests. This is particularly palpable in the audiovisual services sector, which has been the most contentious in this clash and is likely to remain the service sector with the fewest commitments even after a successful completion of the Doha round.<sup>49</sup> Despite the recognition widely shared by key WTO members that the audiovisual sector has changed dramatically,<sup>50</sup> in particular in the face of the convergence of the information technology, telecommunications, and media sectors, and due to the sweeping transformations caused by the Internet, there is little agreement on the way forward. The trade-versus-culture status quo has indeed been perpetuated through the UNESCO Convention. This has had multiple (primarily negative) effects for the WTO outside the narrow domain of

audiovisual services. The spillover effects are felt in the discussions on advancing liberalization and coherent global regulation in the “neighboring” areas of telecommunications and electronic commerce.<sup>51</sup> Overall, the WTO, in many senses, is rendered unable to appropriately address trade in the Internet age,<sup>52</sup> despite the organization’s inherent flexibility and potential to adapt.<sup>53</sup>

Against the backdrop of this political deadlock, many observers had been hoping that when a new trade-versus-culture case emerged, the WTO adjudication—a uniquely powerful mechanism of dispute resolution at the international level<sup>54</sup>—would provide a final resolution to the conflict, while possibly also clarifying the status of the UNESCO Convention and its relationship with the WTO rules.<sup>55</sup> The *China–Publications and Audiovisual Products* case,<sup>56</sup> decided in favor of the United States in 2009, proved the contrary. In this particular case, China tried to justify diverse measures in the media domain by invoking the UNESCO Convention and the related UNESCO Declaration on Cultural Diversity.<sup>57</sup> The panel was not sympathetic to this attempt and recalled that “the UNESCO Convention expressly provides: ‘Nothing in this Convention shall be interpreted as modifying the rights and obligations of the parties under any other treaties to which they are parties.’”<sup>58</sup> The panel went on to say that “[i]n any event, nothing in the text of the WTO Agreement provides an exception from WTO disciplines in terms of ‘cultural goods,’ and China’s Accession Protocol likewise contains no such exception.”<sup>59</sup> Thus, China’s attempt to apply the UNESCO Convention as a shield remained futile—a position that was also supported by the Appellate Body, despite China’s request to the Appellate Body to be “mindful”<sup>60</sup> of the specific dual nature of cultural goods and services.

Interestingly, the panel did leave the door open for further consideration of cultural concerns, as it interpreted broadly Article XX(a) GATT, which justifies measures violating rules of the WTO Agreements when these measures serve the protection of public morals.<sup>61</sup> It acknowledged China’s claim that “reading materials and finished audiovisual products are so-called ‘cultural goods’” and these are “of a unique kind with a potentially serious negative impact on public morals.”<sup>62</sup> Despite the fact that the panel found the measures at issue not “necessary within the meaning of Article XX(a),”<sup>63</sup> this may be interpreted as newly enhanced flexibility of the WTO rules with regard to culture, which can be used in the future.

## 2.2. *The UNESCO Convention’s Impact Outside the WTO*

The standstill in the WTO in trade and culture matters, which has only been confirmed by the UNESCO Convention, has had repercussions outside the WTO. The example with digital trade and the inability of the WTO to tackle the relevant questions because of the issue overlaps with culture is illuminating. It is symptomatic of the overall intensified power plays, which led to increased fragmentation of both negotiation themes and of negotiation fora. The lack of solutions within the WTO context has driven and will continue to drive members to take the bilateral



or regional paths to advance their policy priorities. The United States in particular has made substantial efforts to ensure implementation of its digital agenda<sup>64</sup> through a number of free trade agreements (FTAs). The agreements reached since 2002 with Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore, the Central American countries,<sup>65</sup> and most recently with Panama, Colombia, and South Korea, contain only minimal restrictions on digital products, applying a negative scheduling approach (in contrast to the standard GATS positive pick-and-choose mode) and also tackle some “deep” e-commerce regulatory issues.<sup>66</sup>

Interestingly in this exercise, the United States has shown some deference to the culturally inspired measures of its FTA partners in the field of audiovisual services and permitted the policy space needed for these measures. The measures are, however, frozen at their present level.<sup>67</sup> Moreover, they could only relate to conventional offline technologies. It is also noteworthy that the leeway given to the U.S. partners with respect to trade in cultural products tends to reflect the negotiating capacity of the states involved—the smaller the country, the more concessions it makes.<sup>68</sup> Policy room thus may often be substantially reduced, and countries (especially the poorer ones) may not be able to appropriately cater for diverse public interests in the field of media—particularly digital media—in effect constraining the possibilities for implementing the UNESCO Convention in the said domains.

Before looking at the implementation activities of the convention’s parties, we can sum up at this stage by saying that the UNESCO Convention has had a certain impact on the international regime complex. In the specific case of starkly diverging positions of the EU and the United States on the matters of trade and culture, the theoretical conjecture that ambiguity would persist has by and large been confirmed. Further, it appears that the deadlock in the WTO realm with regard to cultural products and services may have led to overall greater uncertainty and unpredictability regarding the WTO trade liberalization commitments and the ways forward, both in terms of future commitments and rules design. As Shaffer and Pollack contend, and as the *China–Audiovisual* case mentioned earlier proves, this may be related to a process of “softening” the hard law of the WTO.<sup>69</sup> Importantly, as the distributive conflict between the United States and the EU continues, the UNESCO and the WTO regimes are highly unlikely to “converge into a new synthesis, but rather will remain in conflict for a prolonged period.”<sup>70</sup>

The impact of the convention on UNESCO (its own parent organization) and UNESCO’s authority can be deemed sizeable, as it has subsequently become a hub of new activities. The UNESCO Convention has also effectively contributed to promoting the notion of cultural diversity and establishing it as a global public good—that is, as a regulatory objective worth pursuing in a wide range of activities and venues, both domestically and internationally. To be sure, the convention has mobilized international cooperation, although the overall impact of the activities it has triggered may be small in practical terms, as we discuss in the next section, and the question of whether this development can be sustained remains open.

### 3. IMPLEMENTATION INITIATIVES

While looking at the UNESCO Convention's text, we have already alluded to its low legal charge and the many ambiguities (in definitions, actions, and regime interfaces, among others) it contains. It should be added that this state of normative incompleteness is exacerbated by the lack of institutional or adjudicatory mechanisms that could procedurally clarify and complete the contract over time. The convention's own dispute settlement is not compulsory. Negotiation, good offices, and mediation are the preferred modes of settling a disagreement. The possibility for a conciliation procedure exists, but the parties must only consider in good faith the proposal made by the Conciliation Commission, and a party may at any time declare that it does not recognize the conciliation procedure as a method of dispute resolution.<sup>71</sup> The Intergovernmental Committee, which comprises 24 members elected on the principles of equitable geographical representation and rotation and which serves as the executive body of the convention, is also insufficiently empowered. The Intergovernmental Committee's competencies, as defined in Article 23(6), do not provide a solid legal basis to enable it to engage in interpretation of the convention beyond preparing the operational guidelines (which have, however, to be approved by all the members) and commenting on the state reports (which are, however, prepared by the states themselves).<sup>72</sup> It should also be stressed that the UNESCO Convention provides for no sanctions or other strong control mechanisms—failure to fulfill any of the obligations could at worst result in a state being criticized by the Intergovernmental Committee and the Conference of Parties on the basis of its own report.<sup>73</sup> This may carry some reputational costs,<sup>74</sup> but is not comparable to the hard and enforceable sanctions of the WTO dispute settlement.

To be sure, this operational deficiency compounds the relative weakness of the convention's text and substantially lowers the expectations in terms of implementation activities. It should also be stressed that since the UNESCO Convention was initially conceived as a counterreaction to the harder rules of the WTO Agreements and more generally to the deep processes of economic globalization, its main implementation thrust has always been perceived to be in external affairs rather than in a state's own domestic cultural policy.<sup>75</sup> An analysis of the UNESCO Convention and its implications in the Arab world, for instance, revealed that the Arab states almost completely disregard its domestic dimension:

While Arab governments have adopted the Convention, they have a tendency to regard it more as a means through which they can gain recognition in the global arena rather than as a guiding document for internal policy-making, particularly because they are conscious that opening the door to cultural pluralism will naturally lead to a political pluralism that they would much rather delay.<sup>76</sup>

Considering the diversity of states that have ratified the convention, many of which have bad democratic and human rights records, this statement is possibly valid for



other regions too. It is hard to imagine that countries like China, Syria, Afghanistan, Rwanda, or Saudi Arabia will all of a sudden subscribe to a higher standard in protecting cultural rights and promoting diversity. In addition, many of the members fall into the least developed or very poor developing countries category (e.g., Nigeria, Zimbabwe, Malawi, and Haiti), and simply lack the finances to take any action.

This said, we can nonetheless expect some progress in implementation, especially by those states that have been at the forefront of the culture versus trade battle from the very outset and that have fervently worked towards the convention's adoption and ratification. The EU and its Member States are in this sense the obvious front-runners. We thus concentrate in the following above all on the implementation record of the EU, using not only the data provided in the context of the UNESCO Convention but also additional data and more in-depth analysis available on the EU's cultural policy at home and abroad. Where relevant, we take up instances from other countries, using the data made available in their quadrennial periodic reports, as required by the UNESCO Convention and submitted by 48 parties in 2012, some 25 of which are non-EU and 21 non-European countries.<sup>77</sup>

### 3.1. *In External Affairs*

As the recently submitted country reports reveal, there have been a number of activities on the international scene related to the UNESCO Convention's implementation. The major thrust is on international cooperation. Worth noting is that the focus of international cultural cooperation activities by the parties has expanded geographically over the past 20 years (with a new focus on Brazil, China, and India). Even more importantly, there has been a shift from "purely 'promotional' activities (showcasing the cultural heritage of one country in another) to those that facilitate cooperation in specific cultural industry sectors as well as on concrete cultural policy themes or related projects."<sup>78</sup> Culture has become one of the underlying objectives in international frameworks, strategies, and programs of several parties, in particular in the specific context of cultural cooperation for development (as provided for in Article 14 UNESCO Convention).<sup>79</sup> This includes not only capacity building, training, and technology transfer but also newer forms of bilateral and multilateral cooperation that aim to support cultural and creative industries in developing countries, which facilitate the flow of cultural goods and services and the mobility of artists and creators worldwide.<sup>80</sup>

While the number and the diversity of these activities may be impressive, it should be said that many of them are smaller-scale projects without sizeable budgets and they may often be of limited duration.<sup>81</sup> Even the convention's own International Fund for Cultural Diversity (IFCD), established under Article 18, is not well enough endowed to support larger initiatives, as its resources consist of voluntary contributions made by the parties and gifts from other countries, organizations, and individuals.<sup>82</sup> If we contemplate the convention's impact in the longer run, it may be that this aid is found to be insufficient by developing countries, especially

those who were not strong cultural proponents to begin with; these countries may choose the benefits from trade and seek real market access concessions. Such an aspiration would not be utterly misplaced, as “even a cursory look at international trade in cultural products shows” that, “developed countries at the forefront of efforts to ‘protect’ cultural diversity are at the forefront of cultural trade as well.”<sup>83</sup>

Still, these activities endorsed under the auspices of the UNESCO Convention should not be underestimated. They significantly raise the awareness of cultural diversity as a policy objective, as well as the awareness of cultural diversity policies, and move towards establishing best practices.<sup>84</sup> They mobilize an expanding network of actors at all levels of government, including many NGOs—some already existing (such as the network of European Union National Institutes for Culture<sup>85</sup>), others specifically founded for the purpose (such as the Global Alliance for Cultural Diversity<sup>86</sup>)—as well as actors from the cultural industries. None of the initiatives so far, however, amounts to a legal or policy reform; neither does any initiative expressly seek an interface with the trade regime.

One model that stands out for its innovative design and possibly further-reaching effects is that of the Protocols on Cultural Cooperation, negotiated by the European Commission on behalf of the EU and its Member States. The protocols are, on the one hand, a direct implementation effort of the UNESCO Convention; on the other hand, they are responses to broader changes in the EU’s external policies. These changes relate to the extended competencies of the EU in matters of common commercial policy after the Lisbon Treaty,<sup>87</sup> as well as more specifically to the EU’s repositioning with regard to new regional or bilateral agreements having an economic integration dimension.<sup>88</sup> This latter foresees notably that audiovisual services (including the content-related implications of electronic commerce) should be excluded from the scope of such trade agreements, and that audiovisual and other cultural services should receive special treatment under dedicated cooperation frameworks.<sup>89</sup>

The first Protocol on Cultural Cooperation was signed in the context of the Economic Partnership Agreement with the Caribbean Forum of African, Caribbean and Pacific States (CARIFORUM)<sup>90</sup> in 2008, its negotiation having started before the UNESCO Convention was ratified by the EU and before its entry into force. The second effort, which has been slightly calibrated,<sup>91</sup> was the Protocol with South Korea. The most recent examples relate to the EU trade agreement with Colombia and Peru and the EU–Central America Association Agreement, both initiated in 2011, and both of which include cultural cooperation provisions.<sup>92</sup>

The protocols are not uniform but rather are tailored to the specific circumstances of the partner.<sup>93</sup> Typical of all, however, is the attempt to interface trade and culture, and this is no trivial matter: “The inclusion of language on cultural cooperation matters marks a significant evolution in EU attitudes towards the subject matter in a trade policy context, hitherto marked by a desire to preserve maximum policy autonomy by eschewing any commitments in trade agreements and, in the case of the DDA [Doha Development Agenda], by refusing to direct

negotiating requests to its trading partners and to entertain offers in response to trading partner requests in cultural industries.”<sup>94</sup> Although the EU does not expressly grant new market commitments, in many senses the protocols improve access to the EU market, especially with regard to the temporary entry of natural persons and the treatment of cultural industries.<sup>95</sup> In effect, such provisions allow preferential treatment under the exception of Article V GATS for economic integration, and thus again have an impact on global trade and global trade regulation.<sup>96</sup>

Far-reaching has also been the commitment inscribed in the EU-CARIFORUM and the EU–Korea Protocols, whereby coproductions qualify as “European works” in the sense of the EU Audiovisual Media Services Directive (AVMSD),<sup>97</sup> and thus can benefit from various quota and other support schemes made available in the EU, in particular from the majority broadcasting quota.<sup>98</sup> This obligation is reciprocal, and European producers can enjoy the same treatment in the partner country.<sup>99</sup>

The Protocols on Cultural Cooperation have been subject to some criticism, in particular by France and the European Coalitions for Cultural Diversity. Among other things,<sup>100</sup> they have argued that the European Commission is stretching its competences by incorporating culture into trade negotiations through the back door, while cultural affairs still primarily fall into the policy domain of the Member States. They also fear that the trade and culture linkage goes against the spirit of the UNESCO Convention and may in fact harm cultural diversity.<sup>101</sup>

Regardless of whether this critique is unfounded (and it probably is),<sup>102</sup> the EU has softened its approach in the last two cultural cooperation agreements, as they are not directly tied to the trade agreement, which has been negotiated in parallel, and do not include the controversial coproduction recognition as domestic works, which offers a deeper market access and a sizeable package of benefits, otherwise available only to audiovisual works made with European money.<sup>103</sup>

### 3.2. *At Home*

As we noted earlier, the UNESCO Convention is fairly vague on what exactly is to be done to secure its appropriate implementation. The convention’s reporting framework was slightly more specific in showing what is expected, at least for the purposes of reporting. It requested information on the measures that the parties have put in place to promote the diversity of cultural expressions at the different stages of creation, production, distribution, dissemination, and participation. As such, these measures were meant to be understood as those that nurture creativity and form part of an enabling environment for independent producers and distributors working in the cultural industries, as well as measures that provide access for the public at large to diverse cultural expressions.<sup>104</sup> Actions that fall under these categories and have been undertaken by the parties include direct financial support to artists (majority of reporting parties); legislation on the status of the artist (e.g., Austria, Canada, Germany, Lithuania, Namibia, Mongolia, Montenegro, Norway,

and Peru); incubator schemes for young artists and female artists (e.g., Austria); support for artists' mobility, particularly in a regional or subregional context (e.g., Bolivia, Chile, Cyprus, and the EU); establishing artists' residencies (Argentina and Tunisia), as well as support for the better use of copyright mechanisms (e.g., Denmark, Greece, Namibia, Oman, Slovenia, and the EU).<sup>105</sup> In addition, there have been a number of training and education programs<sup>106</sup> and a great variety of initiatives that can be considered as forming part of an enabling environment for the production and distribution of cultural goods and services. On the production side, they encompass direct funding for the production of domestic cultural content (majority of reporting parties); support for the creation and functioning of production infrastructures and entities such as cultural industry companies or networks (e.g., Argentina, Brazil, Bulgaria, Canada, Ecuador, Estonia, France, Germany, Monaco, Paraguay, and the EU); workshops on production competencies and individual entrepreneurial skills (e.g., Argentina, Brazil, and Peru); schemes that collect levies on the revenues of public and private cultural industries to reinvest into national productions (e.g., Poland); and coproduction schemes (e.g., the EU and its Member States). Frequently reported distribution measures were local or national schemes to build up distributional and marketing capacities in cultural production (e.g., Austria, Brazil, Cyprus, Ecuador, Estonia, Mongolia, Nigeria, Slovakia, Tunisia, and the EU); development of local distribution mechanisms including the creation of physical infrastructure (e.g., Montenegro); content quotas (e.g., Canada, France, and Portugal); measures to promote the export of cultural goods and services (e.g., Austria, Argentina, Canada, Estonia, Finland, Oman, and Tunisia); media policies, including the promotion of public service media and of diversity therein (e.g., Austria, Argentina, Denmark, France, Montenegro, Norway, Peru, Slovakia, Slovenia, Sweden, Switzerland, and Uruguay); and support for promotional events such as "markets," "fairs," "festivals," or "years" (e.g., Argentina, Ecuador, Estonia, Greece, Montenegro, and Peru).<sup>107</sup>

A number of the reported cultural measures focus on the audience side and are intended to ensure the public's participation in cultural life as a means to enhance the overall quality of life. Such interventions have been made with a view to promoting cultural and media literacy (majority of reporting parties); promoting the access and participation of minorities, indigenous peoples, young people, and women in cultural life (majority of reporting parties); promoting access and participation of the socially disadvantaged, the disabled and the elderly (e.g., Norway, Portugal, and Spain); and lowering price barriers to access to cultural goods through diverse measures, such as reduced taxes (e.g., the EU Member States).<sup>108</sup>

Overall until now, it appears that the bulk of the action has been on fostering the distribution and enjoyment of cultural goods and services; the policy objectives of creation and production are common but less prevalent.<sup>109</sup> Importantly, institutional policies were the most common type of policies and measures adopted by the reporting convention's parties. Almost all parties have established national institutes to promote the cultural industries or a particular industry, created departments

or institutes of the Ministry of Culture to promote cultural expressions of persons belonging to minorities, or, in some cases, established a Ministry of Culture.<sup>110</sup>

In all these activities, a key question that can be raised when attempting to assess the impact of the UNESCO Convention, as well as the progress made in its implementation, is that of the *causal link* between the convention and the manifold interventions in the field of cultural policy, some of which clearly predate the convention's entry into force. With regard to the EU, which we somewhat singled out as a reference point in our analysis, this question is particularly pertinent.

Despite the EU's limited competence in matters of culture,<sup>111</sup> it has a considerable number of actions in place in the field of culture, encompassing internal policy measures in the domains of (1) culture, education and youth; (2) communication; (3) regional policy; (4) agriculture and sustainable development; (5) employment, social affairs, and equal opportunities; (6) the audiovisual sector; (7) information society and research; (8) competition policy; (9) internal market; and (10) maritime policy.<sup>112</sup> In addition, pursuant to Article 167 Treaty on the Functioning of the European Union (TFEU) (formerly Article 154 EC), the EU has committed to continued efforts to mainstream culture in all its activities.<sup>113</sup> This certainly reflects the spirit and the letter of the UNESCO Convention on Cultural Diversity. On the other hand, despite the fact that the EU has this advanced package of internal policies related to culture, it has not taken any decisive *new* action for the protection and promotion of cultural diversity. We have argued elsewhere<sup>114</sup> that in particular in the field of digital media, its current instruments are outdated.<sup>115</sup> In its report to the UNESCO Convention's Intergovernmental Committee, the EU and its Member States did admit that there is "a certain difficulty in distinguishing the achievements specifically linked to the implementation of the Convention from those related to their existing cultural policies."<sup>116</sup>

Overall, it appears that for the parties, which already had the necessary structures and policies in place, the convention's implementation has meant supplementing existing policies rather than making a major policy shift.<sup>117</sup> It has been argued that the UNESCO Convention has nonetheless introduced "a new perspective and reference framework to cultural policy debates."<sup>118</sup> For parties with less developed structures, the convention has more tangibly spurred the active development of cultural policies and the strengthening of their cultural industries.<sup>119</sup>

#### 4. CONCLUDING REMARKS

As Kal Raustiala and others maintain, we must distinguish between the compliance with a certain legal instrument and its effectiveness.<sup>120</sup> Raustiala argues that

compliance as a concept draws no causal linkage between a legal rule and behavior, but simply identifies a conformity between the rule and behavior. To speak of effectiveness is to speak directly of causality: to claim that a rule is 'effective' is to claim that it led to certain behaviors or outcomes, which may or may not meet the legal standard of compliance.<sup>121</sup>

In this sense, we can contend that the UNESCO Convention has been complied with, and there are a host of activities in both domestic and international contexts that can offer proof of its advancing implementation. We are, however, less certain of the effectiveness of the UNESCO Convention in protecting and promoting the diversity of cultural expressions. We observed that the influence of the convention on the international regime complex where it is situated has been minimal, and no working interface between the trade and the cultural regimes has emerged; indeed, the venue shopping from the WTO to UNESCO on the occasion of the convention's adoption may have exacerbated the conflict and perpetuated the "cultural exception" status quo. While international cooperation has been spurred under the auspices of the UNESCO Convention, in particular in the field of cooperation for development, the implications of this for the overall regime complex may also be marginal, as cooperation pledges are not far-reaching and/or are insufficiently funded. The EU experiment with the Protocols on Cultural Cooperation can be seen as an innovative step, but it has been controversial especially with regard to linking cultural and trade activities and agreements. Bearing in mind that the intended focus of the UNESCO Convention has always been on external affairs, the status of implementation domestically disappoints less. It is hard to draw the line between those instruments and interventions that have been specifically designed to address the convention's (admittedly vague) objectives and the "business as usual" in national cultural policies. Positive achievements should be seen in the development of best practices, the building of statistical resources, and the impact assessments of the tools applied, which may in the longer run improve the efficiency of the measures and dispel some of the protectionist fears the convention has instilled.

To conclude, it is perhaps too early to judge the impact of the UNESCO Convention as only five years have passed since its entry into force. First, it does take time for those newly installed agencies, networks, and institutes to work. Second, it has been argued that a full implementation of the convention should not focus exclusively on technical and financial aspects, such as capacity building, coproduction, or project funding but "embrace its political dimension as well, including strengthening civil society, access to the media, the place of independent creativity in the public realm."<sup>122</sup> Areas such as the integration of culture in sustainable development or in preferential treatment also arguably call for longer-term adjustments.<sup>123</sup> The same may be true for the evolution of international regime complexity. "As the number of countries ratifying the Convention grows, the Convention, together with the 2001 UNESCO Universal Declaration, could be viewed as emerging customary international law that applies to all nations except those nonsignatories who persistently object to it,"<sup>124</sup> and we have yet to see the repercussions of this evolution. The concept of "cultural diversity," as interpreted beyond the narrow trade versus culture context,<sup>125</sup> can also prove powerful enough to mobilize broader and innovative tools in cultural policymaking at all levels of governance.<sup>126</sup> Only time will show whether these expectations can be met.



## END NOTES

1. UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted 20 October 2005, 45 I.L.M. 269 (hereinafter “UNESCO Convention on Cultural Diversity,” “UNESCO Convention,” or just “convention”).
2. Australia, Honduras, Nicaragua, and Liberia abstained.
3. As of 30 October 2012, 125 countries had ratified the UNESCO Convention. See <http://portal.unesco.org/la/convention.asp?KO=31038&language=E> (accessed 16 January 2013).
4. Craufurd Smith, “The UNESCO Convention,” 28–29.
5. See, e.g., UNESCO, Agreement on the Importation of Educational, Scientific and Cultural Materials, Florence, 17 June 1950 (updated with the Nairobi Protocol, 26 November 1976); UNESCO, Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970. More recent acts are the Council of Europe Declaration on Cultural Diversity, Strasbourg, 7 December 2000, and the UNESCO Universal Declaration on Cultural Diversity, Paris, 2 November 2001.
6. See, e.g., UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972; UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003; Council of Europe, European Landscape Convention, European Treaty Series No 176, Florence, 20 October 2000.
7. Graber, “The New UNESCO Convention.”
8. Articles 7–11 UNESCO Convention.
9. Articles 12–19 UNESCO Convention, excluding Article 16, which is of binding nature.
10. GATT, Decision of 28 November 1979 (L/4903), Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (“Enabling Clause”).
11. Article 16 UNESCO Convention. See Nurse, “Expert Report on Preferential Treatment.”
12. See Article 6(2)(a)–(h) UNESCO Convention.
13. Article 6(2)(a) UNESCO Convention.
14. Article 6(2)(h) UNESCO Convention. For a taxonomy of cultural policy measures, see Footer and Graber, “Trade Liberalisation and Cultural Policy,” 122–26.
15. Article 4(1) defines “cultural diversity” as referring “to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.”
16. See U.S. Mission to UNESCO, “Explanation of Vote of the United States.”
17. See Hahn, “A Clash of Cultures?”; Graber, “The New UNESCO Convention”; Craufurd Smith, “The UNESCO Convention”; Burri, “Trade versus Culture in the Digital Environment.”
18. See Operational Guidelines on Measures to Promote and Protect Cultural Expressions (Articles 7, 8, and 17 of the Convention), approved by the Conference of Parties at its second session (June 2009); Operational Guidelines on Information Sharing and Transparency (Article 9 of the Convention), approved by the Conference of Parties at its third session (June 2011); Operational Guidelines on Education and Public Awareness (Article 10 of the Convention), approved by the Conference of Parties at its third session (June 2011); Operational Guidelines Role and Participation of Civil Society (Article 11 of the Convention), approved by the Conference of Parties at its second session (June 2009); Operational Guidelines on Integration of Culture in Sustainable Development (Article 13 of the Convention), approved by the Conference of Parties at its second session (June 2009); Operational Guidelines on Cooperation for Development (Article 14 of the Convention), approved by the Conference of Parties at its second session (June 2009); Operational Guidelines for Partnerships (Article 15 of the Convention), approved by the Conference of Parties at its second session (June 2009); Operational Guidelines on Preferential Treatment for Developing Countries (Article 16 of the Convention), approved by the Conference of Parties at its second session (June 2009); Guidelines on the Use of the Resources of the International Fund for Cultural Diversity (Article 18 of the Convention), approved by the Conference of Parties at its second session (June 2009); Operational Guidelines on Exchange,

Analysis and Dissemination of Information (Article 19 of the Convention), approved by the Conference of Parties at its third session (June 2011); Operational Guidelines on Measures to Ensure the Visibility and Promotion of the Convention, approved by the Conference of Parties at its third session (June 2011). All available at <http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/operational-guidelines> (accessed 24 January 2013).

19. Article 2(2) UNESCO Convention.

20. Eide, "Cultural Rights as Individual Human Rights," 289–301; Stamatopoulou, *Cultural Rights in International Law*.

21. Conversi, "Cultural Homogenization."

22. Articles 2(1), 2(3), and 7 UNESCO Convention.

23. Craufurd Smith, "The UNESCO Convention," 28, 37.

24. See e.g., Article 5 UNESCO Declaration.

25. Despite a few mentions in Recitals 8, 13, and 15 of the preamble, Articles 2(3) and 7(1)(a) UNESCO Convention. See Aylwin and Coombe, "Cultural Pluralism Protects Traditional Knowledge"; Craufurd Smith, "The UNESCO Convention," 54.

26. Recital 17 of the UNESCO Convention's preamble.

27. See, e.g., Cohen, "Creativity and Culture"; Burri, "Cultural Protectionism 2.0."

28. On the notion of conflict, see Pauwelyn, *Conflict of Norms*, 5–11.

29. For all possible causes of conflict, see Dahrendorf, "Free Trade Meets Cultural Diversity."

30. Article 20(2) UNESCO Convention.

31. Article 20(1) UNESCO Convention.

32. See Graber, "The New UNESCO Convention," 565–68; Hahn, "A Clash of Cultures," 540–46; Stoll, "Article 20. Relationship to Other Treaties."

33. Shaffer and Pollack, "Hard vs. Soft Law," 772.

34. Shaffer and Pollack, "Hard vs. Soft Law," 771.

35. Craufurd Smith, "The UNESCO Convention," 53–54; Burri, "Trade and Culture in International Law"; Burri, "Cultural Protectionism 2.0."

36. Craufurd Smith, "The UNESCO Convention," 30–32; also Pauwels et al., "Culture Incorporated."

37. Alter and Meunier talk of "international regime complexity" to signify the presence of nested, partially overlapping, and parallel international regimes that are not hierarchically ordered and stress that the lack of hierarchy is particularly typical of the international level. See Alter and Meunier, "The Politics of International Regime Complexity," 13. This follows up on important work on the notion of "regime complex." See Raustiala and Victor, "Regime Complex for Plant Genetic Resources."

38. Alter and Meunier, "The Politics of International Regime Complexity," 16.

39. Alter and Meunier, "The Politics of International Regime Complexity," 16.

40. We refer here to the process of "regime shifting." As Helfer observed "complexity enables a strategy of 'regime shifting' whereby states and nonstate actors relocate rulemaking processes to international venues whose mandates and priorities favour their concerns and interests." Regime shifting, Helfer argues, is different from "forum shopping," which involves a change of venue to achieve a single favorable decision. Regime shifting is in contrast a longer-term, iterative strategy that "seeks to create outcomes that have feedback effects in other venues." Helfer, "Regime Shifting in the International Intellectual Property System," 39; also Helfer, "Regime Shifting: The TRIPs Agreement."

41. Craufurd Smith, "The UNESCO Convention," 53–54.

42. See, e.g., Moran, "United States' Trade Policy"; Graber, "Audio-Visual Policy"; Bruner, "Culture, Sovereignty, and Hollywood."

43. For example, Brazil, Japan, and India have all ratified the Convention but remain equally willing to engage in further liberalization of the audiovisual sector. See Pauwels et al., "Culture Incorporated."

44. Supported by Germany, Greece, Mexico, Monaco, Morocco, and Senegal, and a number of Francophone UNESCO Member States.

45. See Acheson and Maule, "Convention on Cultural Diversity."

46. Burri, "Trade versus Culture: The Policy of Cultural Exception."

47. There are plenty of proposals that fall into this category. For an overview as well as references to the authors, see Burri, "Trade versus Culture in the Digital Environment," 46–53.
48. WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/W/1, 2010.
49. See WTO, Communication from the European Communities and its Member States, Conditional Revised Offer, TN/S/O/EEC/Rev.1, 2005; WTO Council for Trade in Services, Audiovisual Services, Background Note by the Secretariat, S/C/W/310, 2010.
50. Graber, "Audio-visual Policy," 166–70; Roy, "Audiovisual Services in the Doha Round," 931–36.
51. See Wunsch-Vincent, "Trade Rules for the Digital Age," 501–505.
52. Burri and Cottier, *Trade Governance in the Digital Age*.
53. See, e.g., Cooney and Lang, "Taking Uncertainty Seriously."
54. See, e.g., Sacerdoti et al., *The WTO at Ten*.
55. Graber, "The New UNESCO Convention," 567, 571; Voon, "UNESCO and the WTO," 652.
56. WTO Appellate Body Report, "China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China—Publications and Audiovisual Products)," WT/DS363/AB/R, adopted 21 December 2009, confirming in most essential points WTO Panel Report, "China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China—Publications and Audiovisual Products)," WT/DS363/R, adopted 12 August 2009.
57. China ratified the UNESCO Convention on 30 January 2007.
58. WTO Appellate Body Report, "China—Publications and Audiovisual Products," para. 4.207, referring to Article 20 UNESCO Convention.
59. WTO Appellate Body Report, "China—Publications and Audiovisual Products."
60. WTO Appellate Body Report, "China—Publications and Audiovisual Products," para. 25, referring to China's appellant's submission, para. 12.
61. Following the meaning of the term in Article XIV(a) GATS as broadly interpreted in "US—Gambling." See WTO Panel Report, "United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US—Gambling)," WT/S285/R, adopted 10 November 2004, paras. 6.461 and 6.465. See also Delimatsis, "The Puzzling Interaction of Trade and Public Morals."
62. WTO Panel Report, "China—Publications and Audiovisual Products," para. 7.751.
63. WTO Panel Report, "China—Publications and Audiovisual Products," para. 7.913.
64. See Wunsch-Vincent, "The Digital Trade Agenda," 7–46.
65. The DR-CAFTA includes Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.
66. See Wunsch-Vincent "The Digital Trade Agenda," 28–35 and "Trade Rules for the Digital Age," 516–23; Wunsch-Vincent and Hold, "Towards Coherent Rules for Digital Trade."
67. Voon, "A New Approach to Audio-Visual Products," 25–26.
68. Bernier, "The Recent Free Trade Agreements," 15. Australia, as the most affluent of these states, managed to preserve existing quotas for commercial television and commercial radio. Singapore and Chile were also able to include relatively significant reservations, as did Costa Rica, the Dominican Republic, and Morocco. Conversely, Guatemala, Honduras, El Salvador, and Nicaragua left their audiovisual sectors in practice open to imports. Bernier, "The Recent Free Trade Agreements," 11–12.
69. Shaffer and Pollack, "Hard vs. Soft Law," 773.
70. Shaffer and Pollack, "Hard vs. Soft Law," 773.
71. See Article 25 UNESCO Convention, as well as the Annex on Conciliation Procedure.
72. Article 23(6)(c) UNESCO Convention.
73. Article 9(a) UNESCO Convention; Craufurd Smith, "The UNESCO Convention," 39.
74. On reputational costs, see, e.g., Guzman, "Reputation and International Law" and "How International Law Works"; Brewster, "Reputation in International Relations."
75. This has been admitted by the Intergovernmental Committee, which expressly states that: "At the heart of the Convention is the pursuit of international cooperation to promote culture as a driver for development recognising that the cultural aspects of development are equally important as its economic

components. Parties of the Convention are called upon to incorporate culture as a strategic element in their international cooperation frameworks, taking into account the UN Millennium Declaration as well as in their national sustainable development policies and programmes.” Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, para. 22.

76. Rezk, “Negotiating Diversity,” 250; also European Parliament, “The Implementation of the UNESCO Convention,” 20.

77. Reports have been submitted by Albania, Argentina, Austria, Bolivia, Brazil, Bulgaria, Canada, Chile, Cuba, Cyprus, Denmark, Ecuador, Estonia, the EU, Finland, France, Germany, Greece, Guinea, Hungary, Ireland, Italy, Jordan, Kuwait, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Mongolia, Montenegro, Namibia, New Zealand, Nigeria, Norway, Oman, Paraguay, Peru, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tunisia, and Uruguay. All reports are available at <http://www.unesco.org/culture/cultural-diversity/2005convention/en/programme/periodicreport> (accessed 24 January 2013).

78. Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, para. 30.

79. Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, paras. 24–25.

80. Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” annex 1, paras. 2, 45–48.

81. See Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary,” as well as the individual country reports.

82. By the end of 2012, US\$5,796,373 had been collected in the Fund. The IFCD is unique in that the majority of its funds go toward supporting NGOs working locally in the field of cultural policy. In 2012, the Intergovernmental Committee approved 13 projects to be implemented in 12 developing countries at a cost of more than US\$1 million. Projects cover a wide range of activities—from capacity building and cultural mapping to policy analysis and development, as well as entrepreneurship support and cultural industries consolidation. See <http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/international-fund> (accessed 24 January 2013).

83. Singh, “Culture or Commerce?” 42.

84. See, e.g., Intergovernmental Committee, “Strategic and Action-Oriented Analytic Summary” and Sekhar and Steinkamp, “Mapping Cultural Diversity.”

85. See <http://www.eunic-brussels.eu> (accessed 29 January 2013).

86. The Global Alliance for Cultural Diversity fosters partnerships between public, private, and civil society actors in cultural industries in developing countries. It is a project of the Convention and operates at two levels: by providing information on the partnerships through a web platform and by supporting certain projects. See <http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/programmes/global-alliance-for-cultural-diversity> (accessed 29 January 2013).

87. Pursuant to Article 207 of the Treaty on the Functioning of the European Union (TFEU), EU trade policy is an exclusive EU competence for all sectors, without any sectorial carve-outs, shared competences or mixed agreements. Pre-Lisbon, there had been a carve-out for cultural and audiovisual services (Article 133(6) of the Treaty Establishing the European Union). Any agreement, which included provisions regarding cultural and audiovisual services, would so fall within the shared competence of the EU and the Member States and such mixed agreements had to be concluded together by the EU and the Member States. See, e.g., Krajewski, “External Trade Law,” 95–97.

88. See European Commission, “Global Europe.”

89. European Commission, “Quadrennial Periodic Report,” 24.

90. The CARIFORUM has 16 participating states: Antigua and Barbuda, the Bahamas, Barbados, Belize, Cuba, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Suriname, Saint Lucia, St. Christopher and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

91. Such changes aimed to (1) condition entry into force of the Protocol only upon ratification by Korea; (2) set coproduction criteria, which allow qualifying for the respective “broadcasting quotas”;

and (3) ensure a full institutional separation for the Protocol from the general dispute settlement mechanisms of the Agreement's Trade Committee. The EU–Korea Protocol is based on stricter reciprocity and balance than the EU–CARIFORUM Protocol, which is asymmetrical in nature.

92. Albeit, not in a strictly protocol form: While the agreements on cultural cooperation were still negotiated simultaneously with the trade agreements, they are not annexed to them. As no preferential treatment of coproductions is envisaged, the agreements are disconnected from the trade agreement altogether. In the case of Peru and Colombia, not a protocol but a stand-alone agreement on cultural cooperation has been adopted; for Central America, the cultural cooperation provisions are attached to the provisions for cooperation on cultural and audiovisual matters under the umbrella Association Agreement.

93. European Commission, "Quadrennial Periodic Report," 24. Standard in the Protocol's template are some horizontal and sectoral provisions. The former cover issues that are intended to promote cooperation in all cultural fields taking into account the particular (dual) character of cultural goods and services, such as exchange of best practices, increase of contacts and facilitation of training opportunities, as well as the temporary entry for cultural practitioners. Sectoral provisions address the particularities of some specific sectors, such as audiovisual cooperation and coproductions, as well as cooperation in relation to publications, performing arts, and protection of heritage sites.

94. Sauvé and Ward, "The EC–CARIFORUM," 53–54.

95. Sauvé and Ward, "The EC–CARIFORUM," 58.

96. See Cottier and Molinuevo, "Article V."

97. Article 1(n) of Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95/1, 15 April 2010 (hereinafter "AVMSD").

98. Article 16 AVMSD (previously Article 4 Television without Frontiers Directive) that Member States shall ensure that broadcasters allocate the majority of airtime on TV channels to European-made programs (the so-called European works).

99. Troussard et al., "Article 16," 449–50.

100. For an overview of the various strands of critique, see Loisen and De Ville, "The EU–Korea Protocol," 260–65.

101. Loisen and De Ville "The EU–Korea Protocol," 255; also Loisen et al., "Mainstreaming EU Cultural Policies," 79.

102. See, e.g., Loisen and De Ville, "The EU–Korea Protocol," 266–67; also more generally, Burri, "Trade and Culture in International Law."

103. On the definition and critique of the concept of "European work," see Burri, "The Reform of the EC Audiovisual Media Regulation."

104. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 10.

105. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 15.

106. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 16.

107. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 17.

108. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 19.

109. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 99.

110. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 100.

111. See comprehensively Psychogiopoulou, *The Integration of Cultural Considerations*; Craufurd Smith, "The Evolution of Cultural Policy in the EU."

112. European Commission, "Inventory of Community Actions," 7–24.

113. On the application of Article 167(4) TFEU, see Craufurd Smith, "Community Intervention in the Cultural Field," 64; Holmes, "European Community Law and the Cultural Aspects of Television"; Psychogiopoulou, "The Cultural Mainstreaming Clause."

114. Burri, "Business as Usual?"

115. Coming to the same conclusion, see Attentional et al., "Study on the Implementation," 200.

116. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 85.

117. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 85. See also European Commission, "Report on Measures," 3; European Commission, "Quadrennial Periodic Report."

118. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 85, referring to Austria's quadrennial periodic report, 19.

119. As noted earlier, most of the achievements were of institutional nature. Parties reported about having established national institutes to promote specific cultural industries, created departments or institutes of the Ministry of Culture to promote cultural expressions of minorities or, in some cases, established for the first time a separate Ministry of Culture (e.g., in Bolivia and Ecuador). More fundamentally, for example, in Tunisia, it led for the first time to the recognition of the State's sovereign right to develop and implement cultural policies. For more examples, see Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 87.

120. Raustiala and Victor, "Conclusions," 684–86; Raustiala and Slaughter, "International Law, International Relations, and Compliance," 538; Raustiala, "Compliance and Effectiveness."

121. Raustiala, "Compliance and Effectiveness," 398.

122. European Parliament, "The Implementation of the UNESCO Convention in the EU's External Policies," 21.

123. European Parliament, "The Implementation of the UNESCO Convention in the EU's External Policies," 11. Article 13 UNESCO Convention stipulates that, "Parties shall endeavour to integrate culture in their national development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions."

124. Shaffer and Pollack, "Hard vs. Soft Law," 772.

125. Burri, "Cultural Diversity as a Concept of Global Law."

126. Intergovernmental Committee, "Strategic and Action-Oriented Analytic Summary," annex 1, para. 9; also Pager, "Beyond Culture vs. Commerce" and Burri, "Cultural Protectionism 2.0."

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